EMPLOYMENT TRIBUNALS

Claimant
Miss R. Fuller

Respondent
British Airways Plc

v

Heard at: Watford

On: 19 to 22 November 2018
(23 November 2018 in chambers)

Before: Employment Judge Heal
Mrs F. Betts,
Mrs K. Johnson.

Appearances

For the Claimant: Ms J. Cozens (friend)
For the Respondent: Mr. B. Randle, counsel

JUDGMENT

1. The complaints of unfair dismissal, direct discrimination because of disability and failure to make reasonable adjustments are well founded.

2. There will be a hearing to determine remedy on 20 and 21 May 2019

REASONS

1. By a claim form presented on 17 September 2017, the claimant made complaints of unfair dismissal and disability discrimination.

2. We have had the benefit of an agreed bundle running to 304 pages. The following documents have been added to the bundle (by consent):

3. We have also heard oral evidence from witnesses in this order:

Miss Rebecca Fuller, the claimant;
Mr. Nigel Ginner, Policy and Casework Support Adviser, (previously Inflight Business Manager);

Ms June Parsons, Career Transition Consultant, now semi-retired, and
Ms Linda Bartlett, Area Manager for Eurofleet.

4. Each of those witnesses gave evidence by means of a prepared typed witness statement which we read before the witness was called to give evidence. The witness was then cross examined and re-examined in the usual way.

Issues

5. The issues were identified by the parties at a preliminary hearing on 17 January 2018.

6. These are as follows:

Unfair dismissal claim

1. Did the respondent dismiss the claimant for a potentially fair reason pursuant to section 98 of the Employment Rights Act 1996? The respondent contends that the claimant was dismissed for the potentially fair reason of capability.

2. If so, pursuant to section 98 (4) of the Employment Rights Act 1996, did respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant?

3. Did the respondent undertake a reasonable investigation into the claimant's health?

4. Did the respondent consider if there was any available suitable alternative employment?

5. The respondent, in all the circumstances of the case, acted reasonably in dismissing the claimant?

6. If the dismissal is found to be unfair, should compensation be reduced under the principles established in *Polkey v AE Dayton Services Ltd*. Can the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event and/or to what extent and when? (We have not made a decision on this issue yet but will hear submissions about it at the hearing in May.)

7. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? (The respondent did not pursue this issue.)

Section 6: Disability

8. The respondent conceded that the claimant had a physical impairment namely Aplastic Anaemia (a deficiency of all types of blood cells caused by failure of bone marrow development), Myelodysplastic Syndrome (a form of cancer in which immature blood cells in the bone marrow do not mature and therefore do not become healthy

blood cells) and Paroxysmal Nocturnal Haemoglobinuria (a rare chronic debilitating condition where red blood cells are broken down).

Section 13: Direct discrimination on grounds of disability.

9. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act 2010, namely:

9.1 Not making reasonable adjustments for the claimant;

9.2 Not giving the claimant sufficient time to find a new role;

9.3 Not allowing the claimant more time to recover from her transplant;

9.4 not obtaining an updated medical report on the claimant.

10. Has the respondent treated the claimant as alleged, less favourably than it treated or would have treated a comparator? The claimant relies on a hypothetical comparator.

11. If so, has the claimant proved primary facts which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

12. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Section 15: Discrimination arising from disability.

13. This claim has been withdrawn.

Section 20 and section 21: Failure to make reasonable adjustments.

14. Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely:

14.1. That employees had to go through its Career Transition Service.

15. Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

15.1. She could not compete with fully fit colleagues.

15.2. She could not secure employment in the time allowed.

16. Did the respondent take such steps as were reasonable to avoid the disadvantage? The adjustments asserted as reasonably required are identified as follows:

16.1. Allowing the claimant to continue to work in the grounded role in catering, admin and support.

16.2. Allowing the claimant to continue to work in the grounded role in catering, admin and support only being paid for the hours she worked, if being on full pay was a concern.

16.3. Allowing the claimant to take a period of disability leave/carer break while she received the stem cell transplant and recovered.

16.4. Enabling the claimant to secure a suitable alternative role without the need to undertake a full competitive recruitment process and/or interview.

16.5. Providing more support to the claimant during her time in the Career Transition Service.

17. Would these adjustments have been reasonable?

18. If so, did the respondent fail to make these adjustments?

19. If so, would these adjustments have reduced or eliminated any disadvantage?

20. Did the respondent make any other adjustments?

21. The respondent no longer asserts lack of knowledge.

22. Was the claimant's dismissal discriminatory under section 39(2)(c) of the Equality Act 2010?

23. On 11 April 2018 the complaint of discrimination arising from disability was dismissed upon withdrawal.

24. The respondent has conceded that the claimant is a person with a disability under the Equality Act 2010.

25. No issues are now taken about lack of knowledge of the disability.

Concise statement of the law

Unfair Dismissal

26. The starting point for analysing whether a dismissal for ill health capability is fair is that each case depends on its own circumstances. The basic question is

whether in all the circumstances the employer can be expected to wait any longer, and if so, how much longer?

27. The relevant factors will vary from case to case, but are likely to include the nature of the illness, the likelihood of the illness recurring or some other illness arising, the likely length of the continuing absence, the spaces of good health between absences, the need of the employer to have the work done which the employee was engaged to do, the impact of absences on others, consideration of the employer's policy and the assessment of the employee's personal situation. An employer should approach the issues with sympathy, understanding and compassion. One has to look at the whole history and the whole picture. An employer will also be expected to make it clear to the employee that the situation is causing difficulty and that the point of making a difficult decision to terminate the contract might be approaching.

28. There is a conflict between the needs of the business and those of the employee, and we decide whether the employer has sought to resolve that conflict in a manner which a reasonable employer might have adopted: the question is not what we would have done, but whether what this employer did was within the reasonable range of responses for a reasonable employer. In the course of doing this, we will have to ask whether the employer carried out an investigation which meant that he was sufficiently informed of the medical position. In order to determine the true position, the employer should consult the employee and, in some cases, any doctor or medical adviser.

Direct discrimination

29. We have reminded ourselves of the principles set out in the annex to the Court of Appeal's judgment in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258:

> (1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there

was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

30. Expanding on that, it is the claimant who must establish her case to an initial level. Once she does so, the burden transfers to the respondent to prove, on the balance of probabilities, *no discrimination whatsoever*. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if she had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of her disability. What then, is that initial level that the claimant must prove?

31. In answering that, we remind ourselves that it is unusual to find direct evidence of unlawful discrimination. Few employers will be prepared to admit such discrimination, even to themselves.

32. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can *properly and fairly* infer discrimination.

33. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the *'same, or not materially different'* as those of the claimant.

34. However other comparators may be of evidential value. Their evidential value will be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim. They be relevant to the drawing of inferences or to shed light on how a hypothetical comparator would have been treated. (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at paragraphs 109 to 110 and 143.)

35. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove the facts on which she places reliance for the drawing of the inference of discrimination, actually happened. This means, for example, that if the complainant's case is based on particular words or conduct by the respondent employer, she must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

36. If unreasonable conduct therefore occurs alongside other indications (such as under-representation of a particular group in the workplace, or failure on the part of the respondent to comply with internal rules or procedures designed to ensure non-discriminatory conduct) that there is or might be discrimination on a prohibited ground, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination.

Failure to make reasonable adjustments

37. When we deal with a complaint of failure to make reasonable adjustments under sections 20 and 21 of the 2010 Act, we ask these questions. Did the respondent apply the alleged provisions, criteria and/or practices (PCPs)? If it did, did those PCPs place the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? Did the respondent take such steps as were reasonable to avoid the disadvantage? (Questions of knowledge are not relevant to this case).

38. This process involves an objective test. It is unlikely that an adjustment would be reasonable if it involved little benefit to the disabled person. In many cases however a “yes/no” answer is not possible to this question. If the adjustment sought would have no prospect of removing the disadvantage then it could not amount to a reasonable adjustment. (*Romec v Rudham* [2007] All ER (D) 206). A chance of removing the disadvantage may make an adjustment reasonable (*Cumbria Probation Board v Collingwood* [2008] All ER(D) 04).

39. The Disability Discrimination Act 1995 section 18B(1) gave guidance as to the kind of factors to consider in deciding whether it is reasonable for a person to have to take a step in order to comply with the duty to make reasonable adjustments. Section 18B was not re-enacted in the Equality Act 2010. However, the matters listed in it are largely reproduced in Chapter 6 of the statutory code (Code of Practice on Employment (2011), and HHJ Richardson in *Carranza v General Dynamics Information Technology Ltd* [2015] IRLR 43 said that he had no doubt that the same approach applied to the Equality Act 2010. It is useful therefore to remind ourselves of those matters.

'*18B Reasonable adjustments: supplementary*

(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to—

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable for him to take the step;

(c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;

(d) the extent of his financial and other resources;

(e) the availability to him of financial or other assistance with respect to taking the step;

(f) the nature of his activities and the size of his undertaking;

(g) …(not relevant).'

40. It may be a reasonable adjustment not to dismiss a disabled employee. The duty to make adjustments is, as a matter of policy, to enable employees to remain in employment, or to have access to employment. The duty will not extend to matters which would not assist in preserving the employment relationship.

41. The duty to make adjustments arises by operation of law—it is not essential for the claimant himself or herself to identify what should have been done. It is important however to identify precisely what constituted the 'step' which could remove the substantial disadvantage complained of.

42. The test of 'reasonableness', requires us to apply an objective standard.

43. While it will always be good practice for an employer to consult with an employee, it is not a failure of this duty to fail to consult. (*Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 664.)

Facts

44. We have made findings of fact on the balance of probability.

Credit

45. We have found the claimant a reliable witness. We have found her open in her evidence and very ready to concede points where she sees that they have no or little merit. The claimant has shown herself at all times to be committed to her employment. She has shown a very strong work ethic both before and after her diagnosis and ill-health. We find the respondent's evidence less reliable and less straightforward. We do not consider that the respondent has been wholly open with us about the full discussions between Mr Ginner and Ms Bartlett before the decision to dismiss and the appeal. We are surprised that Mr Ginner felt it appropriate to ask the claimant to seek a change to a medical certificate: changing advice from an expert rather than acting on that advice. We have seen a tendency in the respondent to put a negative interpretation on the medical evidence and an inertia about investigating matters that might benefit the claimant.

46. The respondent is a limited company running an international airline business.

47. The respondent has a contractual absence management policy known as 'EG300'. Section 4 of that policy deals with the procedure for managing absences which exceed 21 consecutive days, or absences which affect an employee's ability to work for medical reasons.

48. At clause 4.6, EG300 states:

'If reasonable adjustments cannot be made to the employee's working environment, and the employee is capable of undertaking suitable alternative employment, the line manager will discuss with, and assist the employee to identify and apply for, suitable alternative employment. In doing so, the line manager should refer the employee to the Career Transition Service and support the employee during the Career Transition process.

….

49. Clause 4.6 goes on to state

'*transfer to other duties:*

- *will not be redeployment under the Redeployment Agreement; and*
- *may require additional and/or further training to be offered;*
- *may result in an 'income top up' if an employee on the advice of BAHS moves to reduced hours (BARPS only)*

If the employee is capable of undertaking suitable alternative employment, but;

- *Does not accept a suitable alternative job offer; or*
- *fails, after appropriate support from the company, to obtain a suitable alternative job within a reasonable period*

The employee's employment may be terminated by the line manager.

Termination of employment on the grounds of medical incapacity

An employee's employment will be terminated on the grounds of medical incapacity if:

(i) reasonable adjustments cannot be made to the working environment of the employee's current job;
(ii) within a reasonable period of time, the employee is incapable of undertaking a suitable alternative job or no suitable alternative available, and
(iii) in cases where the employee is a member of the British Airways Retirement Plan (BARP), the employee's application of income protection benefit (see below) is unsuccessful.

50. The respondent had a Redeployment Process Agreement. This was a collective agreement between the respondent and trade unions to provide a mechanism for how surplus manpower would generally be managed. This therefore applied to members of staff whose roles had been removed in a reorganisation and who were potentially redundant.

51. At 8.2 of that agreement there is provision for redeployees to find alternative employment within the respondent. The agreement states:

'*Unless otherwise required by law to give preference to other candidates, all job vacancies in the first instance will be made available to surplus employees registered with the Career Transition Service, for whom such roles are reasonable alternative employment. Surplus employees will be considered, undergo matching and where appropriate be interviewed, for such job vacancies that they have applied for. As such, in order to look for and secure reasonable alternative employment, surplus employees will have a period of 12 months on Career Transition unless otherwise agreed by the Review Board. This means that surplus employees will be expected to apply for vacancies or maybe matched to vacancies by the Company*.'

52. Clause 14.1 of that agreement states:

'*During the Career Transition period surplus employees may at any time choose to take Voluntary Redundancy, Career Break, or Voluntary Unpaid Leave of Absence*.'

15.1 states:

'*Career Break will be an option made available to individuals throughout the informal, formal and individual stages. Career Break is as defined in the Employment Guide at the time*.'

16.1 states:

'*Voluntary Unpaid Leave of Absence will normally be offered throughout the informal, formal and individual stages on terms to be specified by the Company. The maximum period of VULA available will be four years with mutual agreement, giving due regard to the retention of relevant skills*.' There are then further detailed provisions in the remainder of clause 16.

53. A Career Break involves the employee resigning from their employment, but on terms whereby they may reapply for vacancies which would otherwise be available only internally. This gives them an advantage over wholly external job applicants. Such candidates would also keep continuity of service for travel purposes. A career break can be for up to four years.

54. Ms Bartlett was unclear about the terms of voluntary unpaid leave of absence.

55. The respondent operates what it calls a 'two ticks scheme'. That is, if an individual applying for a role meets the minimum criteria for the role and indicates that they require reasonable adjustments, then that individual will automatically be put through to the next stage of the assessment process. (We have not been shown the precise terms of this scheme).

56. An employee who is unable to carry on with his or her contractual role due to ill-health or whose contractual role has been removed as part of a reorganisation is offered access to the respondent's career transition service ('CTS') as an alternative to termination of their contract. When an employee is registered with CTS he or she is sent a welcome email outlining how the scheme works.

57. That email tells the employee that CTS is there to support them in their job search. They are sent a copy of the 'CTS Three Stage Program' which they are advised to complete to help them with CV writing, application forms and interview practice. The email stresses that it is the responsibility of the employee to engage with the program in order fully to benefit from the range of job searching tools and techniques.

58. The email identifies a 'Career Transition Adviser' who is to make contact with the employee. The team applies for access for the employee to CTSJobsonline which is an internal recruitment portal advertising the respondent's vacancies for CTS registered clients.

59. Displaced employees who were not being managed under EG300 section 4 were given a maximum of 52 weeks 'active on transition' after which their contract was terminated, and their position made redundant. Those being managed under EG300 section 4 had no set time limit with CTS. In theory this was because their time on CTS depended on their individual circumstances. Some such employees have been registered for up to 2 to 3 years.

60. Displaced employees who were not being managed under EG 300 section 4 were sent targeted emails which were not sent to those employees being managed

under EG300 section 4. These emails told employees about jobs which were short-term (probably lasting about two weeks to 2 months although Miss Bartlett was not completely sure about the duration) and business critical. They might involve, for example, an urgent need to give support with a particular piece of work such as, if the respondent had had an influx of complaints about a particular incident. The work might involve looking at how to improve an area in response to concerns.

Chronology

61. The claimant began work for British Midland International (BMI) on 20 August 2003. By TUPE transfer she began to work for the respondent on 2 October 2012.

62. By email dated 21 November 2015 the claimant told Mr Ginner, her manager, that she had been feeling 'under the weather', so had gone to her GP for blood tests. As a result, she had been admitted to hospital immediately. She did not know what was going on or how long she would be off work.

63. Shortly afterwards the claimant was diagnosed with aplastic anaemia, myelodysplastic syndrome and paroxysmal nocturnal haemoglobinuria. She was put on a course of immunosuppressant treatment.

64. The claimant was signed off sick from 21 November 2015 to 31 July 2016.

65. The claimant had presented with symptoms of infections, weight loss, extreme fatigue and severe bruising. Fatigue in particular is a symptom about which we have been told a great deal. At this hearing, the claimant has often used the expression 'brain fog'. The reason for the fatigue is low haemoglobin as a result of haemolysis and underlying bone marrow failure. The claimant's muscles were deprived of enzymes and oxygen. In common with other patients with her condition, she had swallowing difficulties and abdominal pain. The claimant also suffered from headaches, gum and nose bleeding and mouth ulcers.

66. By email dated 7 December 2015 the claimant told Mr Ginner of her diagnosis.

67. After 21 days absence by the claimant, on 14 December 2015 Mr Ginner wrote to her sending her a copy of 'EG300' the respondent's absence management policy and drew her attention particularly to section 4 of that policy.

68. By letter dated 14 April 2016 Mr Ginner wrote to the claimant saying that he believed it was appropriate to manage her ongoing absence from work within section 4 of EG300. He asked her to attend a meeting on 21 April 2016 to discuss the next steps, including the claimant returning to her contractual role, any reasonable adjustments to her contractual role that may assist her and suitable alternative employment if the claimant was not capable of carrying out her contractual role.

69. That meeting took place on 21 April as planned. The claimant told Mr Ginner that decisions were being made about her future treatment and that she had an appointment with a specialist to discuss this on 25 April 2016. Mr Ginner told the claimant that she would be referred to 'BAHS', the respondent's occupational health service. He also told the claimant that her absence would now be managed under

section 4 of EG300 with the possible outcomes being a return to her contractual role, reasonable adjustments being made to her contractual role, suitable alternative employment or termination of the employment contract.

70. The claimant subsequently spoke to BAHS on 29 April 2016. Ms Bashnee Chetty of BAHS reported to Mr Ginner that the claimant was being closely monitored by a specialist. She was awaiting the results of recent investigations, but further treatment was likely, and recovery was anticipated 3 to 6 months after the treatment.

71. Mr Ginner confirmed all the above in a letter to the claimant dated 9 May 2016.

72. Mr Ginner told us that he believes Ms Chetty is a nurse. She has been described to us as an 'Occupational Health Advisor', however we do not know for certain what are her qualifications. At this stage she was acting only upon information from the claimant and not upon advice from the claimant's medical specialist. From her own correspondence, we know that Ms Chetty saw her role as one of support for the claimant and of giving appropriate advice to the claimant's manager. We have not heard evidence from Ms Chetty.

73. On 1 August 2016 the claimant's haematology specialist declared her fit for amended duties. The following day, she discussed this with Mr Ginner. On 2 August, the claimant told Mr Ginner that she might be fit to work in some capacity.

74. On 9 August 2016 Mr Ginner referred the claimant to BAHS saying that she had been absent from work since 22 November 2015, her condition was still continuing, but her consultant had advised that she may be fit to work in some capacity. He asked for an assessment.

75. Bashnee Chetty spoke to the claimant on the telephone on 31 August and advised Mr Ginner that the claimant was unfit for all duties and there were no timescales of when this would change. Ms Chetty was securing consent to speak to the claimant's specialist and would revert to Mr Ginner when she had received information form the specialist. At this point Ms Chetty still did not have input from the claimant's medical specialist and was acting only on the basis of information from the claimant.

76. By letter dated 6 September 2016, Mr Ginner wrote to the claimant inviting her to a meeting to review progress in line with section 4 of EG300. He said that the discussion would include the claimant returning to her contractual role.

77. By letter dated 26 September 2016 Dr Kulasekararaj wrote to Ms Chetty of BAHS confirming the claimant's diagnosis and giving an account of her treatment so far. In answer to specific questions Dr Kulasekararaj summarised the diagnosis as 'bone marrow failure'. He explained the treatment plan. He said that the prognosis was difficult to predict but in view of the claimant's age, all treatment options were open to her. Bone marrow transplant was possible if she did not respond to other treatment or if her condition became worse. Her condition was curable with stem cell transplant, although there were associated complications. The reason for her fatigue was low haemoglobin; depending on her response to treatment, this was likely slowly to improve.

78. Dr Kulasekararaj felt that it would help if the claimant could work on a part-time basis as this might help her manage the symptoms of tiredness and also with coping with the underlying diagnosis. He said, '*we advise patients not to fly unless the platelet count is stable at more than 50*.' (The claimant's platelet count was at 19.) He specifically invited further contact if Ms Chetty had other questions or clarifications to ask.

79. On 27 September 2016 the claimant met with Mr Ginner for the section 4 review meeting to which he had invited her. Mr Ginner himself did not see the letter from the claimant's specialist dated 26 September at this or at any other time. He relied upon Ms Chetty to convey to him the information from the specialist.

80. It appears that the claimant sent in a sick certificate saying that she '*may benefit from amended duties*'. However, by email dated 30 September 2016 Mr Ginner told the claimant that it could not be processed because BAHS were not supporting amended duties for the claimant. He asked the claimant to seek a certificate saying, 'unfit for work'. Mr Ginner did not check with Ms Chetty whether, in the light of the sick certificate, she herself supported amended duties or what if anything the claimant's specialist had said to her on the subject. He did not specifically discuss with, and assist the claimant to identify and apply for, suitable alternative employment in specific response to the claimant's medical certificate, over and above his pre-existing referral of her to CTS.

81. By letter dated 4 October 2016 Mr Ginner confirmed to the claimant the content of their meeting on 27 September. According to his letter they discussed return to the claimant's contractual role, any reasonable adjustments which might assist her and suitable alternative employment. The claimant had told him that her existing treatment was coming to an end, to be replaced by a new treatment. Although Mr Ginner's letter (and we understand from him that his letters were written using templates) says that he and the claimant discussed any reasonable adjustments to her contractual role that may assist her and suitable alternative employment, we think that, given that he would not accept her medical certificate saying that she may benefit from amended duties he did not at this point direct his attention to what those amended duties might be.

82. Mr Ginner's latest medical information was that from BAHS dating from 30 August, that the claimant was unfit for all duties and there were no timescales as to when this was likely to change. He did not at this point have the result of Dr Kulasekararaj's letter of 26 September.

83. Mr Ginner explained to the claimant that the Careers Transition Service could provide support in finding an alternative role. He also told her about the benefits available through the British Airways Retirement Plan ('BARP') although because there was a qualifying period on 5 years, he did not think that the claimant qualified. He told her too that company sick pay would end on 13 November 2016.

84. On 12 October 2016 Ms Chetty of BAHS told Mr Ginner that she had met the claimant on 11 October.

85. Ms Chetty said:

'*I reviewed Rebecca in clinic on 11/10/2016 following receipt of the letter from her specialist. As you are aware Rebecca is receiving treatment for a complex underlying medical condition. She continues to be closely monitored by a specialist. This condition in my opinion is likely to be protected by the disability discrimination provisions of the Equality Act 2010 because but for treatment it could have a significant impact on day-to-day activities on a long-term basis. At present she remains unfit to return to her contractual duties. With this information I am unable to advise when her condition is likely to stabilise on current treatment and also to a level where a return to contracted flying duties may be possible if at all. This is likely to take a number of months with no assurance that it will improve to allow a return to her contractual role. At this stage there is no medical barrier as why Rebecca cannot undertake alternative duties if it can be supported by management. Rebecca could return to a non-customer facing role on three days/week but this would not be part of a rehabilitation plan and it would be for you to determine if this can be supported.*

I hope that this is helpful. Please do not hesitate to contact me should you require any further information.'

86. Ms Chetty was here referring to the letter from the claimant's specialist dated 26 September which we have described above.

87. We note that Ms Chetty did not convey to Mr Ginner the information that the claimant's condition was curable. Nor had she reverted to the specialist to try to discover the time scale within which the condition might be curable or what the claimant's working capacity would be if cured. We note some tendency to emphasise the negative without exploring the possible positive side of the claimant's situation. So, Ms Chetty says that she cannot advise whether the condition will return to a level where the claimant can return to flying duties, if at all. She has not explored this with the claimant's specialist, yet she has chosen to introduce an element of doubt about whether the claimant can return to flying duties at all, which is not expressed in the specialist's letter.

88. The claimant began alternative duties in a grounded placement in the 'Flywell' department on 26 October 2016. She had found this work for herself. Once Mr Ginner had told her that she could return to work in a grounded placement, she discussed the situation with her friend Emma who suggested that the claimant find a placement which she enjoyed, would benefit from and could use in the future. The claimant therefore made enquiries and discovered that Lisa Hibbard of Flywell needed some help.

89. Lisa Hibbard ran the Flywell department. As we understand it, Flywell enabled communication between cabin crew and catering staff. So, for example, if cabin crew were aware of a problem supplying a particular item then they would highlight the problem through the Flywell. The claimant's role was primarily administrative, and she spent much of her time data inputting. However, because one of the more senior staff members, Juliet, was often away and the workload was increasing, the claimant's role in Flywell broadened. She would substitute for Juliet at meetings and would deal with emails, in particular involving contact with crew.

90. Over the period when the claimant was working with Flywell there was a turnover of other staff on grounded placements. Shortly after she arrived, Gee and Lucy arrived, both of whom had been grounded because they were pregnant. When Gee went on maternity leave, Laura joined Flywell. When the claimant left, both Lucy and Laura were still there.

91. We have been told that these grounded roles were additional to headcount so that they were not formal roles in the employment structure and they were paid for, not by the Flywell department but by the original department from which the employee came. We have not been given any exact figures of the numbers of employees on such grounded placements, nor how the respondent provides for them in its overall budget.

92. The claimant enjoyed this work with Flywell. She performed well and was committed to providing good service.

93. Mr Ginner took the view that the claimant's overall prognosis suggested that she would be unlikely to return to her work as cabin crew. We note that this is not what BAHS had told him: the lowest Ms Chetty had put it was 'no assurance' of return to the contractual role. He has taken Ms Chetty's 'no assurance' (meaning no promise or guarantee of return) and concluded that the claimant is unlikely to return. He therefore registered the claimant with the Careers Transition Service ('CTS') on 12 November 2016.

94. As Mrs Bartlett later told the claimant (in her letter of 26 May 2017), registration with CTS was an alternative to the termination of employment. It was the respondent's system of helping employees to seek alternative employment.

95. On 14 November 2016 the claimant was sent a 'welcome' email from CTS. The email told her that her career transition adviser would be June Parsons.

96. The claimant met with Ms Parsons on 25 January 2017. Ms Parsons was sent the claimant's 'Client Registration Form' for CTS. This told Ms Parsons in terms that the claimant had a disability and that it was covered by the Equality Act. It gave her no further information than that about the claimant's medical condition.

97. Ms Parsons told us that the client registration form would not be particularly relevant to her in supporting someone at that point. The claimant had been open with her about her bone marrow transplant but Ms Parsons not aware that the claimant had a disabling condition. The form was she said a file copy. She said that she did not make any judgments about what a client could or could not do, she said, '*it is up to them'*.

98. The claimant was at this point struggling with concentration. Ms Parsons assumed, without enquiry, however that because the claimant could manage a three-day week placement at five hours a day she could therefore manage the CTS process.

99. We accept the claimant's explanation that she could manage her placement because Lisa Hibbard had taken care to research and inform herself about

the claimant's condition. In Flywell, the claimant was working with Ms Hibbard who she knew from a previous airline. However, because of lack of oxygen to her brain, she suffered social anxiety and developed a stutter. She had difficulty formulating sentences. To those who did not know her or understand her condition, she appeared slow, disinterested and vague. She could therefore perform in an environment where people knew her and understood her difficulties. By contrast, she was disadvantaged in performing in the CTS system which was competitive and in which she had to deal with people who did not know her or understand her condition. Because of the effect of the fatigue on her mental condition she needed guidance, suggestions and help tailored to her particular needs.

100. On 6 January 2017 Mr Ginner referred the claimant again to BAHS. He asked Ms Chetty to assess the current situation with the claimant who was '*currently continuing with her grounded duties at Waterside, so that a face to face appointment may be facilitated*.'

101. Ms Chetty replied on 31 January that she had reviewed the claimant on the telephone. She said, *'I remain unable to advise on timescales of when Rebecca is likely or will return to her contractual duties*'. This was the latest information available to Mr Ginner at the point at which he set the claimant's termination date. The only information from the claimant's treating doctors before Ms Chetty was the letter of 26 September 2016 above. There had been no update from the specialist. All Ms Chetty's other information came from the claimant.

102. By letter dated 1 February 2017 Mr Ginner invited the claimant to a meeting on 15 February 2017 to review her progress within section 4 of EG300. He told her that they would discuss her returning to her contractual role, any reasonable adjustments to her contractual role that might assist her and suitable alternative employment if she was not capable of carrying out her contractual role. He told her that '*British Airways will support you back to work, within a reasonable period, however if this is not possible I may need to consider termination of your contract*…'

103. Mr Ginner and the claimant met on 15 February and by letter dated 3 March 2017, Mr Ginner confirmed to the claimant his decision to dismiss. Mr Ginner told the claimant that because she was unable to return to her contractual role he would be terminating her employment on 15 May 2017.

104. In the letter he told her that rehabilitation to her contractual role was the desired outcome. He told her that Ms Chetty had confirmed that due to her medical condition the claimant was unable to resume work in her role as cabin crew in the foreseeable future, if at all. The claimant had asked him what would happen following her medical procedure in March 2017 if she was told that this would positively affect her health and prospects. He said that this could be reviewed at the time. He suggested that the claimant keep him informed about what was happening, both with her health and with alternative employment and any decisions would be reviewed with this in mind. He asked her to let him know if she was applying for positions.

105. He told her of her right to appeal.

106. Pausing there, we note that Ms Chetty actually told Mr Ginner that she was unable to advise on the timescales of when the claimant was likely or would be able to return to her contractual duties. He has interpreted this as meaning that the claimant ***was*** unable to resume work in the foreseeable future. He made no further enquiry of Mr Chetty about what she meant and *why* she was unable to advise on the timescales. Was she unable to advise because she did not possess the information, because she did not have up to date medical advice or because the medical situation was such that the answer was not knowable? We do not know what enquiries he might have made, had he been told that the claimant's condition was curable or when.

107. In an attempt to assist the claimant, a Ms Large of Kings College Hospital wrote a letter which the claimant's friend Emma gave to Mr Ginner. Mr Ginner did not read this letter (although it was given to him on the claimant's behalf) but passed it on to BAHS.

108. That letter said,

'*Rebecca has a rare form of bone marrow failure for which she requires ongoing treatment. It is a complex condition and can fluctuate in severity. Put simply her bone marrow underproduces blood cells and some of those that it does produce are faulty and vulnerable to attack by her immune system.*

Rebecca receives fortnightly intravenous infusion of drug which binds to her immune system and prevents a large part of this destruction, but she in common with most other patients in her position suffer from fatigue, the muscles are deprived of the enzymes and oxygen that they require, swallowing difficulties and abdominal pain.

Stress can greatly exasperate this condition and we were cheered to hear that Rebecca had found a position within a company she feels great loyalty towards which was suiting her and she felt capable and able to perform well in.

We do feel that some sympathy should be shown to Rebecca as she stabilises finds her feet as I'm sure would be shown towards possibly a patient undergoing cancer care for example.'

109. By email dated 7 March 2017 the claimant's union representative, Kris Major, told Mr Ginner that he did not believe that the claimant was well enough or capable enough to have given herself the best representation. It was clear from talking to her he said that her condition was hampering her focus. Her fatigue levels were rendering her apathetic. He hoped that her weakness and vulnerability would not be exploited.

110. He also said that the claimant had a prognosis that would see her capable of fulfilling her full contractual role: the issue was timelines to the end of her condition.

111. At about this time the medical evidence shows that the claimant's symptoms of tiredness were becoming significantly worse. This particular piece of medical evidence was not in the respondent's possession.

112. By email dated 14 March 2017 the claimant wrote to Mr Ginner saying that stress exacerbated her condition and she had been quite poorly again. She said that she was still trying to look for internal jobs but there were very few that were suitable, applying for jobs was hard at the best of times and she was struggling a bit. She asked him to let her know if he heard of any secondments.

113. By another email at about the same time and certainly before 19 April the claimant said that she had been sent a letter and email from her nurse which she would forward onto Mr Ginner. (This was the letter to which we have referred above). The claimant said that she was still struggling with the job search which she was finding it rather difficult. She said that she had access to the ejob site but was not receiving emails prior to release as other colleagues on CTS were. She said that it had been a rough couple of weeks but she was now feeling more herself so that she could attack the job search with more vigour.

114. The claimant found that each application required a lot of concentration. She had been advised to tailor her CV to each particular application, but it took her a lot of focus to rewrite her CV each time. The questions in the application forms required in-depth and lengthy answers. Given her fatigue she found this process stressful and exhausting. Stress then exacerbated her condition.

115. In April 2017 the claimant applied for a position as an absence administrator. Laura Holloway, absence manager, wrote by email to Mr Ginner on 3 April 2017. She said that the claimant had applied under the two ticks scheme and asked if Mr Ginner was aware of anything that Ms Holloway might need to consider when screening the application.

116. Mr Ginner wrote back that the claimant was currently registered with the Career Transition Service and was grounded from her contractual flying role, which was why she was looking for other roles. He said that if Ms Holloway wanted further information she could call him to discuss. He said nothing to Ms Holloway about the claimant's symptoms, her fatigue, her problems with focussing or any matter that would give Ms Holloway understanding of the claimant and her condition.

117. By letter dated 3 April 2017 Ms Bartlett wrote to the claimant inviting her to an appeal hearing on 19 April 2017. This was re-scheduled to 20 April.

118. Meanwhile on 19 April Mr Ginner wrote to the claimant inviting her to a meeting to review her progress in relation to her termination date.

119. Mr Ginner met with the claimant on 26 April. The claimant told him that she was now considered a priority case for treatment and she expected this to happen in the next three months. She expected to spend a month in hospital and then to have a further three months at home before she could return to an 'office' type role. She could not be specific about when she could return to flying.

120. The claimant did not feel confident applying for alternative roles now that she was expecting significant treatment over the following few months. Mr Ginner shared with the claimant the information he had been sent by Ms Chetty.

121. Mr Ginner said that this confirmed what the claimant had told him: that there was no specific change in the claimant's medical condition which would allow a return to her contractual role at that time or in the foreseeable future.

122. Mr Ginner therefore started to process a revised termination date of 29 May.

123. On 26 April Mr Ginner referred the claimant to BAHS. He told Ms Chetty that the claimant had a termination date set for 15 May 2017 although it was planned that she should have some treatment in the near future. He asked Ms Chetty to assess the impact of any future treatment on the claimant's ability to return to her contractual role and the likely timescales.

124. Ms Chetty responded on 4 May 2017 that the claimant was fit for ground duties only. She said that she had reviewed the claimant in the clinic. Significant further treatment was planned to take place within the next three months. The claimant told Ms Chetty that her specialist had advised her that recovery was likely to take 3 months and return to contractual duties may be possible 6 months after treatment. This was the latest medical information available to Mr Ginner prior to his final decision to dismiss.

125. At the end of April 2017, the claimant applied for a role as Senior Passenger Medical Clearance Executive. She did so without telling June Parsons of the application. She was unsuccessful in the application.

126. By letter dated 11 May 2017, Mr Ginner confirmed to the claimant their meeting on 26 April and also that he had agreed to move the termination date to 29 May 2017. This was in order to allow her appeal against termination to be heard.

127. Linda Bartlett heard the claimant's appeal on 15 May 2017. In her witness statement, Ms Bartlett told us that she was asked to chair the appeal hearing because she had no prior involvement in the case and so she was therefore able to approach the matter with an open mind and with the authority to alter or reverse the decision made by Mr Jenner.

128. However, we accept Mr Ginner's evidence that in fact there had been regular case management conferences involving BAHS, and Linda Bartlett. No notes were taken of these case management conferences and although apparently there was a 'tracker', this has not been disclosed. Mr Ginner speculated that this non-disclosure was for GDPR reasons.

129. He gave us evidence that he would have discussed the case with Linda Bartlett although he could not say whether this was specifically in January or February or not. There was a specific discussion between Mr Ginner and Ms Bartlett about the claimant's grounded placement.

130. Mr Randle for the respondent very properly told us that Ms Bartlett had previously told him that there had been discussions about the case with Mr Ginner and that he had not thought what he had been told was of sufficient import to alter the witness statement.

131. We are grateful to Mr Randle for that and we draw no adverse conclusions about Ms Bartlett's credit from the fact that she did not amend her witness statement. However, we are left with some disquiet that these matters were not volunteered to us until Mr Ginner's oral evidence, that no notes have been taken of the case management conferences, that BAHS were involved, that there has been no disclosure of what documents might exist, and that there is a difference between Mr Ginner's evidence and that of Ms Bartlett about the extent of their discussions. On the face of the evidence hitherto, it had appeared to us that Mr Ginner and BAHS had dealt with each other at arm's length. They have had more communication than was originally disclosed to us.

132. In order to prepare for the appeal, Ms Bartlett read only the EG300 policy and the claimant's appeal points. She had the attendance file, but she did not read it before the hearing. She told us that this was to ensure that she approached the appeal with an open mind. (However, Mr Ginner's oral evidence told us that she had in fact had prior knowledge of the case.)

133. At the hearing, Ms Bartlett was accompanied by a notetaker and the claimant by Kris Major, her trade union representative. Mr Bartlett told the claimant that the hearing was her opportunity to talk her through her grounds of appeal and to raise any other matters which she wished to discuss.

132. The claimant's grounds of appeal were that during her time on CTS she had not been given access to the internal job availability prior to general release as promised. Other people on CTS were given a year to look for another role. She did not start looking until January and she did not feel that three months was enough to look for an alternative role. Most of the roles involved 'head management' and the claimant could not take that step. The claimant also raised other points at the hearing itself: that she was contributing to the business in the grounded role she was carrying out. This was she said an actual role, and someone would have to be recruited to it if she left.

133. She also said that she as not being treated fairly due to her sex. This point has not been pursued further in these proceedings.

134. The claimant also said that she was a member of the BMI pension scheme and should be eligible for group income protection. After discussion, this point too has not been pursued by the claimant at this hearing.

135. After the hearing Ms Bartlett then read the attendance file. She decided to uphold the decision made by Mr Ginner. She told the claimant this outcome by email dated 22 May.

136. By detailed letter dated 26 May Ms Bartlett then sent the claimant her reasoning for her decision. She dismissed each of the claimant's points. So far as they remain relevant, she told the claimant that CTS was offered as an alternative to terminating the contract of employment. She would usually expect an employee to be given 4 months on CTS before a termination date although the claimant had had around 6 months before termination.

137. Ms Bartlett said that there was a separate process for managing colleagues who were with CTS due to redeployment. Such employees are given a year to secure an alternative role whereas employees in CTS under EG300 were given 4 months. This was a separate process. She therefore thought that the claimant had been given enough time. (As has been pointed out to us, this was not the point raised by the claimant, but we are told that this answer addresses the way the discussion actually developed at the appeal.)

138. About the ground placement, Ms Bartlett said that this was not an 'actual role' that the claimant was carrying out. If the claimant had not been in place to carry out the role, the work would most likely have been carried out as a grounded role by someone else; for example, a crew member grounded through maternity or someone rehabilitating back to their full contractual duties.

139. Mrs Bartlett thought that the latest information from Ms Chetty of BAHS did not change the fact that the claimant was unable to return to her full contractual duties within a reasonable time. She therefore upheld the decision to terminate the contract.

140. The claimant's employment with the respondent did therefore end on 29 May 2017. This was the effective date of termination.

141. In early July 2017 the claimant began treatment including chemotherapy and a stem cell transplant.

142. The claimant submitted a grievance on 14 July, but the respondent did not hear it. No complaint is made to us about the grievance.

143. The claimant had 'top up' stem cell treatment in January 2018. She is now in good health, clear of her condition and in full time employment.

Analysis

Unfair dismissal

144. The reason for the dismissal was capability, which is a potentially fair reason pursuant to section 98 of the Employment Rights Act 1996. The claimant has not contested this.

145. That being the case, did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant?

146. We have reminded ourselves that the starting point for analysing whether a dismissal for ill health capability is fair is that each case depends on its own circumstances. The basic question is whether in all the circumstances the employer can be expected to wait any longer, and if so, how much longer? What are the relevant circumstances in this case, as known to the employer when it took its decision to dismiss (or at any rate at the final point at which it took its decision to dismiss, because in this case there was an extended process).

147. The claimant was genuinely seriously ill, and the respondent reasonably believed that.

148. The respondent's business needs cabin crew, but the claimant was not in a key position. We have heard no evidence that her absence from her contractual role was going to put any particular pressure on anyone else. The claimant was an employee of 13 years. She had been given accolades for her previous performance. There has been no mention of previous sickness. The claimant had showed herself to be active in finding an alternative placement.

149. Mr Ginner knew that the claimant was unable to carry out her contractual duties as cabin crew. He knew that she had been off work sick from 21 November 2015 to 26 October 2016. She was then working on part-time grounded duties in Flywell on full pay and she was capable of performing that work. (There is no rule of law of course that an employee cannot fairly be dismissed if she is working at the point of dismissal.) He was not himself concerned about the fact that she was on full pay.

150. As at 26 April Mr Ginner's latest information from BAHS had been that Ms Chetty was unable to advise on timescales of when the claimant was likely or would return to her contractual duties. He received updated information from Ms Chetty on 4 May. (He had had briefly in his possession but had not read the letter from Ms Large.) His *final* decision was contained in the letter of 11 May, which therefore included his knowledge of Ms Chetty's information provided on 4 May.

151. At that point, he knew that Mr Major the union representative had told him that the claimant had a prognosis that would see her capable of fulfilling her full contractual role: but the issue was one of the 'time-line' to the end of her condition.

152. He knew that the claimant had been unsuccessful in finding alternative work through CTS. He had information from Mr Major and the claimant telling him in various ways about the claimant's fatigue, weakness, vulnerability, stress and struggle with the CTS process.

153. He thought that the claimant would not be able to return to her contractual role 'in the foreseeable future'. However, he knew from Ms Chetty on 4 May that significant further treatment was planned for *within* the next three months, that recovery was likely to take 3 months and return to full contractual duties may be possible within 6 months after treatment.

154. He did not know whether the claimant could continue to work with Flywell during that period. He did not know if there was any and if so, how much, demand from other redeployees for her temporary role, whether Lisa Hibberd had a continuing need for the claimant in that role or whether she was able to accommodate a break for treatment. He had not asked what degree of permanence there might be in that role. He had not made these enquiries and did not think about making them.

155. No reasonable employer would have failed to make enquiries about the Flywell role in the circumstances.

156. Without those enquiries, we do not think that any reasonable employer would have dismissed an employee in the circumstances that there was a clear 'long

stop': within 9 months it would be clear whether the claimant could return to her contractual role and she was able to perform meanwhile in apparently ongoing alternative employment.

157. Mr Ginner did not reflect on whether it had been reasonable in the circumstances to expect the claimant to seek alternative work through CTS, whether she might have been at a disadvantage in that exercise or whether some other approach to seeking alternative employment might be found for her.

158. It was outside the reasonable range of responses for the respondent to leave the claimant to struggle within the CTS scheme. This was not a reasonable approach to seeking alternative employment for the claimant. Ms Parsons expected Mr Ginner to support the claimant and Mr Ginner expected Ms Parsons to support her. Both expected the claimant herself to be 'proactive' in her job search but did not pick up or act on, or make further enquiries about the information that the claimant was struggling. No reasonable employer would have done this.

159. The appeal was not sufficiently comprehensive to rectify any of these prior defects in the process. Ms Bartlett did not embark on a thorough or any enquiry into the circumstances. She was taking the approach of asking whether Mr Ginner's decision was correct. She did no pre-reading of the surrounding facts. She confined herself only to the points made by the claimant, as developed in discussion at the appeal hearing. At the time of considering the appeal she made no enquiry herself into the Flywell department and the possibility of the placement continuing. What the respondent did overall therefore was outside the reasonable range of responses and was unfair.

160. Therefore, we consider that the decision to dismiss was unfair.

Disability

Section 13: Direct discrimination on grounds of disability.

161. We have found below that the respondent did not make reasonable adjustments for the claimant.

162. Turning to the question of whether the respondent did not give the claimant sufficient time to find a new role: this issue does not define the word 'sufficient' and nor did the parties in their submissions. The claimant was dismissed at the time she was because she had not found a new role in the time given to her. The time she had been given was short and insufficient in the light of the difficulties she faced in dealing with CTS and job applications. It was short too in the light of the time she needed to be treated and for her health to improve. Sufficient time would therefore have been a longer period to find a role and therefore avoid dismissal or have a greater and fair chance of doing so. Such a period would not have been indefinite. In that sense the claimant was not given 'sufficient' time to find a new role and therefore to avoid dismissal or improve her chances of avoiding dismissal. Had she been allowed

until January 2018 that would have been sufficient, although on the facts, such a period would also have significantly increased her prospects of returning to her contractual role.

163. The respondent did not wait for the claimant to undergo her transplant or to recover from it. She would have needed to late 2018 (October or November) to recover. The respondent did not give her this time.

164. The respondent did obtain an updated report from BAHS before dismissal, but not from the claimant's own specialist or from another doctor.

165. In those respects, would the respondent have treated a hypothetical comparator (i.e. a person with the same skills and abilities as the claimant who did not have a disability but who was unable to do his or her contractual role for the same period) more favourably than the claimant?

166. Redeployees are not exact comparators for the claimant because she had a contractual role to return to, but redeployees do not. Pregnant employees are not exact comparators because they are unable to perform their contractual role yet still able to work for a shorter period (although they are then likely to have a period of maternity leave) and (in most cases) for a definite period.

167. However, those employees shed light (in the sense meant by Lord Rodger of Earlsferry at paragraph 143 in *Shamoon*) on how a hypothetical comparator would have been treated. The evidence is that employees likely to be non-disabled were given very considerably longer than the claimant or other section 4 employees in CTS to secure an alternative role or be dismissed. It is of course true that not all section 4 employees would be disabled (and some redeployed staff may well have disabilities), but there will be more such employees in section 4 than in normal redeployment, because these are employees on long term sick absence. Indeed, Ms Bartlett accepted this. Although in theory a section 4 employee could be given an indefinite period in CTS (Ms Parsons told us of someone – remembering no particulars - who was given 2-3 years), Ms Bartlett herself applied a 4-month period as a general rule. The claimant in fact was given 6 months. We consider that this shows a less favourable and less accommodating approach and attitude to a group of those who were ill and who were more likely to have disabilities. Therefore, we find on the balance of probabilities that a hypothetical comparator without a disability who otherwise had the claimant's skills and abilities, would have been treated more favourably than the claimant in the respects to which this relates. That is the respondent would have allowed the non-disabled comparator sufficient time to find an alternative role.

168. We do not consider that we have enough evidence to say that any of the other alleged more favourable treatments would have been meted out to a hypothetical comparator.

169. We have looked at our findings of fact to ask whether there is evidence from which a tribunal *could*, fairly, conclude that that difference of treatment was because of the claimant's disability.

170. We consider that there is such evidence. That is:

170.1 The less accommodating approach to those who were section 4 employees, as set out above.

170.2 Ms Parson's lack of curiosity about the details of the claimant's disability and its impact on her ability to engage with CTS process, albeit she is someone who has delivered equalities training. Ms Parsons did not make the relevant decision, but her approach is indicative of the respondent's approach to disability.

170.3 The respondent's lack of active enquiry into or thought about the claimant's statements that she was struggling, into her ability to cope, into the chances of cure and if so when.

170.4 The lack of enquiry by the decision makers into whether her ground placement might be continued.

170.5 The disquieting situation that Ms Bartlett and Mr Ginner had discussed the claimant's case in advance of the appeal, and indeed had discussed it with BAHS, although these discussions were not recorded except perhaps on the 'tracker', no disclosure was made of the tracker and we were told nothing about the existence of these discussions before the matter emerged in oral evidence,

170.6 The respondent's tendency to process the claimant's situation according to its procedures without attempting to tailor the approach to her individual needs,

170.7 Mr Ginner asking a specialist doctor to alter his advice that the claimant was fit for amended duties, instead of acting on that advice at that point to bring the claimant back into work;

170.8 The respondent's subtle but noticeable tendency to put a negative slant on the medical situation without ever exploring whether there might be a positive aspect to the situation.

170.9 The respondent sending targeted emails to displaced persons that they did not send to the claimant or to others in section 4.

171. Therefore, we find that the burden of proof passes to the respondent.

172. Why then did the respondent not give the claimant sufficient time to find a new role?

173. Mr Ginner told us that he did not think it reasonable to wait a further 8 months for the claimant to recover, yet he did not think about discussing the matter with Flywell or exploring the claimant's ability to cope with the job search. He said that he did not think it appropriate for him to go to another department. We fail to see why this would be inappropriate: how else he could have asked the pertinent questions? If he could not have gone to Flywell himself, someone more senior could have approached them, but no-one did. Had the claimant been permitted to stay in Flywell, she would have been able to continue working while searching for other roles.

174. Ms Bartlett thought that she had power to extend the time to terminate. She did not do so because BAHS gave a timescale of 9 months. She thought the

claimant had had ‘reasonable’ time to find alternative work. She did not at first volunteer what factors made her usual period of four months ‘reasonable’. When pressed, she said that it was the time taken to make an application and go through an interview, a reasonable amount of time for the job search process to yield a role. Yet she thought this without factoring into her thinking the difficulties which disadvantaged the claimant in making that search.

175. We reject those explanations therefore for the reasons we have given. The respondent has not discharged the burden of proving its explanation. We are not satisfied with the explanation givens, that is that the time given to the claimant in CTS was reasonable. The respondent has not shown, on the balance of probabilities, ‘no discrimination whatsoever’.

176. We must therefore find that there has been direct discrimination in this one respect.

Section 20 and section 21: Failure to make reasonable adjustments.

177. The respondent did apply the provision, criterion or practice of requiring employees to go through the Career Transition Service as an alternative to dismissal when they were unable to fulfil their contractual role either by reason of ill-health or because, for some reason, that role no longer existed for them. The respondent did apply this provision, criterion or practice to the claimant. Mr Ginner applied it to the claimant: he registered her with the service. The alternative to using CTS to find an alternative role was dismissal, as Ms Bartlett’s evidence showed. Had the claimant used the process of ‘normal job search’, she would have been at the same or worse disadvantages. The claimant could not be compelled to use CTS, as she accepted, but given that it was the alternative to dismissal, taking a ‘real world’ approach, we consider that this amounts to applying to her a provision, criterion or practice: realistically she did not have a great deal of choice.

178. The PCP put the claimant at a substantial disadvantage compared with persons who were not disabled because of symptoms of the claimant’s disability, and in particular the fatigue, difficulties concentrating and the effects of social anxiety and stress. She was disadvantaged by stuttering, by the appearance of slowness, lack of interest and vagueness. She had difficulty filling in application forms and in providing lengthy, in depth and individually tailored answers to questions. The system of seeking alternative work was exhausting for her and caused her stress which itself made her condition worse. She was therefore less able to make applications, present herself attractively, to compete for roles and to convince potential managers of her suitability.

179. The claimant was unable to find alternative work through CTS and therefore was likely to be dismissed: entry to CTS was the alternative to dismissal. If she failed to find a role, she would be dismissed, as she was. We cannot identify for certain the precise cause of the claimant’s inability to find work: the respondent’s evidence is that few employees secure such employment, however the claimant’s chances of securing alternative employment by this route must have been substantially reduced.

180. There was therefore a duty on the respondent to make such adjustments as were reasonable to avoid the disadvantages.

181. We turn then to the adjustments sought by the claimant. Factually the situation is this:

181.1 The respondent had allowed the claimant to work in her grounded role on full pay but did not allow this to continue as an alternative to dismissal, so it ceased to make what had been an adjustment.

181.2 The respondent did not allow the claimant to work in the grounded role on reduced pay.

181.3 The respondent did not allow the claimant to take a period of disability leave or a career break while she received her stem cell transplant and recovered.

181.4 The respondent did let the claimant secure her own grounded placement without a full recruitment process, but it did not allow her to secure a substantive alternative role without a full process.

181.5 The respondent did provide her with some support during the CTS process: Ms Parsons did give her some support. However, the support was not tailored to the claimant's needs. She needed one to one support: for example, with completing detailed application forms. She needed those dealing with her or interviewing her to understand the impact of her condition on her demeanour and ability to focus and concentrate.

182. Would these adjustments have been reasonable?

183. It would have been reasonable to allow the claimant to remain in her grounded role on full pay. It was not permanent, so the respondent was not placing the claimant in a permanent role ahead of any competition. There was evidence that there was an ongoing need for the role. It suited the claimant with her disability as our findings of fact have shown. We know that pregnant employees could be and were placed in such roles also in other departments, for example Ms Bartlett's own department (however we have not been given any figures of the numbers of such roles or where they were provided, for how long in each case or how they were funded overall): the claimant however was a single employee in an unusual circumstance and that particular role suited her. Mr Ginner told us that it was not a consideration for him that the claimant was on full pay, so the issue of budget was not a problem. This adjustment would obviate the need for the claimant to be in CTS entirely if she could stay in Flywell until it was known whether her treatment worked, say until January 2018.

184. Having found that the first adjustment is reasonable, the second becomes academic. If it is reasonable for the claimant to remain in her alternative role on full pay, then it is even more reasonable to require the respondent to maintain her in that role of reduced pay.

185. The respondent permitted periods of temporary leave to other redeployees. A career break involved resignation and re-applying on beneficial terms.

We do not think it reasonable to make an adjustment that requires resignation: the purpose of adjustments is to enable retention of employment. Voluntary unpaid leave of absence was provided for in the respondent's Redeployment Process Agreement. It would have cost the respondent little or nothing (save for some administration) to provide it to the claimant while she underwent her treatment. It would have enabled her to return thereafter and continue employment. Given that her condition was curable there was a real prospect that this approach would have returned her to work and her contractual role. We consider that this would have avoided the disadvantage set out above because it would have provided her with a different alternative to CTS or dismissal.

186. Again, this becomes somewhat academic given our findings above. However, it can be reasonable to require an employee to be transferred to fill a vacancy (even one at a more senior level) without having to undergo a competitive process (*Archibald v Fife Council* [2004] UKHL 32). There were existing vacancies: the claimant had found two and applied for them. To place her into one of these roles without competition would have avoided the disadvantages of the CTS process and dismissal. However, we consider that it would have been more appropriate to retain the claimant in her Flywell role where she was already known, known to be coping, and established.

187. The fifth proposed adjustment too now becomes academic, however, it would have been reasonable for the respondent to provide the claimant with more support in CTS. This would have involved Ms Parsons and/or Mr Ginner acquainting themselves with the details or the claimant's symptoms, conveying the claimant's problems to decision makers, giving her tailored help in answering questions in applications forms as well as acquainting managers with the details of her condition. Waiting for the claimant to 'reach out' for help was not enough. Given her symptoms, the respondent needed actively to 'reach out' to her.

188. The respondent therefore failed to make the adjustments as set out above and they would have avoided the disadvantages as we have set out..

189. Was the claimant's dismissal discriminatory under section 39(2)(c) of the Equality Act 2010?

190. This issue is the reverse side of the matters we have found above. Had the respondent made the adjustments sought, instead of dismissing her, she would not have been dismissed. The respondent dismissed the claimant instead of giving her sufficient time to find a new role. In any event the dismissal is the direct and natural result of the discrimination we have found.

191. Therefore, complaints of unfair dismissal and breaches of section 13 and section 20 and 21 of the Equality Act 2010 are well founded.

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Employment Judge Heal

Date: 8 / 2 / 2019

Sent to the parties on: 14 / 2 / 2019

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For the Tribunal Office