EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Garrett	**v**	Commissioner of Police for the Metropolis

Heard at Watford

On: 1-15 October 2018 (16 & 17 October in chambers)

Before: Employment Judge Manley
Members: Ms S Goldthorpe
Mr D Bean

Appearances

For the Claimant: In person
For the Respondent: Ms A Chute, Counsel

RESERVED JUDGMENT

1. The claimant was not dismissed because of disability or for something arising in consequence of that disability.

2. The claimant was dismissed because she was redundant. The dismissal was not unfair.

3. The claimant was disabled because of the heath conditions of Fibromyalgia and Chronic Fatigue Syndrome (ME) and the respondent had knowledge of those conditions at the material time.

4. The claimant was less favourably treated because of her disability and unfavourably treated because of something arising in consequence of her disability with respect to an incident in September 2015 but that claim was presented out of time and it is not just and equitable to extend time.

5. The claimant was not less favourably treated because of her disability with respect to any other allegations.

6. The claimant was not unfavourably treated because of something arising in consequence of her disability with respect to any other allegations.

7. There were no failures to make reasonable adjustments.

8. There are no incidents of harassment as defined in Equality Act 2010.

9. The claimant's claims were brought within time save for the August and September 2015 incidents involving Ms Graham which were brought out of time.

10. The claimant's claims fail and are dismissed.

REASONS

Introduction and issues

1. By a claim form presented on 28 February 2017 the claimant brought complaints of unfair dismissal, breach of contract/unauthorised deduction of wages and disability discrimination. The disability discrimination claim has included claims of direct discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment.

2. At a preliminary hearing on 30 November 2017 there was clarification of the claims and a generic list of issues was drawn up as follows:

3. **Unfair dismissal**

    3.1 Was the reason for the claimant's dismissal that the claimant was redundant or was the reason for her dismissal her disability or a reason relating to her disability?

    3.2 If the dismissal was for redundancy, was it fair in all the circumstances of the case to dismiss the claimant?

    3.3 If the reason for the claimant's dismissal was that she was redundant the claimant has confirmed that she does not allege that there were any procedural failings on the part of the respondent which rendered her dismissal unfair.

4. **Disability discrimination**

    4.1 The respondent concedes that the claimant was disabled within the meaning of s.6 of the Equality Act 2010 at all times relevant to this claim. The relevant disabilities are fibromyalgia and ME.

    4.2 Did the respondents have knowledge of the existence and extent of the claimant's disability at the material times?

4.3 The specific factual and legal issues relevant to the claimant's claims for disability discrimination are set out in a detailed table, the substance of which was discussed at the case management hearing. The table is to be agreed between the parties and finalised and will then be filed with the tribunal on or before 25 January 2018. The generic legal issues are as follows:

Direct disability discrimination s.13 Equality Act 2010

4.4 Did the respondents treat the claimant less favourably than it treated or would treat others because of her disability?

Discrimination arising from disability s.15 of the Equality Act 2010

4.5 Has the claimant proved facts giving rise to an apparent case of discrimination arising from disability (ie that the respondent treated the claimant unfavourably because of something arising in consequence of her disability)?

4.6 If so, can the respondents prove that they did not commit any of the acts complained of?

4.7 Does the defence of justification apply?

Failure to make reasonable adjustments s.21 of the Equality Act 2010

4.8 Did the respondent subject the claimant to a provision criterion or practice which put the claimant at a substantial disadvantage in comparison with non-disabled persons who could meet that requirement by reason of the matters relied upon by the claimant?

4.9 If so, did the respondent take such steps as were reasonable to have to take to avoid the disadvantage?

4.10 Did any physical feature put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

4.11 If so, did the respondent take such steps as it was reasonable to have to take to avoid that disadvantage.

Harassment s.26 Equality Act 2010

4.12 Did the respondents commit the acts relied upon by the claimant as amounting to harassment?

4.13 If so, did such acts (a) amount to unwanted conduct related to the claimant's disability; and (b) have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

5. **Remedies**

5.1 In the event that the claimant succeeds, in all or any of her claims, what declarations and/or compensation should be awarded to her taking into account:

5.1.1 Any uplift in respect of compliance with the ACAS Code;

5.1.2 Mitigation or lack thereof and the justice and equity of the matter;

5.1.3 Contributory fault;

5.1.4 Polkey

6. **Jurisdiction**

6.1 Have the claimant's claims been brought within the primary time limits? Do any matters relied upon by the claimant which occurred more than three months prior to the lodging of her ET1 in this matter amount to part of a continuing course of conduct or ongoing act of discrimination?

6.2 If and insofar as allegations are out of time is it just and equitable to extend time in order to allow such allegations to proceed.

7. At that preliminary hearing the claimant provided a schedule of allegations which was rather complex and various matters were amended as matters proceeded. The claimant now pursues 35 complaints of disability discrimination. This had originally been 78 allegations, but the tribunal has determined this rather more concise (but still extensive) list of complaints concentrating on a period of two and a half years from July 2014 to the end of 2016. The respondent raised time limitation issues with respect to the earlier matters.

8. The complaints are pursued under different sections of the Equality Act 2010 (EQA). Some of them are argued to be a breach of one section, others two sections, others three and others four. In summary, the claimant claimed that 20 of the allegations amounted to direct disability discrimination, another 20, with some overlap, amounted to discrimination arising from the disability, 22 of the allegations, again with some overlap, were said to amount to a failure to make reasonable adjustments and 18 were said to amount to harassment, again with some overlap. The respondent's representative had prepared a list of the 35 complaints as a working document for the hearing which was used throughout and is now set out below:-

Complaint 1

Date: 16.07.14
Alleged perpetrator: Andy Milligan
Allegation

Failing to support C when she cried for help

- *On 07.07.14 C submitted a request for reasonable adjustments for a reduction in working hours to 5 hours per day in light of difficulties managing her condition due to stress from (a) death of family member and (b) impending wedding*
- *C submitted note from GP stating she was fit to work 5 hours a day for three months*
- *IR refused C's request for reasonable adjustments. On 16.07.14 Andy Milligan stated R would only permit her to work reduced hours for four weeks, starting at five hours per day in the first week and increasing by half an hour per day each week until full hours were to be worked in week five.*

Complaint 2

Date: 21.07.14
Alleged perpetrator: Andy Milligan
Allegation

Implementing a recuperative plan increasing from 5 hours a day to full time over 4 weeks which the plan was 'too little too late'.

Complaint 3

Date: 19.08.14.
Alleged perpetrator: Danny Nemorin-Noel
Allegation

- *C went off sick on 19.08.14. She was thereafter hounded to return to work as follows:*
    - *On 20.08.14 was required to phone office to arrange a home visit.*
    - *On 21.08.14 R told C that it would not apply the usual 28 day policy for holding home visits and a case conference was to be held the following week.*
    - *Danny Nemorin-Noel telephoned C that same day, berated her for being off sick and telling her she needed to return to work as soon as possible.*
    - *He also told C that Andy Milligan was not convinced by the reasons for her absence and needed further information.*
    - *C was visited at home on her 9th day of absence, which is not in line with company policy.*

Complaint 4

Date: 09.09.14.
Alleged perpetrator: None
Allegation

Management insisting on holding a case conference on the 22nd day of sickness rather than after 40 days in line with R's policy

Complaint 5

Date: 21.10.14.
Alleged perpetrator: Danny Nemorin-Noel
Allegation

- *Offering a 2-week recuperative plan of reduced hours*
- *That the Claimant states did 'nothing to support my disabilities'*

Complaint 6

Date: 20.11.14 – 26.11.14
Alleged perpetrator: Andy Milligan
Allegation

- *R emailed C on 20.11.14 to attend a final case conference in December ahead of usual time frames*
- *C suggested by email dated 21.11.14 returning on reduced hours on 01.12.14 until her pre-booked annual leave over Christmas, where after she would return to work on the recuperative plan proposed by R*
- *On 26.11.14 Andy Milligan told C this was not permitted and she would have to begin her 4-week recuperative plan immediately*

Complaint 7

Date: Dec 2014 to April / May 2015
Alleged perpetrator: None
Allegation

- *R placed draught boards around C's desk to stop draughts at C's request*
- *These were not adequate and C requested they be replaced or enhanced*
- *R did not place any more draught boards around C's desk until April/May 2015*

Complaint 8

Date: Dec 2014
Alleged perpetrator: Andy Milligan
Allegation

Failing to provide a 3-month recuperative plan providing a 6-week recuperative

plan instead which was stated could be extended

Complaint 9

Date: Dec 2014
Alleged perpetrator: Andy Milligan
Allegation

Permitting C only a 6-week recuperative plan including 2 weeks pre-booked annual leave
While permitting MB 5 months of reduced hours

Complaint 10

Date: 20.01.15
Alleged perpetrator: Andy Milligan
Allegation

Refusing to extend C's recuperative plan by a further 4 weeks, requiring her to work full hours despite still having difficulties with her disabilities

Complaint 11

Date: On-going 11.02.15 – 23.06.15
Alleged perpetrator: Andy Milligan
Allegation

- *11.02.15 Andy Milligan stated in a meeting that he had not had time to sort reasonable adjustments for C specifically the draught boards. In attendance to this meeting was Gary Donald – R's Union Rep, and Danny Nemorin-Noel*
- *On 23.06.15 Andy Milligan suggested that C should be capable of working her full time hours. In attendance to this meeting was Gary Donald – R's Union Rep, and Danny Nemorin-Noel*
- *The above were examples of a general ongoing failure on Andy Milligan's part to take C's disability as genuine and serious*

Complaint 12

Date: Feb 15
Alleged perpetrator: Andy Milligan
Allegation

Ignoring Access to Work report stating that it would be beneficial to extend C's recuperative plan

Complaint 13

Date: Q1 2015
Alleged perpetrator: None
Allegation

Delaying response to Fairness at Work request

- *Resulting in accruing a 48-hour work debit*
- *Which R wished C to work back*

Complaint 14

Date: June 2015
Alleged perpetrator: None
Allegation

- *The FAW report concluded that C's request in July 2014 to work reduced hours had been reasonable under EqA 2010.*
- *However, it required C to pay back 50% of the hours shortfall she had accrued as a result of R's failure to put reduced hours in place*

Complaint 15

Date: June / July 2015
Alleged perpetrator: None
Allegation

When redundancies were announced and staff were informed that they had to reapply for their jobs

- *Failing to update the Claimant about opportunities*
- *Not emailing the Claimant on her private email whilst she was off sick*
- *Failing to support the Claimant in securing a new role*

Complaint 16

Date: 11.08.15 to 14.08.15
Alleged perpetrator: 3rd Line manager Linda Graham
Allegation

C had a family holiday booked for 14.08.15. A few days prior to the holiday, Linda Graham refused C permission to go on holiday as C was on sick leave at the time.

Linda was conscious of the amount of leave C was accruing whilst off sick so wanted C to resume from sick to take her leave. Linda threatened discipline if C ignored her response and went on holiday.

R was not entitled to refuse C said permission since her leaving the country was not harmful to her health.

Complaint 17

Date: Aug 15
Alleged perpetrator: Linda Graham
Allegation

- *Linda Graham stated to C that she was aware that she was awaiting acupuncture and counselling, and that she did not see why C could not attend work in the interim*
- *By doing so, she suggested there was nothing else wrong with C*

Complaint 18

Date: Sept 15
Alleged perpetrator: Linda Graham
Allegation

Linda Graham held a meeting with C

- *C was questioned as to her medication and disabilities*
- *It was suggested that the medications C was taking were not for her disability*
- *It was suggested to C that if she could go on an air-conditioned plane she could come to work*
- *Linda Graham stated C's disability was "often in people's heads"*
- *Linda Graham adopted a hostile demeanour in the course of the interview. The impression formed was that an attempt was being made to catch out C.*

Complaint 19

Date: Oct 2015
Alleged perpetrator: None
Allegation

C was not sent details of alternative jobs whilst off sick

Complaint 20

Date: 26.01.16
Alleged perpetrator: Zac Norris/Andy Milligan
Allegation

- *Informing C that she had to return to work on 16.02.16 or file would be prepared for disciplinary*
- *Then on 17.02.16 telling C she would have to take just over five of the next six weeks off as leave*

Complaint 21

Date: c. 27.01.16
Alleged perpetrator: Fairness at work appeal panel
Allegation

On C's FAW appeal, the appeal panel stated she was still required to work the shortfall hours (see #14 above).

Complaint 22

Date: 16.02.16
Alleged perpetrator: None
Allegation

- *C's reasonable adjustments were not there on her return*
    - *Chair broken*
    - *Desk was with someone else*
    - *Lamp was with someone else*
    - *Footstool was missing*
    - *Heater taken by Sgt Lorraine Cole*
    - *Draught boards were missing*
- *Chair was not fixed until 27.05.16*
- *A suitable draught board was never supplied*

Complaint 23

Date: 21.02.16
Alleged perpetrator: None
Allegation

- *C was made compulsorily redundant*

Complaint 24

Date: April 16
Alleged perpetrator: Andy Milligan
Allegation

- *Refusing C disability leave whilst her chair was replaced*
- *Stating C has reduced hours instead*

Complaint 25

Date: 05.04.16
Alleged perpetrator: None
Allegation

Placing C on informal management action for sickness

- *Despite the fact that sickness was caused by R*

Complaint 26

Date: April/May 2016
Alleged perpetrator: None
Allegation

Delaying replacing C's draught board

Complaint 27

Date: 10.08.16
Alleged perpetrator: Andy Milligan
Allegation

Deciding that ordering new draught boards for C is not cost effective for the Met Prosecutions budget

Complaint 28

Date: 24.08.16
Alleged perpetrator: Andy Milligan
Allegation

- *Informing C that if going abroad*
- *She needed to provide contact details*
- *And to be ready to attend a case conference on 7 days' notice at her expense to fly home*
- *To not do anything that would hinder recovery*
- *Which was not required under R's usual policies*

Complaint 29

Date: 13.09.16
Alleged perpetrator: Andy Milligan
Allegation

- *Deciding not to order draught boards as C would not be in the office for long*
- *Cost was only £200*

Complaint 30

Date: 04.10.16
Alleged perpetrator: Andy Milligan
Allegation

- *Refusing to put C on gardening leave as requested by C's union, when she could not return from sick leave on OH and GP advise caused by the absence of draught boards Andy Milligan decided not to order*

Complaint 31

Date: 02.11.16
Alleged perpetrator: None

Allegation

Deducting C's pay for not being able to return to the office on 28.10.16 due to the draught boards not having been ordered, which left C unable to return to work in September after her operation. She was in the same position in October but R thought it was reasonable for her to come back into the office

Complaint 32

Date: 02.11.16
Alleged perpetrator: None
Allegation

Date of C's dismissal by virtue of redundancy

Complaint 33

Date: 09.12.16
Alleged perpetrator: None
Allegation

FAW outcome
Despite being submitted on 29.03.16, it took until December 2016 and after C's employment terminated to produce a final decision

Complaint 34

Date: Throughout
Alleged perpetrator: None
Allegation

Failing to send C to the chief medical officer

Complaint 35

Date: Ongoing
Alleged perpetrator: None
Allegation

R continues to assert that C owes them money by way of salary overpayments, said overpayments having arisen due to C's past absences

9. It was agreed that it was sensible to follow the complaints in the order as on the above list of complaints. The witness statements had all been drafted by reference to the list, that is how cross examination proceeded and how submissions were presented. The claimant's single complaint about the dismissal is that she believed it was because of her disabilities rather than redundancy as argued by the respondent. She raises alleged unfairness of the redundancy procedures that are not linked to disability.

The hearing

10. The hearing commenced with two days of reading. This was because the witness statements, particularly those of the claimant and the main witness for the respondent, Mr Milligan, were very extensive as indeed was the bundle of documents which ran to seven lever arch files and to well over 3,000 pages.

11. The claimant was then cross examined and a witness for her, Ms Sudhakaran, was asked some questions. Two other witnesses, Mr McFarlane and Ms Reader (the claimant's mother), submitted witness statements but no questions were asked of them.

12. The following week the claimant began her cross examination of the respondent's witnesses. First, she cross examined Mr Nemorin-Noel and, Mr Allotey, both of whom had been her line managers at different times. She then asked for time to prepare her questions for Mr Milligan and it was agreed that this would be possible, so we did not sit on Tuesday 9 October.

13. We then heard from Mr Milligan who was the line manager to the claimant's line managers and had considerable involvement in the claimant's case. Mr Padwick, who gave evidence with respect to the Fairness at Work (FAW) procedures, was interposed and, finally, we heard from Ms Graham. The respondent's evidence was finished by Thursday 11 October.

14. There was then time for the parties to make written submissions and we met again on Monday 15 October. There were written submissions and extensive oral submissions from the respondent's representative and the claimant on that day, but we were able to commence our deliberations around 3pm. We reserved judgment because of the extensive material before us.

The facts

15. For the most part, we find facts which would appear to be relevant only to the 35 complaints brought which include the question of the redundancy and whether there was an unfair dismissal. There is some background information which we provide and, as is usual, we set out the facts in chronological order.

16. The claimant commenced employment with the respondent police service on 18 October 2004 as a civilian officer. She worked in Resulting, Archiving and Administration (RAA) section of Met Prosecutions based at Hillingdon Borough.

17. In 2011 she was diagnosed with ME (also 'known as Chronic Fatigue Syndrome) and in 2012 she was diagnosed with Fibromyalgia.

18. The tribunal did note that there was some evidence about historical difficulties for the claimant at work, but this was not relevant for our determinations and they are not therefore repeated here.

19. In 2013 Mr Nemorin-Noel became the claimant's line manager. Mr Milligan was his line manager and Ms Graham was Mr Milligan's line manager. We have also heard that a Ms Lewis was Head of Met Prosecutions.

Events in 2014

20. On 7 July 2014 the claimant asked for a "*permanent line manager*". She went on to say that Mr Nemorin-Noel "*is very understanding and has a sympathetic approach to his staff*" and she wanted him to remain as her line manager.

21. For health reasons, the claimant was finding it difficult to work the hours under her contract which were 36 hours on a full-time contract. Also, on 7 July 2014, she therefore asked if her working hours could be reduced to five hours a day for three months. She put in a service request (SR) and it is worth reading part of that request. It said:-

> *"I am currently suffering a very stressful period in my personal life caused by two major circumstances".*

22. The SR went on to state that the claimant lacked energy and she was struggling to "*manage my work-life balance*". She said that she was experiencing a flare up of Fibromyalgia and was trying not to take sick leave but trying to improve her sickness records. She went on:

> *"I find I start becoming exhausted by around 3pm and working past this causes stress to my body as I am worried about having to last out the remaining 2.12 hours I work and my concentration levels are low. I have no energy when I get home to do any exercise which I am supposed to do as an important part my management of Fibromyalgia do. I am in a downhill spiral. Therefore, I am asking if my hours can be changed to 10am to 3pm to help me get back to whatever normal is for me. My stress will be relieved after September so would like the hours reduced until then to help me sort my work-life balance".*

23. She went on to say that she was sitting in a draught with the windows being open and that caused pain. She referred to the fact that she had been

moved from a corner because of office moves. The claimant was advised to speak to the Occupational Health (OH) Adviser on the issue.

24. Mr Milligan responded in the SR on 10 July. He said:

> *"I have reviewed the request and I do not think it is appropriate to support her request to have her working days reduced by 2 hrs 12 mins a day, a reduction of 30% over the working week. However, I can offer the following options:*
>
> *Option 1*
> *I can offer a reduction of 1 hr 12 mins a day, 6 hrs a week to support Sarah during this difficult period. However, with the expectation that we agree an Action Plan for Sarah to work back these hours after September.*
>
> *Option 2*
> *Sarah can submit a flexible working request to have her hours reduced with the knowledge that her pay would be pro rata with the hours she requested (if approved).*
>
> *Option 3*
> *I am happy to offer Sarah the opportunity to work a 6 day week and reduce her number of hours per day as long as at the end of the week she has worked 36 hrs. This gives her the opportunity to spread the hours and give her some flexibility to manage her condition.*
>
> *Option 4*
> *A mixture of option 1 and 3.*
>
> *I have spoken to her Line Manager and have asked him to review the opening of any windows that impact on Sarah. However, I have asked for him to be reasonable as whilst we need to support Sarah there are also the colleagues in the office and we have to take in to consideration their working environment re excessive heat etc."*

25. The claimant read that response and was told by HR that all necessary adjustments had been put in place through OH, H/S and Access to Work but if she felt her condition was changed she could speak to the OH adviser.

26. The claimant replied within the SR on 11 July saying that she had tried to contact the OH adviser. She stated that she did not feel the options proposed by Mr Milligan were "*realistic or fair*". She went into detail about the impact on her health of her condition. She raised questions about whether the reasonable adjustments were still in place. Mr Milligan responded by that stating that he believed the options were realistic.

27. The claimant presented a Statement of Fitness for Work on 15 July which had the box ticked that said, "*You may be fit for work taking account of the*

following advice". The box for "*altered hours*" was also ticked and it then reads "*Patient may be fit to work taking into account altered hours. Patient has requested 10am to 3pm and that may be a reasonable adjustment*."

28. Mr Milligan told Mr Norris in HR that, having had a meeting with Ms Graham, they decided to offer another option which was:

> *"to offer Sarah a 28-day recuperative plan with the expectation that it would consist of 1 week, 5 hours per day. Week 2, 5 hours 30 minutes per day. Week 3, 6 hours per day. Week 4, 6 hours 30 minutes per day and then week 5, 4 hours."*

29. On 16 July, in an email to Ms Graham, Mr Milligan said he had spoken to the OH advisor and the claimant. He reported that the OH advisor had said "*all reasonable adjustments are in place from the OH referral she did in June this year*". He also reported that the claimant "*confirmed that the stress issue is because she is getting married soon*". The claimant believes that her upcoming wedding was not the sole reason for her stress, but it was a factor.

30. By this time a board had been put in place to reduce draughts and Mr Milligan had asked for a further Access to Work assessment. The claimant said on 18 July saying that the four-week recuperative plan (as set out at paragraph 28 above) was her only option so she accepted it.

31. It was around this time there were questions about whether the claimant and her colleagues were to move offices again. There was discussion about one area which was found to be unsuitable in early August and the claimant's four week recuperative plan ended on 18 August. On 19 August the claimant began a period of sick leave.

32. On the following day Mr Nemorin-Noel asked the claimant to contact the office to arrange a home visit. When the claimant queried the home visit Mr Milligan sent an email explaining why it was necessary. He pointed out that the contact visit was to be on 9th day of absence which was within the respondent's guidelines.

33. The claimant complains that, during a phone call, Mr Nemorin-Noel berated her and said that she should be at work as soon as possible. Along with the home visit, her case is that she was hounded to return. A summary of the home visit appears in the bundle. In summary it was a short and unremarkable visit where the claimant was asked limited questions. The tribunal finds that there was neither berating or hounding by Mr Nemorin-Noel. There is no indication at all from this in the notes and Mr Nemorin-Noel denies it. We find that it is highly unlikely that this occurred. The tone of the meeting is clearly set out in the notes and the claimant's mother's witness statement makes no reference to any "berating". Indeed, Ms Reader's evidence was that Mr Nemorin-Noel was "*very sympathetic and in*

control". The claimant takes issue with the home visit having been arranged at all because she believes it was not in accordance with the policy.

34. A flowchart of the timelines for sickness absence reporting and processing appears in the bundle at page 2700. That does state that the line manager should contact the individual "*as soon as possible"* and that a contact visit should be arranged between the 7th and 28th day of absence. From day 29 it states, "*arrange and chair a case conference*". Later in the Guidance note, under Long Term Absence it states that an initial case conference is at 40 days, but also says "*Some flexibility to recognise individual circumstances, which may arise, must be considered*".

35. In the meantime, a case conference was arranged for 9 September 2014, because the claimant was going to be married in mid-September and then on annual leave. The claimant attended with a friend. Part of the discussion at this conference was about boards which could protect the claimant from draughts where it is recorded that she said, "*she would require something that went from the floor to at least head level when she was sitting down plus some cover at the sides of her desk".*

36. The claimant was also reminded of the requirement to seek permission to be away from her home address whilst on sick leave. This was a reference to the respondent's guidance on sickness absence policy at page 2724. This states as follows:-

"There is no objection to any member of the MPS being absent from their registered address during a sickness absence. However, if you intend to be absent overnight you must:

Inform their second line manager if they intend to be away from their registered address and supply full details of where they will be during their absence from their registered address;

Provide a contact address and telephone number for the period of your absence from your registered address;

Be available to attend case conference with a minimum of 7 working days notice and;

Don't do anything that would hinder your return to good health, HR or an Occupational Health Practitioner can be contacted in any case of doubt about the medical advisability of such an absence.

Approval is given on the understanding that if you are required to return, it would be in your own time and at your own expense".

37. That guidance does not expressly state that permission is required but does refer to approval being given. The claimant's managers and the claimant understood that approval needed to be sought for travel abroad during

sickness absence. The tribunal heard that a person who was on sick leave but who wished to take annual leave only needed to ring and confirm that they were no longer on sick leave and intended to take annual leave (if they had some outstanding and/or it had been pre-booked).

38. A further case conference was eventually rescheduled and took place on 28 October 2014. The claimant was offered a two-week recuperative plan by Mr Nemorin-Noel at this time. The claimant remained off work during October and November 2014.

39. Mr Milligan wrote to the claimant on 20 November offering proposals for a 4-week recuperative plan and to discuss reasonable adjustments to support her. He confirmed that boards were in place to reduce draughts. There was further discussion about this with respect to the recuperative plan with the claimant due to return to work on 1 December.

40. A referral was made to OH and an adviser subsequently spoke to the claimant and suggested that a further draughtboard was necessary. Mr Nemorin-Noel began the process of ordering this and agreement was ultimately reached for the claimant to return to work on 15 December 2014 on a six-week recuperative plan. Mr Milligan suggested that this was a compromise, the claimant having suggested three months and the discussions having started at two weeks and then four weeks. The claimant said that she would accept this although, again, she stated she believed she had no choice.

41. The claimant also complains that this was different treatment to that of another member of staff, MB. Mr Milligan told the tribunal that MB required a knee operation and had been referred to OH who had advised a recuperative plan whilst she was waiting for the operation. That operation was delayed so the plan was extended on OH advice. We have no evidence as to the extent of the reduction in hours.

Events during 2015

42. There was a further meeting with Mr Milligan and the claimant on 6 January 2015. The claimant at this point requested further draughtboards. It is not clear to the tribunal whether the previous ones had not arrived or whether these were extra.

43. In any event, on 20 January, the claimant emailed Mr Nemorin-Noel about the boards and asked for an extension of four weeks to the recuperative plan.

44. Mr Milligan had already sent an email about a meeting which had happened on 6 January. In that email he said that all reasonable adjustments were in place when the claimant returned to work and that further screens had been requested and ordered. He said he did not believe extending the recuperative plan was appropriate but he was willing "*to offer you again, the*

opportunity for you to work reduced hours on pro-rata pay until the time that you feel that you can return to full-time hours".

45. The next day the claimant was told the draughtboards would be delivered on 23 January. The tribunal understands that the boards came around 28 or 29 January. The claimant reiterated her request for an extended recuperative plan and Mr Milligan referred the matter to Mr Norris of HR who then emailed the claimant.

46. There being no extension to the recuperative plan, Mr Milligan informed the claimant that she was required to work 36 hours, but she should discuss matters with him if she was having difficulty. Further options of spreading the 36 hours over 6 days, reducing the hours but with a timetable to work the hours back and using flexi and annual leave were offered to the claimant following HR advice.

47. Mr Milligan agreed to speak to the disability officer and told the claimant that if she left early it would be recorded as flexi time.

48. In early February Mr Milligan told the claimant he would meet with her and Mr Garrett, the disability officer, or the trade union representative. There was then a meeting with Mr Milligan, Mr Nemorin-Noel and the claimant and a trade union representative on 11 February. The tribunal have seen notes of this meeting. In large part it went through the various issues with the claimant's workstation, the difficulties she said she was facing and what adjustments had been made to date.

49. There is one dispute about the minutes. The claimant alleges that Mr Milligan said that he had "*not had time to fix the boards*". Mr Milligan denies saying this. The claimant made some amendments to the notes which were accepted but this amendment was not agreed. Mr Nemorin-Noel, who took the notes, said that it had not been said or he would have added it. We do not accept that Mr Milligan made this comment as it is completely out of step with everything else that he said at that meeting.

50. An Access to Work report had been organised on 16 February. That said that the claimant was contracted to work 37.5 hours (which was not accurate as her contract was for 36 hours) but was "*using flexi time to work reduced hours*". It also said there were "*no additional ergonomic solutions"* that could be recommended. It also stated that the claimant "*would feel more supported if her employer extended her period of reduced hours for an additional 6 weeks*". Mr Milligan saw that report sometime after 18 February and he also spoke to Mr Garrett, the Disability Officer.

51. In early March there was a meeting again with Mr Milligan, Mr Nemorin-Noel, the claimant and a colleague to talk about outstanding actions from the meeting on 11 February. Mr Milligan also set out some options with respect to reduced hours repeating those options offered before including the opportunity to "*work reduced hours for pro-rata pay".* Somewhat later in

March, Mr Milligan reminded the claimant that she was expected to work within the respondent's flexi policy.

52. On 17 March the claimant instigated a Fairness at Work (FAW) process. It may be worth setting out briefly the FAW process here. It appears at page 2650 of the bundle. It involves somebody being appointed to see whether an informal or local resolution is possible. If it is not, it proceeds to an FAW advisor. Where the FAW involves senior management an adviser "*from an alternative B/OCU*" is to be appointed. We heard evidence that the Grievance Management Team was under resourced trying to deal with approximately 125 live grievances. It was not until 31 May that there was contact by Mr Johnson to try to discuss informal resolution. A meeting was held on 27 April with the claimant, her trade union representative and Mr Johnson, about the FAW which led to the FAW being passed to an independent advisor. Mr Babu was appointed as an independent adviser. He is a former officer with the respondent.

53. In April Mr Milligan sought advice from his line manager, Ms Graham, about the claimant's use of flexitime. In early May, Mr Milligan held a meeting with the claimant about flexitime and told her that he would seek HR advice. Meanwhile, the claimant was arranging to meet Mr Babu about the FAW.

54. In June 2015, the respondent sent letters to affected staff, including the claimant, about significant organisational changes. It was proposed that there be changes to the Case Overview and Preparations Application (COPA) process which was to reduce the amount of work required to be carried out by RRAs. This was to lead to a significant reduction in RRAs from 277 to 129. Staff would be required to apply for the remaining fewer posts.

55. On 11 June Mr Babu advised that the claimant's FAW had not been upheld. In the summary of his investigation, he made the following statement:-

"On 7 July 2014 Ms Garrett requested a reduction in her hours, reducing her 36 full time hours to 30 hours from July to September a period of three months. This would be a reasonable adjustment as part of the Equalities Act 2010"

56. Mr Babu was not quite correct about the reduction requested which was to reduce to 5 hours per day, making it 25 hours. In any event, he went on to state that Mr Milligan had offered to compromise on 50% of the negative hours that had been built up by the claimant leaving early over the previous months. He concluded that he did not believe that MPS had breached the Equality Act and that reasonable adjustments had been made. In the covering email to Met Prosecutions, he stated – "*I believe the flexible hours offered by the MPS via her line management are reasonable and appropriate"*. The claimant read the first comment quoted above at paragraph 55 as meaning that Mr Babu was saying her request was a

reasonable adjustment but, in the context of the whole document and his clear conclusion, this cannot be the case. He may well have been meaning that the claimant had asked for the reduction in hours and believed it was a reasonable adjustment.

57. The claimant had worked 48 hours fewer in this period than she should have, and it was agreed that she only needed to work back 24 hours. She was provided with the FAW outcome on 22 June. On 23 June there was a meeting with Mr Milligan to find out how she intended to rework those hours. The minutes record that the claimant became very upset and said she was going to appeal the FAW outcome. Mr Milligan informed the claimant she was expected to work a 36 hour week from the following Monday.

58. In July 2015 there was some air conditioning issues in the claimant's office which the respondent was trying to remedy.

59. The claimant had indicated that she was appealing the FAW and Ms Graham suggested that the claimant should meet with her and Mr Norris. In the meantime, the claimant had been advised that she faced redeployment or redundancy. The process was that officers within the respondent were delegated to assist people with their applications and the officer delegated to assist the claimant (LF) sent an email to her, offering to assist the claimant with the redeployment application, the closing date for which was 17 July.

60. The claimant reported sick on 14 July and on, 15 July, officer LF informed Mr Nemorin-Noel that the claimant had not asked for assistance with the application form. The claimant's sick note indicated that she was signed off with work related stress, but she did send in her completed application form on 22 July. Even though it was late it was accepted.

61. On 30 July Mr Nemorin-Noel conducted another contact visit. In August the claimant was booked to travel abroad on holiday even though she was on sick leave.

62. On 11 August Ms Graham wrote to her and said that she was not granting her request to travel abroad while on sick leave. Ms Graham referred to the fact that it had been granted the previous year because it was linked to the claimant's wedding. She said:-

> *"Your attendance record is poor and I am conscious that you have accrued annual leave whilst on sick leave. I do appreciate that you are currently signed off sick with stress, and a holiday may be beneficial, but I feel on this occasion you should resume to take your pre-planned leave. I am conscious also that you are awaiting counselling and acupuncture appointments (although I am not clear why you cannot attend work whilst awaiting these)"*

63. The claimant had booked annual leave for this period and she therefore had the option of taking the holiday as part of her annual leave, as long as she

confirmed to the respondent that she was not on sick leave, or not going. In the event the claimant did go abroad but did not ring the respondent to come off sick leave.

64. In early September the claimant was informed by Mr Nemorin-Noel that she had not been successful in her application to remain employed in one of the fewer remaining posts. The claimant was waiting for an operation on her foot and she told Mr Nemorin-Noel that that was to take place on 5 November. There was to be a referral to OH with respect to the claimant's health and position at work.

65. On 11 September 2015 the claimant met with Linda Graham. The claimant was accompanied by a trade union representative Mr Parrock. Ms Graham did not take notes (or only took short notes which have been lost). The claimant made some notes after the meeting which it was agreed are accurate to a degree. The claimant's complaint states that Ms Graham adopted a hostile demeanour, but Ms Graham denies that, and the claimant does not state that in her note. Ms Graham agrees that she did question the claimant about her medication and she asked how she coped with air conditioning on long flights. She denies that she implied the medication was not for her disability or that the condition was in her head. The tribunal have read the note and accepts that the things recorded there were said by Ms Graham, particularly as Ms Graham was given a chance to comment on the notes shortly after the meeting and did not do so. The tribunal finds that the questions about the claimant's medication were unwise and strayed too far into suggesting a distrust of the information provided by the claimant. Ms Graham also mentioned to the claimant that she also suffered from fibromyalgia but could not explain to the tribunal why she mentioned that.

66. The process for those not successful in the application for the remaining posts was that they needed to fill in a form to be placed on the Police Staff Posting List (PSPL). Staff were required to fill Form 7303 in before 23 October 2015.

67. In an email of 21 October, Mr Nemorin-Noel set out the claimant's sickness absence as being 156 days in the current year and 265 days in the last four years.

68. The claimant indicated on 4 November that she was attaching Form 7303, but it was not attached. Her foot operation took place on 5 November, and on the same day, Mr Nemorin-Noel asked her to attend a case conference on 10 November. Mr Nemorin-Noel chased the claimant for Form 7303 and it was sent through by her on that day. The claimant did then receive circulars with available vacancies within the respondent on at least two occasions. She did not apply for any as they were not suitable for her because of her difficulty of travelling any distance.

69. It was difficult for the claimant to attend a case conference because of her recent operation, Mr Nemorin-Noel sent a list of questions that he felt

needed answering. The case conference was arranged with the claimant's trade union representative by phone and the claimant had answered the questions by the end of November.

70. As part of the redundancy programme there was an Early Departure Voluntary Redundancy Scheme to be launched in early January. Mr Nemorin-Noel was transferred to Brent in December 2015. There were some difficulties between the claimant and OH managing to speak to each other. The claimant was told towards the end of December that her line manager would be Mr Allotey. Mr Allotey wrote to her towards the end of 2015 asking for a meeting to discuss her sickness absence in January 2016.

Events in 2016

71. The claimant decided that she would not take advantage of the voluntary redundancy proposals on 14 January. There was a final case conference held on 26 January 2016 which involved the claimant and her trade union representative, Mr Parrock. Mr Norris from HR was also in attendance. The claimant was due to return to work on 16 February. The claimant particularly complains about a remark made by Mr Norris towards the end of the meeting which reads:-

> "*ZN informed SG that if she failed to return to work on 16 February 2016 a file would be prepared and sent to DPS for consideration of dismissal under the Unsatisfactory Attendance policy*"

72. Before she returned the FAW appeal outcome was sent to her and she was unsuccessful in that appeal.

73. Because the claimant had been unsuccessful in the application for a post in the reduced team and had decided not to ask for voluntary redundancy, the HR Team informed Mr Allotey that he needed to have a one-to-one meeting with the claimant to serve a compulsory redundancy notice on her.

74. The claimant did resume work on 16 February and Mr Allotey, who was on leave that day, decided to attend to welcome her there. There were a number of difficulties with her workstation which she pointed out to Mr Allotey. Amongst other matters, her special chair was broken. Mr Allotey assisted her with the other items that were missing (heater and lamp etc) but there was still the outstanding matter of the broken chair and perhaps a need for more draughtboards. The claimant emailed Mr Milligan that day to point out the difficulties with her workstation. The trade union representative suggested that a DSE Assessment should be carried out on her workstation.

75. The following day, 17 February, Mr Milligan met with the claimant at her workplace. He arranged a draughtboard to be placed in front of the claimant and discussions were had about other necessary adjustments. He emailed the claimant the next day with his recollection of what had

happened about her work station. He set out the damage to the chair which was about the material coming loose and said he had emailed the supplier. He said that the claimant had said that the draught board he had found was "too big" and made the claimant feel isolated. He said he would look for a smaller board. He said:-

> *"Prior to leaving yesterday I personally checked with you if you required any other reasonable adjustments and you informed me that you did not".*

76. The email then discussed the claimant's annual leave which was that she had 25 days leave outstanding which she would need to take before April on top of the leave already booked for late March. There had been various discussions about the claimant's annual leave which she had accrued during her sick leave. Her trade union asked that she be permitted to carry over more than the 9 days usually allowed and, after discussion with Ms Graham, Mr Milligan informed the claimant what leave she had outstanding and he would allow one extra day to be carried forward but otherwise it would have to be taken or lost. He also suggested that she could convert some of the outstanding amount of time she was due to repay (which was still 24 hours after the FAW appeal) to 3 days annual leave. The claimant did not, of course, have to take that leave and she could have worked some of it to repay some of the hours owed to the respondent. She was not forced to take leave but told of her entitlement.

77. In the meantime, the chair needed to be fixed and Mr Milligan had been in discussions with Posturite, who had supplied the chair, to try and get it fixed. On 22 February Mr Milligan emailed the claimant to say he had authorised a replacement seat. Mr Allotey held a meeting with the claimant to discuss her sickness absence levels and that was followed up with a letter.

78. The claimant did take her annual leave from 23 February.

79. During March there was a decision that the claimant should be put on the first level of the respondent's sickness absence procedure which involved being put on an Informal Management Action Plan (IMA). An OH appointment was arranged for the claimant and Mr Milligan gave authority for the purchase of a seat and chased the supplier for a delivery date. The claimant submitted a formal FAW on 29 March, which included complaints about the incidents involving Ms Graham in August and September 2015. The FAW was acknowledged on 31 March.

80. The claimant returned from annual leave on 4 April and told Mr Allotey that it seemed the chair had been repaired incorrectly. Mr Allotey told Mr Milligan about this and Mr Milligan chased Posturite about it on 6 April. He also spoke to them that day about the chair and a few days later a photo was sent and Posturite told Mr Milligan they were going to investigate. The claimant was told about all these discussions with Posturite. Because the claimant had raised it with Mr Allotey, he wrote to Mr Milligan on 12 April in which he said - "*I believe we are failing on the reasonable adjustment that*

should be in place for her". Mr Milligan replied by email and disagreed with that description as he said he had dealt with things as they arose and in a timely manner.

81. The claimant's FAW was progressed and Ms Gordon was appointed on 12 April to look at informal resolution. She had a meeting with Mr Padwick for guidance and met with the claimant on 12 May.

82. There was further chasing of Posturite in mid-April and the claimant raised concerns with Mr Allotey because her recuperative plan meant that she was going to increase her hours to five hours per day but that she was having difficulties because of the chair. Meanwhile, Mr Milligan had been told that Posturite were ordering the chair and that it would be delivered in early May.

83. It was clear by this point that the claimant was to be made redundant and Mr Allotey was trying to find out what date that would be.

84. The chair part was delivered in early May but, unfortunately, it had no pump attached. At some point it had no connecting cable. Posturite confirmed that they had sent the wrong chair base and, on 11 May, Posturite eventually informed Mr Milligan that the manufacturer did not make that particular seat anymore. The claimant was asked to decide what replacement she wanted on that day.

85. OH informed Mr Milligan that Posturite should come out and assess the claimant's needs and they would come out earlier if the replacement seat was cancelled. Because of the issues with the chair, the claimant emailed Mr Allotey and Mr Milligan asking for disability leave. Mr Milligan indicated that he would take professional advice. The claimant also told Mr Allotey that she was still feeling the effects of draughts.

86. On 20 May Mr Milligan informed the claimant that he had been advised that her request did not meet the criteria for disability leave but that reasonable adjustments would be made while the issue with the chair was outstanding. She was to be allowed to work significantly reduced hours outside of the recuperative plan and to take breaks. It is also clear to the tribunal that the claimant was allowed to leave work whenever she asked to without any reduction in her pay. The chair was to be delivered on 29 May.

87. Meanwhile, the issues with the draughtboards continued. The claimant's evidence to us was that she had mentioned to Mr Milligan in February that she would prefer a transparent board. There were now several draughtboards around her, to the front of her, to the side and behind her in front of the windows and she said she felt isolated from colleagues.

88. The tribunal accepts that the claimant made reference to feeling isolated, but we cannot see, looking at the documentation before us, which is extensive, that there is a very clear reference to a transparent board until a little later. There was a comment which may have been a reference to a

transparent board or to the fact that the board in front of her blocked her view somewhat.

89. On 2 June Mr Allotey, with a colleague, thought that perhaps that they could turn the board the other way and the claimant indicated she would look at it the following week. The claimant had asked for an Access to Work report but the application had been lost.

90. Around 6 June, after a conversation with Mr Allotey, the claimant emailed him about a board with plastic windows and this was forwarded to Mr Milligan. Mr Milligan asked for an update on the Access to Work report and matters were progressed. An informal FAW Report was produced on 6 June for matters to be progressed to the next stage. Unfortunately, there was a mix up and it was not progressed as it should have been at that point.

91. On 7 June there was an email exchange between the claimant and Mr Milligan about draughtboards. He said that he was seeking professional advice and that he was happy to investigate sourcing a see-through board He indicated a little later that day that he did not recall her mentioning a see-through draughtboard before that time and the tribunal find that is correct.

92. The claimant was having another foot operation and that was to take place later in June. She was off sick for that operation from 9 June and the claimant believed that she would be off for about three months.

93. In early July, Mr Allotey visited her at home and Mr Milligan tried to check the date that she would be returning and what would be the last before her redundancy took effect. He believed the last day of attending work would be 22 September because she would have accrued further annual leave. He indicated that she would be likely to return under a recuperative plan and he asked the claimant directly whether a clear board was, in her view, a reasonable adjustment, given that she would only be at work for 14 days at a reduced level. She indicated that she believed that it was. The claimant was chasing the FAW as she had not heard an outcome from it.

94. On 14 July the claimant emailed Mr Allotey and said that she had not been given a return to work date, but she did want the board to be in place on her return. Enquiries were made to see whether a board could be sourced internally but it could not.

95. There was a mix up with respect to the FAW in that it had been believed that it had been resolved informally which it had not, so it would therefore need to be progressed.

96. On 15 July Mr Milligan provided a budget code for the clear board to be ordered and told the claimant that he would have the item ordered. In the meantime, an OH referral was made for the claimant. On 22 July Mr Allotey asked Mr Milligan whether he should order the board.

97. There were further conversations about how much annual leave the claimant had outstanding. OH advice was still outstanding with respect to the claimant's return. Mr Milligan was waiting for that OH advice which was due to be given on 2 August but the date for that was put back. OH advice was received by Mr Milligan on 9 August that the claimant was currently unfit for work. OH were unable to confirm if she would be able to resume her four hours of recuperative duties on 13 September as it would depend on what her doctor said.

98. In the meantime, the claimant was told by Mr Walsh that he was the FAW investigator and he wanted to meet with her.

99. On 10 August Mr Milligan told Mr Allotey that he had decided not to order the board. Mr Allotey had calculated that the claimant would only work for 8 days and Mr Milligan confirmed it would be for four hours a day. When asked by Mr Allotey whether it was "cost effective" as she was only working 8 days, Mr Milligan replied "*No, I will not be ordering it after the OH report re her likely return date, annual leave and recuperative plan. I do not believe the cost is reasonable*". It is agreed that the likely cost was less than £200.

100. Mr Milligan did not tell the claimant that he had decided against ordering a clear board at that point. When asked during the FAW investigation why he did not tell the claimant he was not ordering the clear board at that point, he said that it was because she had asked for little or no contact while she was on sick leave because she found it stressful. He acknowledged later that that was perhaps a mistake as the claimant believed that the clear board was indeed being ordered for her.

101. A case conference was held on 22 August and the claimant also attended a Stage 2 FAW with her TU Rep.

102. A Risk Assessment was carried out and the claimant indicated that she hoped to be at work on 13 September but said it depended upon all her reasonable adjustments being in place, including the see-through board. She believed that was in accordance with her GP's Statement of Fitness to work certificate dated 12 September which read "*can return as long as reasonable adjustments are in place as previously agreed*". There is no specific mention of a clear board.

103. In the meantime, there was discussion about the claimant's desire to go abroad whilst on sick leave. Mr Milligan emailed her about that on 24 August reminding her of the policy, having not heard directly from her about it.

104. Posturite had identified a transparent board but the order was put on hold until Mr Milligan knew about the claimant's return. The claimant saw her GP on 12 September and on that day, Mr Milligan told the claimant that he had not ordered the board as he said it was not reasonable. He provided his reasons which he stated were as follows:-

1) Upon your return you will have 8 working days prior to taking your accrued annual leave before your redundancy date of 28 October 2016.
2) One of the working days will be a disability leave day. I understand it will be 14 September 2016.
3) You will physically be working for 7 working days.
4) You have a recuperative plan in place to support your return of 4 hours a day.
5) There is an existing draught board in place."

105. Mr Nemorin-Noel called the claimant about her return but on 13 September the claimant emailed to say that she would not be returning as the clear board had not been ordered. There was further email communication, but the claimant did not work between that day and her last day of work on 22 September before annual leave.

106. On 4 October the claimant's trade union representative asked Mr Milligan to consider putting the claimant on "*gardening leave*". Mr Milligan replied to that on 13 October refusing the request and giving detailed reasons. He said that he belied that all reasonable adjustments were in place. He said:-

> *"These included a specialist chair, lamp, heater, desk writer and air conditioning above her desk disconnected. All these were recognised by Posturite. There was also an existing draughtboard in place which was identified by Posturite as negating the issues of too much light or glare……I did not think that a 'clear' draught board was a reasonable adjustment for the time Sarah would actually be in attendance at work".*

107. The respondent was chasing the FAW investigator with respect to the status of the FAW which was ongoing.

108. On 26 October the claimant was told that her last working day had been extended from 28 October to 3 November because the FAW report had not been completed. She was told that she needed to attend work between Monday 31 October and Wednesday 2 November. The claimant was very upset by this and indicated that she was unable to attend for the same reasons she had not attended in September, namely that there was no clear board. It was also very late notice and she said she had other plans. Mr Milligan wrote to the claimant on 15 November explaining that arrangements had been made to deduct her pay by three days. We understand that decision might have been made by Ms Lewis, but Mr Milligan passed it on to the claimant.

109. Mr Walsh delivered the FAW Report to the respondent and it then went through the processes. It was approved to be sent to the claimant in early December. Slightly before that the claimant was told by the respondent that she had been overpaid because she had not attended for the three days and somewhat later in February 2017 a further letter was sent to her about that.

Law and submissions

110. The claimant brings claims under the Equality Act 2010 for various forms of disability discrimination and the Employment Rights Act 1996 for unfair dismissal.

111. As far as the unfair dismissal complaint is concerned, the primary legislation appears at s.98 of the Employment Rights Act 1996 (ERA). The initial burden of proof rests on the respondent to prove the reason for dismissal. In this case the respondent says that the reason for dismissal was that the claimant was redundant, being one of the potentially fair reasons set out at s.98. The definition of redundancy appears at s.139 of the ERA which reads: -

> *"(1) For the purposes of this Act an employee who is dismissed should be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to-*
>
> *a) -*
> *b) the fact that the requirements of that business –*
>
> *(i) For employees to carry out work of a particular kind,*
>
> *(ii) –*
>
> *have ceased to diminish or are expected to cease or diminish"*

112. The claimant's case is that she was dismissed because of her disability. The tribunal will determine that question when considering the disability discrimination complaints. If it is found that the dismissal was by reason of her disability, it will be unfair. If it is not by that reason, the tribunal will need to consider whether the respondent has shown sufficient evidence for the redundancy definition to be met. If it does show that potentially fair reason, the tribunal must then determine, the burden of proof being neutral, whether the dismissal was fair or unfair under s.98(4) ERA which reads:-

> *"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*
>
> *a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *b) shall be determined in accordance with equity and the substantial merits of the case"*

113. The tribunal will need to see evidence of a fair procedure for a redundancy exercise for a substantial employer. This will usually include the usual safeguards of consultation with affected employees, proposals to avoid compulsory redundancies, consideration and offers of alternative employment if available.

114. The claimant's other claims fall to be determined under the provisions of the Equality Act 2010 (EQA). The respondent accepts that the claimant was disabled at the material time and that it was aware of the disability. The relevant sections therefore are s.13 for direct discrimination, s.15 for discrimination arising from something in consequence of a disability, s.20 and 21 for the failure to make reasonable adjustment and s.26 for the harassment allegations.

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) -

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, 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, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) -

(6) -

(7) -

(8) -

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding the substantial disadvantage includes a reference to –

a) removing the physical feature in question,

b) altering it, or

c) providing a reasonable means of avoiding it

(10) -

(11) -

(12) -

(13) -

21 Failure to Comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails or comply with that duty in relation to that person.

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) -

(3) -

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

115. The burden of proof provisions are set out in s136 EQA and apply to all discrimination complaints. That section requires the claimant to prove the primary facts from which the tribunal could conclude there has been discrimination. If there are such facts, the burden shifts to the respondent to explain how any such treatment as found is without discrimination. Those sections of EQA which provide for the respondent to justify any otherwise discriminatory treatment require the tribunal to consider proportionality and, in particular, to balance the discriminatory effect with business needs. The more serious the adverse impact the more cogent the business reasons should be.

116. The claimant also relies on direct discrimination under s13 EQA. For such a complaint, a comparator is necessary and should be one whose circumstances are not materially different (s23 EQA). The comparator, which may be a hypothetical comparator, will be a person in very similar circumstances to the claimant but without her disability(ies). For one allegation only (Complaint 9), the claimant mentions an actual comparator.

There is no provision in EQA which would allow a respondent to justify direct discrimination.

117. The complaint of a failure to make reasonable adjustments was central to this claim. The relevant sections are as set out above. The tribunal's task is to first consider the proposed provisions, criteria or practices (PCPs) and determine whether there was a PCP that placed the claimant, as a disabled person, at a substantial disadvantage. The question of whether there was substantial disadvantage requires identification of a non-disabled comparator (usually in these cases, a hypothetical comparator) who would not have suffered the disadvantage. If there are one or more such PCPs and the employer has knowledge of the disability and its effects, the tribunal will move to consider whether the respondent can show it has taken such steps as were reasonable to avoid that disadvantage. This requires careful analysis of the evidence and finding of the relevant facts to which the legal tests should then be applied. In considering what steps would have been reasonable, with the burden of proof resting on the employer, the tribunal looks at all the relevant circumstances and determining that question objectively, may well consider practicability, cost, service delivery and/or business efficiency.

118. The complaint of discrimination arising from a disability needs no comparator but the tribunal needs to consider what facts, if any, show unfavourable treatment linked to the disability. If that is shown, the employer can seek to show with evidence, that it had a legitimate aim which it used proportionate means to achieve. The tests for each section under EQA are as set out in the issues above at paragraph 4 and will therefore be clear from our conclusions.

119. Another important issue which arises in this case is the time limits to bring discrimination claims. S.123 EQA reads as follows:-

"(1) Proceedings on a complaint within section 120 may not be brought after the end of –

a) the period of three months starting with the date of the act which the complaint relates to, or

b) such other period as the employment tribunal thinks just and equitable

(2) -
(3) For the purposes of this section –

a) conduct extending over a period is to be treated as done at the end of the period"

120. Although that wording on the time limits for presentation of a claim is a little different from that which appeared in the anti-discrimination legislation which pre-dated the EQA, the previous case law remains relevant and

useful. Guidance is provided by the Court of Appeal in Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530 where it was said "*The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed*".

121. This means that the tribunal will need to consider those matters which took place more than three months before the claimant referred the matter to ACAS, and consider what evidence points to conduct extending over a period so as to bring them in time or whether they are discrete events and therefore out of time. If they are out of time the tribunal should consider whether it is just and equitable to extend time.

122. The respondent referred us to various cases on the time limitation point which can often be difficult to resolve. It is clear that, in this case, the claimant is claiming that the conduct extended over a period. Significantly, in this case, Mr Milligan was the line manager who took a lot of the responsibility for decisions in her case.

123. The respondent submitted that his involvement finished around Complaint 30 which is the request for the claimant to be placed on gardening leave between 13 and 22 September. Although the request was made on that date, in fact Mr Milligan's response to that which was a negative response, took place on 13 October. If that was his last involvement, that may make the complaints before that out of time

124. Conduct extending over a period will cover continuing course of discriminatory conduct (see Barclays Bank v Kapur [1991] IRLR 136). It is also the case that sometimes a number of acts may be themselves conduct extending over a period (see Owusu v London Fire and Civil Defence Authority [1995] IRLR 574). This will require the tribunal to consider whether matters are part of a policy or whether they are discrete acts. An operation of a discriminatory policy would constitute an act extending over a period.

125. The respondent's representative suggested that the case of the Secretary of State for Work and Pensions (Job Centre Plus) v Ms S Jamil and others UK EAT 97/13 might well be of assistance to us. This case dealt with the situation where a decision was made which was subject to a review which could keep the claim in time. There is also consideration of whether an omission might amount to a failure to make reasonable adjustments (see Matuszowicz v Kingston upon Hull City Council [2009] IRLR 288). It will also depend on our judgment about which acts are found to be acts of discrimination and which are not. Particularly, in a relatively complex case such as this one, where there are a number of allegations over a period of time, the tribunal needs to exercise care on the time limits (HSBC Asia Holdings BV and another v Gillespie [2011] IRLR 209).

126. If there is no conduct extending over a period and some or all of the complaints have been presented outside the three-month period, the

tribunal has jurisdiction to hear complaints if it decides to extend time on the basis that it would be just and equitable. In British Coal Corporation v Keeble [1997] IRLR 336 it was said that the discretion is as wide as that given to the civil courts by section 33 of the Limitation Act 1980. The court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension and to have regard to all the other circumstances, in particular the length of and reasons for the delay, the extent to which the cogency of evidence is likely to be affected by delay, the extent to which the party sued has cooperated with any requests for information, the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action. However, it is said that there is no legal requirement for a tribunal to go through such a list in every case provided that no significant factor has been left out of account by the tribunal in exercising its discretion.

127. Another relevant case is Robinson v Post Office [2000] IRLR 804 where the claimant was following an internal process and that such a factor can be taken into account when deciding whether it is just and equitable to extend time. That case also reminds us that time limits are exercised strictly in employment cases and that the exercise of discretion is the "*exception rather than the rule".*

128. The claimant has brought her discrimination complaints under different sections of EQA. These are understood to be claims brought in the alternative. S212 EQA states that "*detriment" does not, subject to subsection(5), include conduct which amounts to harassment*". For the purposes of this case then, we cannot find the same facts as amounting to both direct discrimination and harassment.

129. The respondent's representative and the claimant handed in detailed closing submissions. They were very helpful to us particularly as they did as we requested and prepared submissions on each complaint so that the tribunal could look at the arguments for complaints at the same time as well as considering the evidence for each complaint.

130. In summary, the respondent's submissions are that complaints 1 to 30 have been presented out of time and it is not just and equitable to extend time. As far as the remaining complaints are concerned, the respondent submits that the claimant does not succeed on any of those complaints because the facts do not support any such finding. The respondent submits that for most of the complaints the burden of proof does not shift and that while some reasonable adjustments were necessary, these were in fact implemented. The redundancy, says the respondent, is plainly not on the grounds of the claimant's disability.

131. One particularly complicating factor here is that the PCPs suggested for the reasonable adjustments claim is, particularly in one case, a PCP that it is

difficult, if not impossible, for the claimant to show. We return to these arguments in our conclusions rather than setting them out here.

132. The claimant also set out her reasons for asking that her claim succeeds. She had the assistance of a barrister when preparing the allegations table and she is concerned that she now hears some criticism of it which she finds it difficult to argue with. We did have some discussion about the PCPs and some were suggested by her which we will come to in our conclusions. In essence, the claimant feels strongly that she has been discriminated against and unsupported whilst employed by the respondent. She believes that her redundancy was because of her disability and she asked us to consider Nottingham County Council v Meikle [2004] EWCA Civ 859, Waddingham v NHS Business Services Authority which is an ET decision on requiring disabled employee to attend a competitive interview, and London Borough of Southwark v Charles UK EAT/0008/14 which concerns a disabled employee being required to attend an interview redundancy process. The claimant also made references to various stress surveys about the level of stress and mental health problems and reminded us of the evidence.

Conclusions

133. The tribunal has decided to give our conclusions on each cause of action under each Equality Act complaint and then deal with the unfair dismissal allegation. This is somewhat time consuming but there is really no alternative given the number of complaints and their different nature.

134. We deal first with the provisions, criteria or practices (PCPs) for the reasonable adjustment claims. The stated PCP for complaints 1,2, 3,4,5,6,8,9 and 10 is - *"the respondent adopted a policy of requiring employees to work their contracted hours*".

135. We are bound to find that there was no such PCP. The respondent did not adopt a policy of requiring employees to work their contracted hours. This is clear from the evidence before us with respect to this claimant and indeed the actual comparator that she refers to for complaint 9. Not surprisingly, the respondent did expect most of their employees to be working their contracted hours but there were possibilities for fewer hours to be worked under the recuperative plan arrangements as happened in the claimant's own case. The claimant has failed to show that such a PCP existed.

136. We could have left any decisions with respect to the failure to make reasonable adjustments complaint for those complaints, as there is no duty to make reasonable adjustments where there is no PCP. However, in recognition of the claimant's position as a litigant in person, even though a barrister apparently drafted the schedule, we have decided to consider alternative PCPs as long as they are firmly based on the evidence before us. We will indicate what they are under each complaint.

137. That PCP above with additional wording is said to be the PCP for complaints 12, 14 and 21, with the additional wording "*and to work back any shortfall in hours accrued*". It does seem to us that that PCP may amount to a PCP for those complaints and we will come to that later.

138. Other PCPs are suggested at other complaints and we deal with those under the findings under that heading. Some of the complaints referred to the physical features of the office in which the claimant worked which were "*an open plan style with numerous windows and prevalent draughts".* We accept that as a physical feature under s20 (4) EQA.

Complaint 1

Date: 16.07.14
Alleged perpetrator: Andy Milligan
Allegation

Failing to support C when she cried for help

- **On 07.07.14 C submitted a request for reasonable adjustments for a reduction in working hours to 5 hours per day in light of difficulties managing her condition due to stress from (a) death of family member and (b) impending wedding**
- **C submitted note from GP stating she was fit to work 5 hours a day for three months**
- **IR refused C's request for reasonable adjustments. On 16.07.14 Andy Milligan stated R would only permit her to work reduced hours for four weeks, starting at five hours per day in the first week and increasing by half an hour per day each week until full hours were to be worked in week five.**

139. This is said to be a failure to make reasonable adjustments. As indicated above we do not accept the proposed PCP. Strictly speaking the claimant does not shift the burden of proof. The respondent does not suggest an alternative PCP here and when the claimant was asked, she said that the respondent was trying to get her to return to work "*full time*".

140. The only PCP that the tribunal was able to construct, to try to assist the claimant, is a failure by the respondent to allow her to work five hours per day for three months whilst receiving full time pay, which was the adjustment she asked for.

141. If that is a PCP, the tribunal should consider whether the respondent had failed to make a reasonable adjustment to allow her to work at that level for full time pay. As a matter of fact, the respondent did refuse to allow the claimant to work at that level whilst she retained full time pay.

142. The tribunal accepts that the claimant had some support from the GP who repeated her request in the Statement of Fitness to Work Note, but the tribunal can see no other advice to that effect. It is quite clear that there were several options available to the claimant, not least that she could consider working fewer hours on pro-rata pay. We appreciate that the claimant may have felt that she could not afford that option, but it was an alternative that was put to her, as well as some other alternatives of reduced hours as set out in the findings of fact. Even if there was the PCP

suggested by us, we do not accept that there was a failure to make reasonable adjustments here because a number of other reasonable adjustments were made. It was not a reasonable adjustment to agree to the request for the reduction in hours in the circumstances.

143. The claimant also pleads this as an act of direct discrimination. We consider whether there are facts from which we could conclude that the failure to allow her to work that pattern whilst retain full time pay was less favourable treatment because of her particular disability. There is no evidence whatsoever that the refusal related directly to the claimant's conditions of fibromyalgia and/or ME. The evidence relates primarily to the fact that alternatives were offered which, on the face of it and with no advice to the contrary, seem to be reasonable. The claimant cannot succeed in a claim of direct discrimination here.

144. The claimant also pleads this as an act of harassment and we therefore consider whether there was unwanted conduct which related to disability. We accept that this was unwanted conduct as the claimant did not get the reply that she very much wanted. However, we do not accept that it was reasonable for her to believe that the conduct had the effect of violating her dignity or creating an intimidating etc environment. The claimant was given several options on how to resolve this matter and it was kept under review. The claimant cannot succeed in a claim for harassment.

Complaint 2

Date: 21.07.14
Alleged perpetrator: Andy Milligan
Allegation

Implementing a recuperative plan increasing from 5 hours a day to full time over 4 weeks which the plan was 'too little too late'.

145. This is very much linked to complaint 1. The stated PCP cannot succeed here so we apply the one that we suggested for Complaint 1 in order to consider what, if any, further reasonable adjustments should have been made.

146. The recuperative plan was based on the respondent's written policy. It is plainly designed to support people to return to work from sick leave. As at this date, this was not such an occasion, but the plan was extended to address the claimant's concerns. The claimant is arguing that the request for five hours a day for three months is what she was requesting as a reasonable adjustment here. She cannot succeed in this any more than she did in the first complaint. It was not a failure to make reasonable adjustments.

147. Similarly, the claim for direct discrimination and harassment must have the same answers as under Complaint 1. The burden of proof does not shift with respect to the direct discrimination complaint as she cannot show any facts which show less favourable treatment because of her particular disability. Nor can she show that it was reasonable for her to believe that

the conduct had the effect of violating her dignity or creating an intimidating etc environment.

Complaint 3

Date: 19.08.14.
Alleged perpetrator: Danny Nemorin-Noel
Allegation

- **C went off sick on 19.08.14. She was thereafter hounded to return to work as follows:**
  - **On 20.08.14 was required to phone office to arrange a home visit.**
  - **On 21.08.14 R told C that it would not apply the usual 28 day policy for holding home visits and a case conference was to be held the following week.**
  - **Danny Nemorin-Noel telephoned C that same day, berated her for being off sick and telling her she needed to return to work as soon as possible.**
  - **He also told C that Andy Milligan was not convinced by the reasons for her absence and needed further information.**
  - **C was visited at home on her 9th day of absence, which is not in line with company policy.**

148. In this case the claimant complains about Mr Nemorin-Noel and she pleads it as a failure to make reasonable adjustments. Again, we had difficulties with the PCP as what she mentions here has little to do with the alleged PCP. We therefore considered, with some care, whether there was any alternative PCP which applies here. The respondent suggests that her PCP ought to have been "*a failure to apply or modify our sickness absence procedure on the dates that she complains of*". The tribunal is not convinced that that PCP works any better than the one proposed by the claimant. The respondent was applying its policy for home visits and arranging a case conference.

149. If we accept that the PCP was a failure to modify that policy, the claimant has not succeeded in proving some of the facts set out above. She has not satisfied us that she was hounded or berated by Mr Nemorin-Noel. She was asked to arrange a home visit and a case conference was called. Further information was requested but she has not shown that Mr Milligan was not convinced of the reason for her absence.

150. In any event, considering the reasonable adjustments the claimant might have been asking for, it seems to the tribunal that she was saying that she should have had more time to be left alone to get better. The PCP might well therefore be that the respondent applied their procedure and she hoped that they would not apply it in the circumstances of her case. In the circumstances, there was no reason for the respondent not to carry through its own policies. There was no disadvantage in a home visit nor indeed in a case conference. The claimant can show no failure to make reasonable adjustments.

151. Her direct discrimination claim stands no chance of success at all. She has shown no facts from which we could conclude that these arrangements were less favourable treatment, even less that they were less favourable

treatment related to her particular disability. Nor can she show those are facts from which we could conclude there was harassment. If the claimant had shown sufficient facts that this could amount to unwanted conduct because these arrangements were made when the claimant was on sick leave so that it is possible that it was related to a disability, the tribunal do not accept that it was reasonable for her to believe these matters had the effect of violating her dignity or creating an intimidating etc environment.

152. Finally, in relation to this complaint, the claimant claims that it amounted to discrimination arising from a disability. We therefore consider whether there is any unfavourable treatment related to disability. The unfavourable treatment can only be the home visits and case conference, as we have found no hounding or berating. Even if that could be said to be unfavourable treatment, which in the tribunal's view it is not, it is quite clear to us that the respondent justifies such actions as being carried out sensitively and in line with their policy. The actions taken are a proportionate means of achieving a legitimate aim. The claimant cannot succeed on that complaint either.

Complaint 4

Date: 09.09.14.
Alleged perpetrator: None
Allegation

Management insisting on holding a case conference on the 22nd day of sickness rather than after 40 days in line with R's policy

153. The claimant has the same causes of action for this complaint as Complaint 3 and our findings are very closely tied to our findings with respect to that complaint.

154. We look first at the reasonable adjustments claim, the proposed PCP is not a PCP as stated above. Even if there was a PCP, the suggestion is that the claimant be entirely left alone and not asked to engage with the respondent at all. The claimant cannot show substantial disadvantage. That is not a reasonable adjustment.

155. As far as direct discrimination is concerned, the claimant must show that the case conference was connected to her own particular disability and there is absolutely no evidence of this. Nor are there sufficient facts to shift the burden of proof for the harassment complaint. In this case the respondent did hold a case conference rather earlier than it usually would but has given particularly valid reasons for it that is without any discrimination, because the claimant was taking annual leave after her wedding.

156. As for discrimination arising from a disability, again, there was no unfavourable treatment and even if there was, the respondent can clearly justify it as a proportionate means of achieving a legitimate aim given the need to have policies in place to discuss sickness absence with employees.

Complaint 5

Date: 21.10.14.
Alleged perpetrator: Danny Nemorin-Noel
Allegation

- **Offering a 2-week recuperative plan of reduced hours**
- **That the Claimant states did 'nothing to support my disabilities'**

Complaint 6

Date: 20.11.14 – 26.11.14
Alleged perpetrator: Andy Milligan
Allegation

- **R emailed C on 20.11.14 to attend a final case conference in December ahead of usual time frames**
- **C suggested by email dated 21.11.14 returning on reduced hours on 01.12.14 until her pre-booked annual leave over Christmas, where after she would return to work on the recuperative plan proposed by R**
- **On 26.11.14 Andy Milligan told C this was not permitted and she would have to begin her 4-week recuperative plan immediately**

Complaint 8

Date: Dec 2014
Alleged perpetrator: Andy Milligan
Allegation

Failing to provide a 3-month recuperative plan providing a 6-week recuperative plan instead which was stated could be extended

Complaint 9

Date: Dec 2014
Alleged perpetrator: Andy Milligan
Allegation

Permitting C only a 6-week recuperative plan including 2 weeks pre-booked annual leave While permitting MB 5 months of reduced hours

157. We take these complaints together as they are close in time and broadly concern similar matters. Complaint 5 is the offer of the two-week recuperative plan and it is said to be a failure to make a reasonable adjustment only.

158. Again, we had some difficulty with the PCP here as it is not clear what the claimant says should have been done at this point. We assume that she is arguing that the recuperative plan should have been longer (as indeed it was at a later stage). In which case, we consider that the PCP could arguably well be initially only offering a two-week recuperative plan. The respondent's representative suggested that the PCP should be a failure to dis-apply or modify the sickness absence procedure so as to offer her a lengthier recuperative plan. Obviously, this has not been pleaded. It seems to the tribunal that is not what the claimant is suggesting. The question for

the tribunal is whether there was any failure to make a reasonable adjustment in line with what the claimant wanted, namely a longer recuperative plan. The tribunal do not find there was any failure to make reasonable adjustments at this point. It was an initial offer only and very shortly after was amended before the claimant returned. The claimant was on sick leave at this point in any event. There was no failure to make a reasonable adjustment.

159. Turning then to Complaint 6, several matters are raised here including the respondent's request that the claimant should attend a final case conference. The policy states that a "*final case conference would be usually at the end of month 10*". It is clear that the email heading said it was an invite to a case conference. In fact, what was being done was consideration for an IMA. Another matter complained about relates to the suggestion by the claimant about returning on reduced hours which was refused, and the four-week recuperative plan offered.

160. Again, there are difficulties with the PCP because we cannot accept the pleaded PCP. The alleged perpetrator for complaints 6, 8 and 9 is Mr Milligan. Complaint 8 is about the failure to provide a three-month recuperative plan and Complaint 9, which is only permitting a six-week recuperative plan (where the comparator of MB is proposed)

161. On the face of it, the claimant was asking for two things here. She was asking for the three-month recuperative plan to work five hours a day and she was also asking whether she can break the recuperative plan with Christmas annual leave.

162. Doing the best we can, we think it is possible to argue that there was a PCP of applying the Sickness Absence Policy with respect to the IMA and/or not applying the Sickness Absence Policy about the date of the suggested final case conference. The claimant clearly takes issue with the refusal of the three-month recuperative plan and offers of 4 and 6 weeks' recuperative plans. In any event, the adjustments sought were not reasonable. There was no failure to make reasonable adjustments.

163. The respondent considered what the claimant proposed and reviewed its options. Those matters raised under Complaint 6 relate to the increased offer to six weeks and any comparison with MB. MB was clearly in a very different position to the claimant. It is important that employers treat employees with different conditions and different needs with respect to treatment, in different ways. Mr Milligan did not seem to have particular involvement with MB and where he did, he took advice from Occupational Health as indeed he did with the claimant's case. MB's operation had been delayed.

164. The claimant cannot succeed in a claim for direct discrimination with respect to any of these matters. She has not shown facts from which we could find any less favourable treatment related to her particular disability.

165. Nor can the claimant show any harassment. She cannot show unwanted conduct which related to her disability. The conduct she complains of are the decisions to offer recuperative plans for shorter periods than she believed were ideal for her situation. Even if she could show unwanted conduct related to disability, in the circumstances of this matter and the options offered to her, which included the offer that she could consider part-time work, it was not reasonable for her to consider it had the effect of violating her dignity or creating an intimidating etc environment.

166. Finally, with respect to discrimination arising from disability which she pleads under complaints 6 and 9, the claimant cannot show facts from which we could conclude there was any unfavourable treatment because of her disabilities. Again, even if she could, the respondent can justify the steps they took which were based on considerable advice taken by Mr Milligan and consideration of the options available to the claimant. Clearly there was a legitimate aim for the respondent to have a sickness absence procedure, offer recuperative plans to allow employees to return to their contractual hours so that the service could continue. The means were clearly proportionate.

Complaint 7

Date: Dec 2014 to April / May 2015
Alleged perpetrator: None
Allegation

- **R placed draught boards around C's desk to stop draughts at C's request**
- **These were not adequate and C requested they be replaced or enhanced**
- **R did not place any more draught boards around C's desk until April/May 2015**

167. This is a complaint of failure to make reasonable adjustments only. The physical feature is, as indicated earlier, one which is accepted by the tribunal. The claimant's case is that the respondent failed to take sufficient steps to protect her from draughts. The time period suggested is December 2014 to April/May 2015.

168. There has been much evidence on draughtboards and when they were available and when not. The tribunal has heard about various boards being in place at different times. Although we can see that the claimant has expressed concern about them, we are satisfied that the respondent was taking all reasonable steps to try and ensure that there were sufficient boards to protect the claimant, as far as possible, from draughts. The tribunal saw several photographs and there was often some confusion about the boards and when they were in place.

169. Stepping back and taking a view on the evidence as it was presented to us, we are satisfied that the respondent took all the necessary steps when recommendations were made by OH, after talking to the claimant, to try to ensure that sufficient boards were in place, or it honestly so believed. There was therefore no failure to make reasonable adjustments. The workplace could be described as an imperfect workplace, as many are, but the

requirement is to do what is reasonable in all the circumstances and we find that that is what the respondent did.

170. Indeed, it appears from the evidence before us that the case conference on 11 February led to the request for more boards and further discussions took place on 2 March. No further discussions took place until May when the claimant asked for more matters to be looked at.

Complaint 10

Date: 20.01.15
Alleged perpetrator: Andy Milligan
Allegation

Refusing to extend C's recuperative plan by a further 4 weeks, requiring her to work full hours despite still having difficulties with her disabilities

171. The claimant satisfies us that, of course, this did happen. She did make the request and it was refused. It is pleaded first as a failure to make reasonable adjustments and therefore we come upon the difficulty of identifying the PCP, as the one proposed is not a PCP. It seems the PCP might well be the respondent's failure to modify their procedure and that the adjustment requested was to extend the recuperative plan.

172. The question for the tribunal in relation to this matter is, if the claimant can show a PCP, whether she can show any substantial disadvantage from the refusal to extend the recuperative plan.

173. We have insufficient evidence on what the substantial disadvantage was except the claimant seems to suggest that she might have to take sick leave. Clearly the claimant was having some difficulty with working hours at that time, but she has not given us sufficient evidence of anything that we could decide amounted to a substantial disadvantage. Even if she had, we would consider what were reasonable adjustments in these circumstances. The respondent did consider the request, through Mr Milligan and he reminded the claimant again, of the offer to "*work reduced hours, on pro rata pay until the time that you feel you can return to full time hours*". This is an entirely reasonable offer and is one which would have amounted to a reasonable adjustment if the claimant had decided to accept that offer. The tribunal can find no failure to make reasonable adjustments here.

174. This matter is also claimed as an act of direct discrimination and harassment. But again, she cannot show facts from which we could conclude that she was treated less favourably because of her particular disability. There is no evidence that Mr Milligan would have treated somebody with a different disability, or with none, any differently. Nor can she show, given the other offers made to her, that she reasonably believed that this amounted to unwanted conduct related to her disability which violated her dignity or created an intimidating etc environment and she can therefore show no harassment.

175. Finally, in relation to the claim that it amounted to discrimination arising from a disability, the claimant must show facts from which we can conclude there was unfavourable treatment in not extending the recuperative plan. The claimant's case is that this had something to do with prior absences, but the decision related to her current circumstances. In any event, the respondent would be able to justify the treatment in light of the alternative options offered to the claimant.

Complaint 11

Date: On-going 11.02.15 – 23.06.15
Alleged perpetrator: Andy Milligan
Allegation

- **11.02.15 Andy Milligan stated in a meeting that he had not had time to sort reasonable adjustments for C specifically the draught boards. In attendance to this meeting was Gary Donald – R's Union Rep, and Danny Nemorin-Noel**
- **On 23.06.15 Andy Milligan suggested that C should be capable of working her full time hours. In attendance to this meeting was Gary Donald – R's Union Rep, and Danny Nemorin-Noel**
- **The above were examples of a general ongoing failure on Andy Milligan's part to take C's disability as genuine and serious**

176. This is in relation to the draughtboards and Mr Milligan's response to requests.

177. The claimant is complaining about a meeting on 11 February and 26 July which she says are examples of "*general ongoing failure*".

178. The claimant's case here on failure to make reasonable adjustments relates to the physical feature of the premises as set out above. We accept that the physical feature was that she was working in an open-plan style office with numerous windows and prevalent draughts. We cannot say for sure whether that necessarily placed her at a substantial disadvantage, but we are prepared to accept that it did, because of her susceptibility to draughts.

179. The question is similar to that at complaint number 7, that is whether there were sufficient draughtboards in place between these dates to support the claimant and deal with her difficulties.

180. Our answer is therefore similar to that we have provided for complaint 7. We have found that Mr Milligan did not say that he had not had time to source reasonable boards. The respondent's case, which we accept, is that he and others at the respondent made reasonable efforts to find the boards and put them in place when requested.

181. It is not clear to the tribunal what further boards the claimant was suggesting should have been provided at this point in time. She had raised several issues in the tribunal with respect to gaps between boards but there is no evidence that was raised at the time.

182. The tribunal finds there is no failure to make reasonable adjustments with respect to the draughtboards.

183. As far as direct discrimination is concerned, the claimant has not shifted the burden of proof to the respondent because she has not managed to show facts from which we could conclude that she had been treated less favourably because of her particular disabilities. The evidence is that the respondent responded to her requests and did what they could to put the draughtboards in place.

184. With respect to harassment, the claimant cannot show that it was reasonable for her to believe, even if she could show unwanted conduct, that it had the effect of violating her dignity or creating an intimidating etc environment.

Complaint 12

Date: Feb 15
Alleged perpetrator: Andy Milligan
Allegation

Ignoring Access to Work report stating that it would be beneficial to extend C's recuperative plan

185. Here the claimant complains of a failure to make reasonable adjustments, direct discrimination and harassment.

186. As far as reasonable adjustments are concerned we have the same problem of the PCP, except in this case the claimant has added "*and to work back any shortfall in hours accrued"*. The tribunal is prepared to accept that the respondent did have a PCP at this point that people should work back any shortfall in hours accrued. So that we can move on the consider adjustments, we also accept that it was to her substantial disadvantage because her health caused problems for her working long hours.

187. So, the question is what reasonable adjustment should have been made in these circumstances. The claimant is suggesting an extension to the recuperative plan that she should not have to work back those hours which she had not worked. The Access to Work Report did not say exactly that. It said this; "*May find it more supportive and productive is C was allowed an additional period of reduced hours to allow her stress and anxiety symptoms to reduce*". It goes on to say that they have not managed to discuss matters with the claimant's line manager and records "*this will ultimately be a management decision*". The evidence before us is that this report was considered, it was not ignored. It is not clear whether Access to Work were aware that Mr Milligan had offered the claimant the opportunity to work reduced hours on pro rata pay. The claimant has not made out the report was ignored or that there was any failure to make reasonable adjustments.

188. Similarly, the claimant's pleaded case under direct discrimination and harassment fails for the reasons provided earlier. She simply fails to show less favourable treatment related to her particular disability and she fails to show it was reasonable for her to consider that it was unwanted conduct

related to her disability which had the effect of violating her dignity or creating an intimidating etc. environment.

Complaint 13

Date: Q1 2015
Alleged perpetrator: None
Allegation

Delaying response to Fairness at Work request

- **Resulting in accruing a 48-hour work debit**
- **Which R wished C to work back**

189. This is said to be a complaint of direct discrimination only.

190. There was a slight delay in the respondent's dealing with her initial FAW between March and June 2015. We have clear evidence that there was under resourcing in the team dealing with FAWs and there were the usual delays in trying to arrange meetings and so on. Although the tribunal accepts there was a slight delay, the question is whether the tribunal takes the view that those are facts from which we could conclude that less favourable treatment had been accorded to the claimant because of her particular disability. There is absolutely no evidence to that effect.

191. The respondent was progressing the FAW and the claimant was aware that was the case. There is nothing to show that anybody involved in that FAW had any particular concern about her particular disability. What is more there was a suggestion that her hours debit should be cut by 50% even though that was time owed to the respondent by the claimant. The claimant fails to show any direct discrimination.

Complaint 14

Date: June 2015
Alleged perpetrator: None
Allegation

- **The FAW report concluded that C's request in July 2014 to work reduced hours had been reasonable under EqA 2010.**
- **However, it required C to pay back 50% of the hours shortfall she had accrued as a result of R's failure to put reduced hours in place**

192. This also concerns the outcome of the FAW in June 2015.

193. This is pleaded as a failure to make reasonable adjustments and discrimination arising from disability.

194. The proposed PCP is that the respondent adopted a policy of requiring employees to work back any shortfall in hours accrued. The difficulty with this is that the claimant cannot make out that PCP because she was not required to work back any shortfall in hours accrued at this point, she was only required to work back 50%. This makes it rather difficult to consider or decide whether there is an alternative PCP. The claimant cannot make out the PCP in this case.

195. If we were to consider an alternative PCP that the respondent applied a requirement to work back some of the shortfall in hours, we could then go on and consider whether the reasonable adjustment as suggested, which would appear to be that she should work back none of these hours. The claimant was clear about what hours she was required to work, having had a recuperative plan and there were other options available to her which she felt unable to take. There was no failure to make a reasonable adjustment here.

196. As far as the discrimination arising from a disability is concerned, the question is whether the claimant has shown facts from which we could conclude she was treated unfavourably because of something arising in consequence of her disability by being required to work back 50% of the shortfall.

197. It is difficult to see why being required to work back 50% of the shortfall amounts to unfavourable treatment. We accept that the claimant believes that it was so, and it arose because of her inability, for health reasons, to work her contractual hours.

198. The first question is therefore whether that requirement to repay 50% related to her disability, which we accept that it was. We therefore consider the respondent's explanation and we are satisfied that it was a proportionate means of achieving a legitimate aim. The legitimate aim is to have enough people at work to carry out necessary tasks and the proportionate means was the recuperative plan offered by the respondent with other options available to the claimant. Bearing in mind, also, that the respondent is publicly funded, the tribunal is satisfied these were proportionate means.

Complaint 15

Date: June / July 2015
Alleged perpetrator: None
Allegation

When redundancies were announced and staff were informed that they had to reapply for their jobs

- **Failing to update the Claimant about opportunities**
- **Not emailing the Claimant on her private email whilst she was off sick**
- **Failing to support the Claimant in securing a new role**

Complaint 19

Date: Oct 2015
Alleged perpetrator: None
Allegation

C was not sent details of alternative jobs whilst off sick

199. These complaints relate to the redundancy process begun by the respondent in June 2015.The claimant complains that staff had to reapply for their jobs which is correct in as far as staff had to apply for the fewer jobs

that would remain after the reorganisation. It is a complaint of failure to make reasonable adjustments only.

The claimant complains that she was not updated about opportunities, that she was not emailed at her private email and there was a failure to support. She also complains that she was not sent details of alternative jobs in October. The October date makes little sense because the claimant had not filled in a form F7303 by October 2015. Her manager having been notified of her failure to be successful only in mid-October. There was therefore no need for them to send alternative jobs before she did complete the form which was not until 10 November.

200. The claimant has not made out facts which support her case. As our findings of fact make clear she was told about what opportunities there were; emails were sent to her private email while she was off sick, and she was offered support by LF which she ignored.

201. In complaint 15 the PCP is said to be the respondent adopting the policy of requiring existing staff to reapply for jobs according to set deadlines in light of planned redundancies. This is a PCP. The claimant therefore needs to show what substantial disadvantage she faced in the application of this PCP. The claimant only had to complete the application form if she wished to have a chance to remain in the respondent's employment. There is no evidence that she was disadvantaged because of her disability with respect to this requirement. She was told about it, given time to apply and allowed extra time when she applied after the deadline. She did not accept the support offered to her. She has not shown substantial disadvantage.

202. Even if she had shown substantial disadvantage, and we needed to go on and consider what reasonable adjustments should have been made, it is unclear to us what the claimant is saying the respondent should have done. She made no specific requests at the time for anything more. We find there was no failure to make a reasonable adjustment.

203. The PCP for complaint 19 is said to be that the respondent's adopted a PCP of requiring employees at risk of redundancy to search and apply for new roles. To some extent this PCP is made out; it was for those at risk of redundancy to look for roles, but the respondent did later send details of jobs. The claimant was also sent information on how to search for jobs and she was spoken to on the telephone about the process. In any case, as we saw, she was later sent many details of jobs to her personal email address as requested.

204. Even if the claimant succeeds on the PCP here, she has shown no substantial disadvantage from the process. It is not clear what reasonable adjustment is expected although it seemed to be that she asked for details to be sent while she was off sick. As far as we can tell she was sent those details. Therefore, there was no failure to make reasonable adjustments.

Complaint 16

Date: 11.08.15 to 14.08.15
Alleged perpetrator: 3rd Line manager Linda Graham
Allegation

C had a family holiday booked for 14.08.15. A few days prior to the holiday, Linda Graham refused C permission to go on holiday as C was on sick leave at the time.

Linda was conscious of the amount of leave C was accruing whilst off sick so wanted C to resume from sick to take her leave. Linda threatened discipline if C ignored her response and went on holiday.

R was not entitled to refuse C said permission since her leaving the country was not harmful to her health.

Complaint 17

Date: Aug 15
Alleged perpetrator: Linda Graham
Allegation

- **Linda Graham stated to C that she was aware that she was awaiting acupuncture and counselling, and that she did not see why C could not attend work in the interim**
- **By doing so, she suggested there was nothing else wrong with C**

205. These allegations are with respect to steps taken by Ms Graham when she wrote to the claimant on 11 August 2015. These are pleaded as acts of direct discrimination, harassment and discrimination arising from a disability.

206. The facts about this matter are in the findings of fact at paragraph 62 and 63. In brief, this was Ms Graham's decision with respect to the claimant asking to be allowed to go abroad whilst on sick leave.

207. For the direct discrimination claim, the question is whether the claimant has shown facts from which we can conclude there was less favourable treatment related to her particular disability in this matter. The claimant has not shown those facts. Ms Graham's decision has nothing to do with the claimant's particular disabilities but with the respondent's policy and the facts of the claimant's absence in the past. The suggestion of disciplinary action is a reasonable one given the history of this matter. There is really no suggestion of any less favourable treatment and the claimant cannot shift the burden of proof. Even if she had, we are satisfied that the explanation for the treatment was not connected to the claimant's particular disabilities.

208. As far as the harassment complaint is concerned, although the claimant considered this to be unwanted conduct which related to her disability because it was related to her sick leave, it was clearly within the policy. In the circumstances of this case the tribunal cannot accept that it was reasonable for the claimant to consider this had the effect of violating her dignity or creating an intimidating etc environment. The fact of the matter is that the claimant could go on holiday; she simply needed to ring up, come

off sick leave and she could go. The claimant did in fact go abroad whilst on sick leave without any consequences.

209. Even if we are wrong about that and it is unfavourable treatment for something arising in consequence of her disability, we are satisfied the respondent has shown a proportionate means of achieving a legitimate aim, that is that employees should abide by the respondent's reasonable policies and procedures.

210. Our answer is really the same for Complaint 17 as for Complaint 16. Ms Graham did not suggest there was nothing wrong with the claimant. The claimant does not succeed in any showing direct discrimination, harassment or discrimination arising from disability in relation to those comments.

Complaint 18

Date: Sept 15
Alleged perpetrator: Linda Graham
Allegation

Linda Graham held a meeting with C

- **C was questioned as to her medication and disabilities**
- **It was suggested that the medications C was taking were not for her disability**
- **It was suggested to C that if she could go on an air-conditioned plane she could come to work**
- **Linda Graham stated C's disability was "often in people's heads"**
- **Linda Graham adopted a hostile demeanour in the course of the interview. The impression formed was that an attempt was being made to catch out C.**

211. This also relates to Linda Graham and concerns the meeting in September 2015.

212. Our findings of fact on this are at paragraph 65. This matter is said to amount to direct discrimination, harassment and discrimination arising from disability.

213. This is one of the few areas where there is some dispute on the facts. Ms Graham accepts that she asked the claimant about medication and her health conditions and we must therefore consider, in the circumstances of this case, what effect that might have and how it might lead to a finding of discrimination.

214. We also accept that, on the face of the note made by the claimant, there was a suggestion that the claimant might have had some confusion about what the medication was for which was probably not accurate. We also accept that Ms Graham talked about how the claimant could go on air-conditioned plane journeys. We do not accept that she said that any particular disability of the claimant was "*often in people's heads*", or if she did, she was supported by the claimant's own trade union representative who did not recall it but stated that is she had said it, it was because she was trying to be helpful. We do not accept that Ms Graham adopted a

hostile demeanour although we do accept that the claimant was upset by the nature of the questions.

215. On those facts therefore, for the direct discrimination complaint, the tribunal asks itself whether the claimant has shown facts from which we could conclude that less favourable treatment related to her disability had occurred. In this case we find that the burden of proof does shift. This is particularly because, for no obvious reason that she has been able to explain, Ms Graham told the claimant that she herself had fibromyalgia. We think this may have led to Ms Graham falling into the error of discussing details of the claimant's medication which led to some confusion and a suggestion of distrust which was not helpful.

216. Given that we have shifted the burden of proof, we are unable to find a very clear explanation from Ms Graham with respect to this incident. The comments related to the claimant's disability and we therefore find that there was direct discrimination in those comments that she made on that day.

217. Having found there was direct disability discrimination, we do not need to consider harassment. As for any discrimination arising from disability, we find for similar reasons to the finding of direct discrimination, there was unfavourable treatment which cannot be explained by the respondent. We cannot find that the respondent has shown a proportionate means of achieving a legitimate aim. The respondent therefore cannot justify this discrimination.

218. The claimant therefore would have succeeded in the disability discrimination claim with respect to some of the comments made at that meeting, albeit not at a particularly serious level. However, as we will come to at the end of this judgment, we have found that she is out of time for that claim. It is not part of any conduct extending over a period and it is not just and equitable to extend time. We give our reasons for this when we consider the question of time limits later in this judgment.

Complaint 20

Date: 26.01.16
Alleged perpetrator: Zac Norris/Andy Milligan
Allegation

- **Informing C that she had to return to work on 16.02.16 or file would be prepared for disciplinary**
- **Then on 17.02.16 telling C she would have to take just over five of the next six weeks off as leave**

219. This complaint is one of harassment and discrimination arising from a disability.

220. This relates to part of the note taken of the meeting on 16 February where the claimant was told that the file would be prepared and sent to DPS for consideration for dismissal under the Unsatisfactory Attendance Policy if she did not return on 16 February.

221. The question here is whether that is unwanted conduct related to her disability. The tribunal accepts that the claimant perceived the information about a possible disciplinary process as unwanted. As a matter of fact, the file was not prepared and sent to DPS because she did return on 16 February. So, her complaint is that she was warned that this might happen is she did not return.

222. The tribunal finds that the claimant cannot show that it was reasonable to believe that being given this information could violate her dignity or lead to an intimidating etc environment for her. There is nothing wrong with HR pointing out to the claimant what the next steps would be, given her absence of 169 days, as at December 2015.

223. That is the first part of the harassment claim.

224. The second part relates to Mr Milligan telling the claimant how much leave she had remaining and that she needed to take it before the end of the leave year.

225. The first thing to say about this is that it was information which she was entitled to receive, and it is very hard to suggest that being informed of entitlement to holiday, being allowed to take it before the end of the year, given that you had only just returned, was unwanted conduct. The claimant cannot satisfy the tribunal that that was unwanted conduct and it certainly is not reasonable for her to believe it violated her dignity or created an intimidating etc environment.

226. The claimant also claims this as discrimination arising from disability. The tribunal finds that the facts do not show unfavourable treatment related to disability. Even if there was such unfavourable treatment, it is justified by the respondent because it can show the legitimate aim of an absence management process and the proportionate means of providing information to the claimant. That claim must fail.

Complaint 21

Date: c. 27.01.16
Alleged perpetrator: Fairness at work appeal panel
Allegation

On C's FAW appeal, the appeal panel stated she was still required to work the shortfall hours (see #14 above).

227. This concerns the outcome of the first FAW and is pleaded as a failure to make reasonable adjustments and discrimination arising from a disability.

228. The PCP here is said to be the respondent requiring employees to work their contracted hours and to work back any shortfall in the hours accrued.

229. As with Complaints 12 and 14, we have already made it clear that we do not consider that there was a PCP of requiring employees to work their contracted hours but have accepted that there was, on occasion, a requirement to work back shortfall in hours. However, as stated earlier, the difficulty here is that was not the requirement on the claimant which was that she work back 50%. She therefore cannot really succeed in a reasonable adjustment claim without us considering an alternative PCP.

230. It seems to us (as with Complaints 14 and 21) this can only really work if the PCP is requiring employees to work back 50% and, as we understand it, the claimant is saying that she should not have to had to work back any of her shortfall in hours.

231. This was not a reasonable adjustment. Not only had it been made clear what the position was with the claimant's hours of work, 50% was already an adjustment and she had already been informed that she could use annual leave. The tribunal does not find that there was a failure to make a reasonable adjustment with respect to the FAW finding.

232. Considering the discrimination arising from a disability claim, we must consider whether the claimant can show facts from which we could conclude that there was unfavourable treatment because of her disability. We are prepared to accept that the requirement to repay 50% hours not worked was unfavourable treatment. However, we are more than satisfied that the respondent's explanation for this requirement was without discrimination as set out at paragraph 198 above.

Complaint 22

Date: 16.02.16
Alleged perpetrator: None
Allegation

- **C's reasonable adjustments were not there on her return**
  - **Chair broken**
  - **Desk was with someone else**
  - **Lamp was with someone else**
  - **Footstool was missing**
  - **Heater taken by Sgt Lorraine Cole**
  - **Draught boards were missing**
- **Chair was not fixed until 27.05.16**
- **A suitable draught board was never supplied**

233. These are complaints about the claimant's workstation when she returned to work after a long absence on 16 February 2016. They are pleaded as failures to make reasonable adjustments, direct discrimination and discrimination arising from disability.

234. The claimant relies on the physical feature of the building in which she worked. During the hearing, although we heard some evidence on the difficulties with the claimant's chair, she did not appear to particularly rely on that issue. It is a fact that there were some difficulties with the chair and it

was damaged. Although it took some time to repair, the tribunal has seen and accepts that the reasons for this delay were not because of any fault of the respondent. If the physical feature was that she had a poor working environment because of the damaged chair, a reasonable adjustment would be to fix the chair and the respondent did so as soon as it was able. The claimant was paid full-time, but she could take breaks and she often left work if she needed to. There were no further reasonable adjustments with respect to that.

235. Nor did the claimant pursue any matters in relation to the desk, lamp, footstool and heater, all of which were located by Mr Allotey on the day of her return.

236. The difficulty of the physical feature in this case is that the draughtboard which is said to be missing at this point was the transparent draughtboard. As far as the draughtboard is concerned, we have already made it clear that we do not accept the claimant's evidence that she asked for a transparent draughtboard or made it clear that she wanted or needed one in February 2016. This did not become clear until June 2016. The question therefore is whether the claimant can show a substantial disadvantage because of the lack of a transparent draughtboard.

237. We accept that Mr Milligan understood the claimant needed a smaller board and that there were concerns about sunlight and isolation. As assessment was needed to ascertain what would be best.

238. Complaint 22 is with respect to 16 February and we can find no failure to make a reasonable adjustment with respect to a clear or transparent board at this point. Indeed, the substantial disadvantage to the claimant was that she was susceptible to draughts and that disadvantage had been alleviated by the provision of the boards.

239. As far as direct discrimination is concerned the claimant cannot show facts from which we could conclude that there was less favourable treatment which related to her particular disability. The respondent was taking whatever steps it could to make her workplace suitable for her.

240. As far as discrimination arising from disability is concerned, there is no unfavourable treatment of the claimant because of disability. Attempts were made to make the adjustments which were necessary at this point, and that cannot be said to amount to unfavourable treatment. Even if she could show unfavourable treatment, the respondent has shown a proportionate means of achieving a legitimate aim in providing all that it could at this point.

241. We deal with Complaint 24 now because this relates also to the question of the chair not being fixed promptly.

Complaint 24

Date: April 16
Alleged perpetrator: Andy Milligan

Allegation

- **Refusing C disability leave whilst her chair was replaced**
- **Stating C has reduced hours instead**

242. This is a complaint about Mr Milligan refusing disability leave while the chair was replaced. It is a complaint of failure to make reasonable adjustments, direct discrimination, harassment and discrimination arising from disability.

243. The PCP is said to be the respondent applying a PCP requiring employees to continue to work while OH measures were put in place. We are satisfied that there was a requirement for employees to continue to work whilst OH measures were implemented.

244. We therefore consider what the substantial disadvantage was. We are prepared to accept that the claimant felt that the problems with the chair made her working life rather difficult. We therefore consider what reasonable adjustments could have been made and whether the reasonable adjustments she puts forward, of being allowed disability leave, was a reasonable adjustment.

245. With this we consider other reasonable adjustments already made including reduced hours, regular breaks and being allowed to go home if necessary. We accept that these were sufficient reasonable adjustments and that it was unfortunate that the chair took so long to be repaired. However, the claimant was on annual leave for a significant portion of the time; she returned to work on 4 April and the chair was fixed towards the end of May. It was not a reasonable adjustment to allow her to take disability leave in the light of the adjustments already made.

246. The claimant has not shown facts from which we could conclude that this treatment was less favourable treatment because of her particular disability. Nor are there facts which show unwanted conduct which it was reasonable for her to believe violated her dignity or created an intimidating etc environment. There is no unfavourable treatment related to something which arose in consequence of disability and, even if there was, the respondent has shown that it had a legitimate aim of needing people at work to carry out necessary tasks and had adopted a proportionate means by allowing the adjustments already made.

Complaint 23

Date: 21.02.16
Alleged perpetrator: None
Allegation

- **C was made compulsorily redundant**

247. With respect to the notification of redundancy in February 2016, this is pleaded as direct discrimination, harassment and discrimination arising from disability.

248. As far as the direct discrimination is concerned there is absolutely no evidence that the claimant was made redundant because of her particular disability. Many staff were being displaced and a significant proportion of them opted to take voluntary redundancy. We heard that the claimant was one of four across the respondent's boroughs made compulsory redundant. There are no facts from which we could conclude there is any direct discrimination in the redundancy process.

249. Nor are there facts which show unwanted conduct which it was reasonable for the claimant to believe violated her dignity or created an intimidating etc environment. There is no unfavourable treatment related to something which arose in consequence of disability and, even if there was, the respondent has shown that it had a legitimate aim of re-organising its workforce appropriately and had adopted a proportionate means by asking for people to consider voluntary redundancy and other measures for continued employment or redeployment.

Complaint 25

Date: 05.04.16
Alleged perpetrator: None
Allegation

Placing C on informal management action for sickness

- **Despite the fact that sickness was caused by R**

250. This matter relates to the decision to place the claimant on an informal management action (IMA) plan in April 2016. This was in line with the respondent's processes. The PCP, accepted as amounting to a PCP, was requiring employees who had high level of past sickness to be subject to a Management Action Plan. The claimant had a high level of past sickness and it was within the respondent's procedures to inform the employee of a plan to address that. Advice was sought from HR who suggested a shorter period of time that Mr Milligan suggested. As we understand it because that was a change in the policy.

251. The reasonable adjustment suggested by the claimant was that she should not be placed on an IMA. The tribunal does not agree that that was a reasonable adjustment. Being placed on an IMA did not amount to substantial disadvantage. Although the claimant seeks to argue that the respondent caused the sickness, there is insufficient evidence for the tribunal to make such a finding, even if it were necessary. The claimant had long standing conditions and had a foot operation which do not appear to have been "caused" by the respondent. It is very unlikely to be a reasonable adjustment for an employer not to follow its own policies with respect to managing sickness absence even where an employee is disabled.

252. This is also pleaded as discrimination arising from disability. When we consider this, we accept that the IMA could arguably amount to unfavourable treatment and that it was linked to the claimant's disability. However, we accept that placing the claimant on an IMA was a

proportionate means of achieving a legitimate aim as it was part of the process of managing and monitoring so that the respondent had sufficient staff to carry out necessary work.

Complaint 26

Date: April/May 2016
Alleged perpetrator: None
Allegation

Delaying replacing C's draught board

Complaint 27

Date: 10.08.16
Alleged perpetrator: Andy Milligan
Allegation

Deciding that ordering new draught boards for C is not cost effective for the Met Prosecutions budget

Complaint 29

Date: 13.09.16
Alleged perpetrator: Andy Milligan
Allegation

- **Deciding not to order draught boards as C would not be in the office for long**
- **Cost was only £200**

253. We take Complaints 26, 27 and 29 together because they all relate to the transparent draughtboard and are all said to amount to failures to make reasonable adjustments. For these three complaints, the physical feature is that the claimant was required to work in an open plan office with numerous windows and prevalent draughts which the tribunal accepts was a physical feature.

254. Complaint 26 is with respect to the period between April/May 2016. The difficulty that the claimant faces here is that there were already draughtboards in place and she does not suggest at this time that the placing of a board with a transparent area would make any difference to the draughts.

255. We do accept that the number of draughtboards around the claimant's workstation did mean that she did become to feel isolated, but she does not complain about draughts between February to April.

256. On the facts that we have found it was not clear at this point that she wanted a transparent draughtboard. Her complaints about isolation were raised more clearly in May 2016 and the respondent decided it would be wise to get an Access to Work assessment carried out and there was also consideration of Posturite looking into the workstation.

257. We cannot find a failure to make reasonable adjustments under Complaint 26.

258. By the time of complaints 27 and 29 (August and September 2016), Mr Milligan knew that the claimant did want a transparent draughtboard and he decided not to order it. Those are the facts of this situation. The question is whether his decision amounted to a failure to make a reasonable adjustment given that he understood the claimant wanted it in place when she returned from sick leave.

259. We first consider whether there was substantial disadvantage to the claimant by the fact that she would not have a transparent draughtboard for seven days when she was working four hours a day before her redundancy took effect.

260. The tribunal are not satisfied that there was a substantial disadvantage because the main concern the claimant had which was linked to her disability was draughts. Although we understand that it might not be particularly pleasant for the claimant to feel isolated, we are not satisfied that she can show that had a direct connection to her disability. The claimant has not shown substantial disadvantage.

261. If we are wrong about that and that the isolation amounted to a substantial disadvantage, we go on to consider whether the decision not to order a new transparent board was a failure to make a reasonable adjustment. We balance this matter carefully, looking at it from the point of view of the claimant and from the point of view of Mr Milligan on behalf of the respondent. We have come to the view that this was not a failure to make a reasonable adjustment. Balancing the fact that the claimant was only going to be attending work for seven days for four hours a day; that she had worked for some months without a transparent board and that her main health difficulties were caused by draughts, we accept that the decision not to order the board was not a failure to make reasonable adjustments in all the circumstances of the case.

Complaint 28

Date: 24.08.16
Alleged perpetrator: Andy Milligan
Allegation

- **Informing C that if going abroad**
- **She needed to provide contact details**
- **And to be ready to attend a case conference on 7 days' notice at her expense to fly home**
- **To not do anything that would hinder recovery**
- **Which was not required under R's usual policies**

262. This is pleaded as an act of direct discrimination, harassment and/or discrimination arising from a disability.

263. To put it as plainly as we can, we see nothing wrong with Mr Milligan informing the claimant of the policy. What Mr Milligan said was in line with the policy. We have already looked at the policy in relation to what Ms Graham decided about this and already made the point that there is nothing to stop the claimant taking annual leave or going on holiday as long as she returned from sick leave. The claimant can show no facts from which we could conclude there was direct discrimination, harassment or discrimination arising from a disability.

Complaint 30

Date: 04.10.16
Alleged perpetrator: Andy Milligan
Allegation

- **Refusing to put C on gardening leave as requested by C's union, when she could not return from sick leave on OH and GP advise caused by the absence of draught boards Andy Milligan decided not to order.**

Complaint 31

Date: 02.11.16
Alleged perpetrator: None

Allegation

Deducting C's pay for not being able to return to the office on 28.10.16 due to the draught boards not having been ordered, which left C unable to return to work in September after her operation. She was in the same position in October but R thought it was reasonable for her to come back into the office

264. These complaints are said to be discrimination arising from a disability. Complaint 30 is Mr Milligan's refusal to put the claimant on garden leave as requested by the trade union and complaint 31 concerns the respondent's decision to deduct her pay for 3 days she did not attend work at the end of October. The date is incorrect for complaint 30 because the decision was, in fact, communicated to the trade union on 13 October. The tribunal does not accept that the claimant's reasons for not being able to return to work, either in September or in October were justified. Draughtboards were in place which appeared to have the effect of protecting the claimant from draughts.

265. The claimant has not been able to show facts from which we could conclude there was unfavourable treatment related to her disability. Even if she could, we have accepted the respondent's justification for any such treatment, it being a proportionate means of achieving a legitimate aim, that is ensuring that the business of the respondent continued, and people attended work if they were able to. Although we have some sympathy for the claimant that she was asked, with very late notice, to attend work because her FAW was delayed, she could have reported sick. In any case, she cannot show that it was discriminatory treatment.

Complaint 32

Date: 02.11.16
Alleged perpetrator: None

Allegation

Date of C's dismissal by virtue of redundancy

266. This relates to the claimant's dismissal for redundancy. This is said to amount to an act of direct discrimination, harassment and discrimination arising from disability. It is also pursued as unfair dismissal which we deal with later in this judgment. We deal now with alleged discrimination.

267. As indicated previously under Complaint 23, we can find no evidence that the redundancy process was linked in any way to the claimant's sickness absence or disability. The claimant has shown no facts from which we could conclude that there was less favourable treatment because of her particular disability. Nor can she show facts from which we could conclude that there was unwanted conduct related to disability or unfavourable treatment because of disability. The redundancy process applied to many people and the claimant was one of four who were made compulsorily redundant when they failed to apply for voluntary redundancy. This claim fails.

Complaint 33

Date: 09.12.16
Alleged perpetrator: None
Allegation

FAW outcome
Despite being submitted on 29.03.16, it took until December 2016 and after C's employment terminated to produce a final decision

268. This is about the delay in the FAW outcome and is said to be an act of direct discrimination.

269. The claimant simply cannot show any facts from which we could conclude that the delay was because of her particular disability. Indeed, she could not show that it was to do with any factors of disability at all. Delays were caused because of matters completely separate from disability related issues. The claimant cannot succeed in that complaint.

Complaint 34

Date: Throughout
Alleged perpetrator: None
Allegation

Failing to send C to the chief medical officer

270. We can deal with this matter very shortly. It is said to be a failure to make reasonable adjustments.

271. The PCP for this is said to be that the respondent permitted line managers to monitor sickness absences exclusively. We are not satisfied that that PCP is made out on the facts. It does not seem to us that line mangers did have exclusive jurisdiction over sickness absences although, as we have

seen through this case, Mr Milligan, who was the claimant's second line manager, did have considerable involvement. We can also see that other people were involved including OH and HR and decisions were taken often with much communication between different departments.

272. Even if the claimant could make out such a PCP, which we doubt, it is not clear what the substantial disadvantage was. She has not explained to the tribunal why she felt she was disadvantaged by not being seen by the Chief Medical Officer. Even if she could show such disadvantage, we do not consider that it was a reasonable adjustment to send her to the Chief Medical Officer because we have no idea why or how it would have alleviated any disadvantage. That complaint fails.

Complaint 35

Date: Ongoing
Alleged perpetrator: None
Allegation

> **R continues to assert that C owes them money by way of salary overpayments, said overpayments having arisen due to C's past absence**

273. These are said to be acts of direct discrimination and discrimination arising from a disability.

274. The claimant complains about the respondent's assertion that money is owed by her to it. These assertions are consistent with the respondent's argument that she could have attended work and therefore owes money for overpayments.

275. The claimant cannot shift the burden of proof in relation to either of these matters. Even if she could, because it is some way connected to her belief that she could not attend because of her disability, the respondent can justify this based on its own procedures and of course the fact that it is responsible for public money and ensuring that it is not spent inappropriately.

276. That deals with the details of the discrimination matters but we now turn to the time limitation point.

Time limitation point

277. It is clear from the findings set out above that the claimant does not succeed in any of her complaints of discrimination, save for the single issue of Ms Graham's comments made to her (Complaint 18) in September 2015. We therefore consider whether that claim is in time.

278. The claimant, we assume, would argue that there is conduct extending over a period because Linda Graham did have some involvement with her case. However, we have seen no indication that she was particularly involved with the claimant right up to her dismissal and, even if she was, we think that is insufficient to make it conduct extending over a period. The September

meeting was a discrete incident where we have found that Ms Graham overstepped the mark and drifted into making discriminatory comments. She might not have believed she was doing so, but that is our finding. They are not comments which were repeated and no action was taken with respect to them. We therefore find that those complaints as set out above at complaints 16, 17 and 18 were not made in time.

279. We cannot find any just and equitable reasons to extend time with respect to that matter, not least because the claimant did not herself complain about it until some seven months after the incident itself. She clearly did not consider it to be as important as it has become in these proceedings. We therefore have no jurisdiction to determine that matter and it fails because it was brought out of time.

280. Briefly we should mention what we found about the time limitation point otherwise. The claimant has not succeeded on the facts or law in her disability discrimination claims with respect to any other matters, but we find that the claim was made in time with respect to matters involving Mr Milligan between July 2014 and November 2016. Mr Milligan was involved throughout. He responded to the request about gardening leave on 13 October but there is definite involvement by him up to 15 November at least. Although the claimant's claims have failed on the facts, our finding is therefore that there was conduct extending over a period for most matters and we had jurisdiction to deal with them. For the reasons given above all those disability discrimination complaints fail and are dismissed.

Unfair dismissal

281. Finally, we deal with the claim for unfair dismissal. The respondent has shown, with sufficient evidence, that there was a redundancy situation. There was a diminution in the need for employees carrying out the work the claimant carried out.

282. The claimant has not shown any facts which would suggest that the reason she was made redundant had any connection to either her particular disability or the fact that she was disabled.

283. Given the way in which the process worked and the fact that it was covering a large number of employees, the claimant was subject to the same process as everyone else with the same opportunities to apply for work, for voluntary redundancy and to be on the list for redeployment. There is no evidence that disability had any connection to the dismissal.

284. The claimant has not suggested that there were any faults in the redundancy process, but we consider procedural aspects for completeness. The respondent gave some months' warning to affected employees, offered support in the application process and placed those who were unsuccessful in a redeployment pool. Details of vacancies were sent to affected employees and voluntary redundancy offered. The dismissal was for redundancy and was not unfair.

285. This means that the claimant does not succeed in her disability discrimination complaints nor in her claim for unfair dismissal. The claim is dismissed.

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Employment Judge Manley

Date: 14 November 2018

Sent to the parties on: 16 November 2018

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For the Tribunal Office