EMPLOYMENT TRIBUNALS

Claimant: **Ms Samantha Coe**

Respondent: **The London Borough of Southwark**

Heard at: London South Tribunals

On: 15, 16, 17, 18, 19 & 22 August 2018
In chambers on 05 October 2018

Before: Employment Judge Freer
Members: Ms S V MacDonald
Mr N Shanks

Representation
Claimant: Mr S Soor, Counsel
Respondent: Mr A Line, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant's claims are unsuccessful.

REASONS

1. By a claim presented to the employment Tribunals on 22 August 2017 the Claimant claimed unfair dismissal, disability discrimination and wrongful dismissal.

2. The Respondent resists the claims.

3. The Claimant gave evidence on her own behalf.

4. The Respondent gave evidence through Mr Earlan Luther Legister, Environmental Health Officer; Mr Nicholas Paul Mellish, Cleaning, Grounds

Maintenance and Tree Service Manager; Ms Fiona Jane Dean, Director of Leisure; and Ms Marie Rance, Executive Human Resources Business Partner.

5. The Tribunal was presented with two bundles of documents plus additional documents during the course of the hearing as agreed by the Tribunal.

The Issues

6. A list of issues had been agreed at a case management preliminary hearing on 05 January 2018, which is set out at pages 65 to 69 of the bundle. It was agreed at the outset of the hearing that the Tribunal would determine liability and remedy issues save for injury to feelings.

7. At the commencement of the case the Claimant withdrew the wrongful dismissal claim and any claim relating to the carrying over of annual leave and assistance with travel costs.

A brief statement of the relevant law

Unfair dismissal

8. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.

9. Section 98 provides that, where dismissal is not controversial, the Respondent must show that the reason for dismissal is one of a number of permissible reasons. The Respondent in this case contends that the reason for dismissal is related to the Claimant's capability.

10. The Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4):

> "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"

11. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well substantive aspects of the decision to dismiss. A Tribunal must adopt an objective standard and must not substitute its own view for that of the employer. (**Iceland Frozen Foods –v- Jones** [1982] IRLR 439, EAT as confirmed in **Post Office –v- Foley** [2000] IRLR 234, CA; and **Sainsbury's Supermarkets Ltd –v- Hitt** [2003] IRLR 23, CA).

12. In **Taylor –v- Alidair Ltd** [1978] IRLR 82, CA, it was held that the analysis in a capability dismissal includes:

> "Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent".

13. The EAT in **Spencer –v- Paragon Wallpapers Ltd** [1976] IRLR 373, indicated that there are a variety of factors to be considered in assessing whether the decision to dismiss is reasonable, which include: the nature of the illness and the job; the needs and resources of the employer; the effect on other employees; the likely duration of the illness; how the illness was caused; the effect of sick-pay and permanent health insurance schemes; and alternative employment. The length of service of the employee may also be relevant. The weight to be given to particular factors is case specific.

14. This was reiterated in **Lynock –v- Cereal Packaging Ltd** [1988] IRLR 510, where the EAT stated:

> "The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment—sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following—the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching".

15. The likely duration of the illness is an important consideration. If after a reasonable period of time the employee is still unable to say when they are likely to be able to return, that will properly weigh heavily with an employer (see for example **Luckings –v- May and Baker Ltd** [1974] IRLR 151, EAT and also **McPhee –v- George H Wright Ltd** [1975] IRLR 132, EAT).

16. An employer must carry out a fair review of the attendance record and the reasons for absence; give the employee an opportunity to make representations; and give appropriate warnings if things do not improve (see **International Sports Co Ltd –v- Thomson** [1980] IRLR 340, EAT).

17. The Tribunal has referred itself to the ACAS Code of Practice on Disciplinary and Grievance procedures. A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, employment tribunals will take the Code into account when considering relevant cases.

Direct discrimination

18. Section 13 of the Equality Act 2010 provides:

> "(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".

19. On comparison between the Claimant and the case of the appropriate comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23).

20. A Tribunal may not make findings of direct discrimination save in respect of matters found in the originating application. A Tribunal should not extend the range of complaints of its own motion (**Chapman –v- Simon** [1994] IRLR 124, CA, per Peter Gibson LJ at para 42).

Reasonable adjustments

21. Sections 20 to 21 of the Equality Act 2010 set out provisions relating to the 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) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

. . . (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	*Applicable Schedule*
Part 5 (work)	Schedule 8

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 to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

22. Schedule 8 provides:

SCHEDULE 8
Work: reasonable adjustments
Part 1
Introductory
1 Preliminary

This Schedule applies where a duty to make reasonable adjustments is imposed on A by this Part of this Act.

2 The duty
(1) A must comply with the first, second and third requirements.

(2) For the purposes of this paragraph—
(a) the reference in section 20(3) to a provision, criterion or practice is a reference to a provision, criterion or practice applied by or on behalf

of A;
(b) the reference in section 20(4) to a physical feature is a reference to a physical feature of premises occupied by A;
(c) the reference in section 20(3), (4) or (5) to a disabled person is to an interested disabled person.

(3) In relation to the first and third requirements, a relevant matter is any matter specified in the first column of the applicable table in Part 2 of this Schedule.

Part 2
Interested disabled person
4 Preliminary

An interested disabled person is a disabled person who, in relation to a relevant matter, is of a description specified in the second column of the applicable table in this Part of this Schedule.

5 Employers (see section 39)

(1) This paragraph applies where A is an employer.

Relevant matter	*Description of disabled person*
Deciding to whom to offer employment.	A person who is, or has notified A that the person may be, an applicant for the employment.
Employment by A.	An applicant for employment by A. An employee of A's.

23. The Equality and Human Rights Commission has produced a Code of Practice on Employment (2011) ("the Equality Code"). The Code of Practice does not impose legal obligations, but provides instructive guidance. The Tribunal has referred itself to the Code as appropriate. This has been taken into account by the Tribunal. For example, the Equality Act 2010 no longer lists factors to be considered when determining reasonableness, but these factors appear in the Code of Practice (paragraph 6.28). However, it will not be an error of law to fail to consider any of those factors. All the relevant circumstances should be considered.

24. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination (**Archibald v Fife Council** [2004] IRLR 651, HL).

25. The test of reasonableness is an objective one.

26. A failure to consult is not of itself a failure to make a reasonable adjustment (see **H M Prison Service & Johnson** [2007] IRLR 951, EAT).

27. The correct approach to assessing reasonable adjustments is addressed in **Smith –v- Churchills Stairlifts plc** [2006] IRLR 41; **Environment Agency –v- Rowan** [2008] IRLR 20; and **Project Management Institute –v- Latif** [2007] IRLR 579.

28. In **Smith**, the comparative exercise required by s.6(1) of the DDA was considered by the Court of Appeal having regard to the speeches contained in the judgment of the House of Lords in **Archibald**. Maurice Kay LJ stated:

> ". . . Notwithstanding the differences of language, it would be inappropriate to discern a significant difference of approach in these speeches. . . it is apparent from each of the speeches in **Archibald** that the proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements".

29. The Court of Appeal in **Matuszowicz –V- Kingston Upon Hull City Council** [2009] IRLR 288 held that there may breaches of the duty to make reasonable adjustments "due to lack of diligence, or competence, or any reason other than conscious refusal".

Indirect discrimination

30. Section 19 of the Equality Act 2010 provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim".

31. Disability is a relevant protected characteristic.

32. The Supreme Court in **Essop -v- Home Office (UK Border Agency)** [2017] UKSC 27 identified six main features in indirect discrimination claims: (i) there is no express requirement for an explanation of the reasons *why* a particular PCP puts one group at a disadvantage when compared with others; (ii) direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual; (iii) the reasons why one group may find it harder to comply with the PCP than others are many and various; (iv) there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage; (v) it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence; and (vi) it is always open to the respondent to show that his PCP is justified.

33. When considering a proportionate means of achieving a legitimate aim, the Tribunal will assess whether the aim of the provision, criterion or practice is legal and non-discriminatory, and one that represents a real, objective consideration and if the aim is legitimate, whether the means of achieving it is proportionate including whether it is appropriate and necessary in all the circumstances. See **Homer** below.

Discrimination arising from disability

34. Section 15 of the Equality Act 2010 provides:

> "(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."

35. In **Williams –v- Trustees of Swansea University Pension & Assurance Scheme** [2017] EWCA 1008 (Civ) the Court of Appeal endorsed the decision of the EAT, which confirmed that 'unfavourable treatment' was different from 'less favourable treatment' and is to be measured in an objective sense.

36. As confirmed in the Supreme Court in **Homer –v- Chief Constable of West Yorkshire Police** [2012] UKSC 15:

> "As Mummery LJ explained in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:
>
> ". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. . . . First,

is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

As the Court of Appeal held in *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

. . . To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so".

Burden of Proof

37. The burden of proof reversal provisions in the Equality Act 2010 are contained in section 136:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

38. Guidance is provided in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, the Claimant must, on a balance of probabilities, show facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council** [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If the Claimant does establish a *prima facie* case, then the burden of proof moves to the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

39. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' (see **Nagarajan –v- London Regional Transport** [1999] IRLR 573, HL; and **Igen Ltd –v- Wong**, as above).

40. The Court of Appeal in **Madarassy** above, held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex or race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient

material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

41. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were, and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (*per* Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL).

42. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC has confirmed:

> "The points made by the Court of Appeal about the effect of the statute in these two cases [Igen and Madarassy] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

43. The Tribunal has also referred itself to the additional authorities referred to by the parties.

Facts and associated conclusions

44. The Tribunal received a 'Chronology of Key Events' document from the parties. The Tribunal has considered that document and adopts it as the outline facts together with the series of Occupational Health and medical reports to which the Tribunal was taken.

45. The Claimant was employed by the Respondent in 2006 as a Principal Enforcement Officer and was working in the Respondent's Environmental and Housing Department at the time of her dismissal.

46. On 18 January 2014 whilst walking home the Claimant was hit by a car in a road traffic accident and sustained life-threatening injuries and later in August 2016 was diagnosed with a brain injury.

47. This resulted in lengthy periods off work of: 20 January 2014 to 30 January 2015 (a period of 253 days); 04 February 2015 to 15 June 2015 (a period of 69 days) and 04 April 2016 to 02 October 2016 (a period of 131 days).

48. The Claimant first returned to work after the accident on 02 February 2015 and worked reduced hours and reduced duties, which essentially remained the position up to her dismissal on capability grounds on 20 July 2017.

49. The Tribunal will first address the Claimant's disability discrimination claims as they may inform the decision on the unfair dismissal claim.

50. The Claimant's disabilities and knowledge of them have been conceded by the Respondent as set out at paragraphs 11 and 12 of the List of Issues.

51. It is agreed that the Claimant is disabled for the purposes of section 6 of the Equality Act 2010 from 18 January 2014 by reason of a brain injury that impacts upon the Claimant's planning and processing skills; anxiety levels; and levels of cognitive fatigue.

52. The Respondent admits that it knew, or ought reasonably to have known, from 28 October 2016 that the Claimant was a disabled person as a result of the brain injury.

53. It is further agreed that between 18 January 2014 and October 2016 the Claimant fell within the section 6 definition by virtue of a lower limb musculoskeletal injury, which had an impact on her mobility. The Respondent admits that it knew, or ought reasonably to have known from 07 January 2015 that the Claimant was a disabled person as a result of the lower limb musculoskeletal injury.

Direct discrimination

54. With regard to the Claimant's claim of direct discrimination, the Claimant relies upon a hypothetical comparator.

55. The claims are that Mr Legister made "comments, threats or otherwise interrogated" the Claimant as alleged in paragraph 54 the Particulars of Claim at page 27 of the bundle.

56. The alleged comments in the capability hearing concerning the Claimant's competence set out in paragraph 54(ii) were clarified at the outset of the hearing and are those contained in page 342 of the bundle relating to concerns about the Claimant's grasp of the technical considerations involved in the satisfactory completion of an inspection and page 345 of the bundle relating to concerns about doing inspections without having knowledge of legislation and how it is handled.

57. The first issue is a reference to the comments alleged at paragraph 17 of the Particulars of Claim that at a meeting on 27 July 2015 Mr Legister stated that he was not a 'walking encyclopaedia' and that he was not there to 'mollycoddle' the Claimant. These comments are disputed by Mr Legister.

58. The 'walking encyclopaedia' comment was not materially pursued by the Claimant in evidence or submissions. Even if that comment was made, the Tribunal concludes that it does not amount to less favourable treatment because of the Claimant's brain injury disability. There was no suggestion on the evidence that Mr Legister would have treated anyone else any

differently in similar circumstances. It was not a comment that Mr Legister used consciously or subconsciously because of the Claimant's brain injury disability as alleged.

59. With regard to the 'mollycoddle' comment, the notes of the dismissal appeal hearing records that the Claimant used that term: "it was like management were saying they weren't here to mollycoddle me" (see page 195) although the Claimant does attribute it to Mr Legister in her 'corrections to sickness absence case overview document' produced for the appeal hearing (page 477). On sparse evidence and on balance the Tribunal concludes this comment was not said by Mr Legister. The Claimant would have pressed the matter more deliberately at the appeal hearing and the Tribunal was not taken to any contemporaneous record of the comment. However, even if the comment was made, on the Claimant's evidence it was made in the context of a question about some work set for the Claimant, not because of the Claimant's disability. In cross-examination the Claimant stated that she did not know what Mr Legister had suggested or meant by it. Accordingly, the Claimant has not proved, even by inference, that the comment was made because of her disability. It may possibly be an 'arising from disability' issue, but that has not been pleaded.

60. With regard to the second issue in paragraphs 54(i) and 38(viii) of the Particulars of Claim, that on 14 November 2016 Mr Legister made a comment to the effect that: "were a painter and decorator to lose a limb, they would no longer be able to do their job", the Claimant argues that it was said in an impromptu meeting. Mr Legister could not recall the matter. The Claimant's email to Mr Legister (copied to HR) on 13 December 2016 mentions the matter in the final paragraph. The Particulars of Claim, witness statement and the 13 December 2016 email repeat the same allegation, but without context. No further context was added by the Claimant in oral evidence.

61. Mr Legister's evidence was that he looked at the e-mail of 13 December quickly and left the matter for HR. HR replied to the Claimant and advised her to speak to her trade union representative. The Claimant raised the matter in her 'sickness capability appeal' document at page 365.

62. It is difficult decision, but on balance the Tribunal concludes that the comment was said.

63. The Claimant suggests that Mr Legister intended the analogy to be that the Claimant's disability meant she would no longer be able to do her job.

64. That view, we find, is inconsistent with Mr Legister's positive actions and assistance that he provided to the Claimant pre-and post the alleged comment. Mr Legister also complied with the vast majority of the material Occupational Health recommendations. There is also a lack of detail from the Claimant with regard to both context and meaning when assessing if the comment was made because of the Claimant's disabilities.

65. However, because Mr Legister could not recall the comment and therefore could not explain it, the Tribunal cannot adopt a *Shamoon* approach. When applying the reversal of proof provisions, which is apt in this circumstance, the Tribunal is driven to conclude that the Claimant has proved facts from which the Tribunal *could* conclude the statement was made because of the Claimant's disability.

66. This is not a finding of fact by the Tribunal that this was a direct discriminatory comment by Mr Legster. The Tribunal has noted all he has done for the Claimant, but applying the burden of proof provisions to the circumstances drives the Tribunal to conclude that this allegation is made out as the Respondent has not shown that the comment was in no sense whatsoever because of the Claimant's disability.

67. However, as is set out below, this is the only successful finding of discrimination and as such it has been presented to the Tribunal out of time. The Tribunal has considered whether or not it is just and equitable to extend time and concludes that it is not. The onus is on the Claimant to convince the Tribunal that it is just and equitable to extend time and the exercise of discretion is the exception rather than the rule. The claim is substantially out of time and no reason has been advanced with regard to time limit issues in respect of any of the Claimant's discrimination claims. The cogency of the evidence was affected in that Mr Legister, who was a credible witness, genuinely struggled to recall the event. The Claimant received trade union representation from an early stage (from at least July 2015), was able to engage with sickness guidance meetings and other internal processes, was fully aware of discrimination as a concept, her ability to pursue a claim in the employment tribunals and the application of time limits.

68. With regard to the comments made in the capability meeting as referenced by the Claimant at pages 342 and 345 of the bundle (see above), the Claimant in oral evidence was not able to describe how these comments amounted to direct discrimination or arose because of the Claimant's disabilities and care was taken to describe to the Claimant what direct discrimination entails and particularly the causation requirement. The Tribunal concludes that Mr Legister's concerns of the Claimant's knowledge was genuine and well-founded and were not comments made because of the Claimant's disability.

69. With regard to the alleged threats about starting the capability process as set out in paragraphs 54(iii) and 9, 18 and 31 of the Particulars of Claim, Mr Legister was reasonably required to inform the Claimant about the prospect of applying the capability process in circumstances where the Claimant was not able to return to full duties and hours and where that information was consistent with the Sickness Absence Procedure which provides: "If your attendance has not improved to the required standard, your manager will consider whether it is appropriate to set a further review period or whether it is appropriate to proceed with formal action under the Council's capability procedure. You should be aware that formal sickness guidance interviews

may also, where appropriate, be regarded as the initial steps of the formal capability process".

70. Mr Legister would have provided the same warnings to any other employee with similar absence levels.

71. With regard to paragraph 54(iv) and 21, 22 and 29 of the Particulars of Claim and interrogating the Claimant about the Occupational Health recommendations, the Tribunal concludes that it was reasonable for Mr Legister to make enquiries regarding what he considered to be relevant issues.

72. There was no suggestion on the evidence before the Tribunal that the enquiries made by Mr Legister relating to the September 2015 Occupational Health assessment amounted to an interrogation. On the Claimant's oral evidence Mr Legister asked "why I needed this and why I needed that". The Tribunal concludes that it was reasonable for Mr Legister to make enquiries and seek clarification of the Claimant's situation in light of the Occupational Health report There was no suggestion that he would not have made similar types of enquiries of a non-disabled person off work through sickness absence.

73. Mr Legister established what was needed and when it was needed with regard to a Workstation Assessment Report (page 148) and discussed with the Claimant the six key recommendations (see page 149). The Claimant conceded in cross-examination that it "did not particularly bother me much at the time".

74. On 07 October 2016 the Claimant attended at a return to work meeting with Mr Legister. The notes of this meeting are at page 207 to 208 of the bundle.

75. The notes of the meeting show that Mr Legister was thorough in gaining an understanding of the Claimant's position. Any reservations displayed by Mr Legister regarding the Occupational Health report were reasonable observations given his detailed knowledge of the work required and his view that the best way for the Claimant to refamiliarise herself back to work in a gentle way was to become involved with the reactive service/complaints. Mr Legister needed to know what the Claimant could do and the support that was required. Having heard Mr Legister's evidence, the Tribunal concludes that this was a reasonable approach and that the conduct of Mr Legister did not amount to a detriment when considered objectively and also was not consciously or subconsciously done because of the Claimant's disabilities.

76. The final allegation of direct discrimination is a failure to allocate work or increase the Claimant's duties as set out in paragraphs 24, 28 38(iii) and 41 of the Particulars of Claim.

77. Essentially, after hearing the evidence, this is an issue of Mr Legister not organising inspections for the Claimant. The Tribunal accepts Mr Legister's evidence that he needed to assess the Claimant's ability on inspections in

multiple scenarios before she was able to progress alone. Also, Mr Legister considered the Claimant's progress should be through reactive complaints work then progressing on to higher standard inspection work. The requirement for assessment was particularly important given the Respondent's regulatory function. The Tribunal accepts Mr Legister's evidence regarding difficulties in timing in order to undertake the accompanied inspections. The Tribunal concludes that there was no suggestion that Mr Legister's actions in this regard were either consciously or subconsciously because of the Claimant's disability.

A failure to make reasonable adjustments

78. The pcp's relied upon for the reasonable adjustment claim are the same as for the indirect discrimination claim. The Claimant initially relied upon six potential pcp's.

(a) Requiring a steep phased return to work.

79. The Tribunal concludes that the Respondent did not operate a pcp of a steep phased return to work. The phased return to work occurred on two occasions at the recommendation of Occupational Health. Those phased returns to work were kept under review and extended. The Tribunal concludes that the pcp as argued was not applied.

(b) Not allowing the Claimant to carry over all of her accrued and untaken annual leave.

80. This formed part of the withdrawal made by the Claimant at the outset of the hearing.

(c) Requiring an employee to meet targets when returning to work after a period of absence.

81. Targets in this context means inspection targets. The Claimant was not required to achieve any inspection targets. The target referred to by Mr Legister was 12 inspections per month when the Claimant was working on full duties. This was clarified in an email dated 15 February 2016 at page 178 in the bundle: "I was informing you of the minimum target number of inspections expected when on full duties". Those targets were never applied to the Claimant.

(d) Requiring an employee to return to full-time work after a period of absence.

82. There was an expectation that the Claimant would return to full-time duties eventually in the absence of any successful request for flexible working. There was no immediate requirement for employees generally to return to work on a full-time basis after period of absence and this was not a standard ever applied to the Claimant. The Claimant took annual leave at her discretion once the Occupational Health recommended phased return to

work ended and she resumed usual hours, but this was not at the instruction or expectation of the Respondent.

83. If the pcp somehow is intended to mean that there was an *eventual* requirement to get back to full-time work (which is not how the Tribunal reads the issue raised in the list of issues), for indirect discrimination purposes that pcp has to apply in the circumstances broadly to all employees. However, there was no evidence of a requirement for employees to return to full-time work after a period of sickness absence. It depends on the circumstances, including the role, of the individual employee.

84. If it amounts to a pcp for reasonable adjustment purposes, the Claimant is at a disadvantage compared to most non-disabled persons, which is considered by reference to the particular disadvantage: the Claimant could not return to full-time duties. Therefore, the duty to make a reasonable adjustment could arise in those circumstances. Having regard to the specific adjustments contended for by the Claimant, suggested adjustments (b) and (e) were withdrawn at the outset of the hearing and (c) and (f) were reasonably adjusted: the Claimant would have no targets until at a time when she returned to full time working and the Respondent did reasonably support the Claimant in attending medical appointments during working hours.

85. With regard to suggested adjustment (a) of a gradual increase in the Claimant's duties in line with Occupational Health recommendations and then gradually increase her hours, the Tribunal concludes that the Respondent did gradually increase the Claimant's duties pursuant to the Occupational Health advice. Notwithstanding that, Mr Legister had some concerns about the Occupational Health advice relating to reactive complaints. The advice was complied with and the Claimant did not start doing reactive complaint work again until around March 2017. In terms of the requirement for an accompanied inspection, this was based on Mr Legister's professional experience and represented a reasonable management decision. This did not take place before dismissal because of the difficulties in arranging for supervised inspections.

86. With regard to (c) and allowing the Claimant to work part-time on a temporary/permanent basis, the Claimant did undertake part-time work for a considerable period. This was a reasonable adjustment and it continued. The Tribunal accepts Mr Legister's evidence that because of the regulatory function, the pressure on staff, the backlog in inspections and the increase in workload, these were sufficient reason why this could not continue indefinitely. There was a reduction in overall resources, the cost of agency workers, plus agency workers did not undertake the complex inspections so would not cover the Claimant's full role.

87. The Claimant has not suggested hours of attendance other than broadly accepting part-time working as a proposition. It was only raised formally at the capability hearing. The Tribunal accepts Mr Legister's evidence that he

discussed the matter a number of times with the Claimant and her trade union representative that the Claimant needed to submit a form setting out her request. The reality was that the Claimant wanted to get back to full-time working prior to the capability hearing.

88. The Claimant had not returned back to full-time duties even on her reduced hours and could not do so for the foreseeable future.

89. There were no other part-time roles available and the Claimant went through a 12 week redeployment period.

90. The Tribunal accepts the Respondent's evidence that part-time workers with the necessary skills are hard to acquire.

91. The Tribunal concludes that it was not a reasonable adjustment for the Claimant to work part-time in her current role and there was no other part-time work available.

(e) Not assisting employees with transport costs.

92. This was withdrawn by the Claimant at the outset of the hearing.

(f) Requiring employees to organise medical appointments outside working hours.

93. The Tribunal concludes this was not applied to the Claimant. It was a preference of the Respondent, but it was not mandatory (see the notes of the sickness guidance interview on 13 July 2015 at page126).

94. The Tribunal concludes overall that the Claimant's reasonable adjustment claim is unsuccessful.

Indirect discrimination

95. The pcp's relied upon by the Claimant are the same as for reasonable adjustments above. For the reasons set out above, the pcp's have not been made out and the possible extended meaning of pcp (d) has been addressed. Therefore the indirect discrimination claim is unsuccessful.

Discrimination arising from disability

96. The unfavourable treatment was placing the Claimant into the capability process and her eventual dismissal. This was clearly unfavourable treatment and arises from the Claimant's disability.

97. However, the Respondent can objectively justify managing the Claimant's absence through the formal capability process. It is a legitimate aim of the Respondent, particularly given its regulatory functions. The Respondent set out its legitimate aims as: (a) ensuring that the needs of the business were met, in respect of the Respondent's food safety regulatory functions and

ensuring that a sufficient level of work/hours is being undertaken by employees in the food safety team to ensure that the Respondent could satisfactorily meet his relevant functions, which are aimed at ensuring public protection. (b) managing the workload of other members of the food safety team fairly. Inevitably, the Claimant's work would need to be spread between existing team members, which impacts negatively on their overall work levels. The only way to mitigate this is through the use of agency staff, which has a negative cost implication on the Respondent. Also, agency staff could only be used in routine inspection work but would not be able to cover other aspects of the Claimant's role relating to complaints and enforcement work, which would need to be covered by other employees.

98. The legitimate aim was not seriously challenged by the Claimant.

99. In considering whether or not that legitimate aim was achieved by proportionate means, the Tribunal concludes that a good deal of reasonable adjustments were made. For example, physical adjustments to the workplace including the provision of equipment; paid time off for medical/rehabilitation purposes; phased returns to work; reduced working days; reduced working duties; full pay for the first period of absence of over twelve months; regular referrals to OH and management reviews; and the use of carried over annual leave to reduce the Claimant's working week (for examples, see page 326). The Claimant's circumstances were reviewed over a significant length of time, after liaison with Occupational Health and other medical input and after following a formal procedure. Therefore, the Tribunal concludes that the means adopted by the Respondent of a formal capability procedure was proportionate in achieving the legitimate aim. It was appropriate and necessary.

Unfair dismissal

100. The reason for the Claimant's dismissal was capability and the Tribunal concludes that this was a reason genuinely held by the Respondent. Indeed the Tribunal does not understand that matter to be disputed by the Claimant.

101. The reasons put forward by the Claimant for why her dismissal was unfair are set out in paragraph 4 of the list of issues in subparagraphs (a) to (g), which the Tribunal addresses below.

(a) "The Respondent failed to directly engage with the Claimant's external clinicians and specialists".

102. The Tribunal concludes that the Respondent did engage with the Claimant's specialists. The Respondent considered the views of the clinicians, which formed part of the Respondent's Occupational Health process. For example, Mr Legister made seven OH referrals in respect of the Claimant from August 2014 to April 2017, there were seven sickness guidance meetings over a similar period and a range of adjustments were made.

103. The main argument made by the Claimant was her criticism of Mr Legister for not permitting the Claimant's Occupational Therapist to attend at her place of work and undertake a workplace assessment.

104. The Tribunal refers to a letter sent to Mr Legister by Ms Melony Trott, Occupational Therapist at the Vocational Rehabilitation Programme at The Wolfson Neurorehabilitation Centre at page 255 of the bundle. It states: "I am writing to you as Samantha Coe has been referred to the vocational rehabilitation programme. The role of the programme is to provide support in returning to work after a neurological injury. We are able to give this support by liaising with employers and if possible, attending the workplace and identifying if there are areas that we can assist with. This is often done by providing advice and strategies for the person and employers to use. We are able to follow up with further visits as required. The programme is available to patients living in London and surrounding areas. We carry out many work visits in all types of employment and this has included working with other local Councils to support patients in the workplace. It would be very beneficial to liaise with you and to arrange a meeting to discuss the plan for supporting Miss Coe. I would be grateful if I could arrange this with you both".

105. Mr Legister replied by a letter dated 24 January 2017: "Thank you for your letter dated 23 December 2016 regarding the above and your desire to liaise meet with me to discuss the plan for supporting Miss Coe in the workplace. This is an unusual request and one which falls outside the processes which the local authority utilises in matters relating to employee health. I discussed the contents of your letter with my HR advisor and I have been advised that you should liaise with our occupational health provider, Optima Health and provide them with the relevant information pertaining to Miss Coe so it can be considered as part of an overall assessment of Miss Coe when she is next assessed by the occupational health practitioner".

106. Mr Legister informed Ms Trott of the next assessment date and asked her to provide the outcome of her assessment to the practitioner for consideration in the report to Southwark.

107. In the subsequent report by Optima Health dated 27 January 2017 it is recorded: "Samantha was good enough to bring with her papers from her occupational therapist as well as her case manager. She also was able to let me see the report from the assessment, which has given me a much clearer picture of what Samantha needs now in order to help her at the workplace". The report also confirms: "Having discussed things with the occupational therapist…". The letter states: "I can't emphasise strongly enough how valuable I think it would be for you to meet with her occupational therapist. This is a person who has the most information on how to help Samantha at the workplace, and indeed seeing her at the workplace could be seen as part of the assessment process to see how she is managing and what small details of assistance can be done to support her".

108. By letter dated 4 April 2017 Ms Trott set out a 'Vocational Rehabilitation Summary' which states: "Since the assessments, intervention has been ongoing, identifying how best to support Ms Coe in her work role. Repeated attempts have been made to liaise with Ms Coe's managers and to request attendance at relevant work meetings; however this has been declined on each occasion". The Tribunal was not shown any evidence that supported the contention that repeated attempts had been made to liaise with the Claimant's managers and which had been declined on each occasion, save for the exchange set out above.

109. Mr Legister had not seen the letter from Dr Michael Dilley, Consultant Neuro-Psychiatrist, to the Claimant's GP dated 19 April 2017.

110. The Tribunal accepts Mr Legister's evidence that Human Resources saw the communications that were provided to the Respondent, took a view on the best course of action and advised him accordingly.

111. Occupational Health did see material from the Claimant's Occupational Therapist and discussed matters with Ms Trott.

112. The Tribunal accepts that it is the Respondent's policy not to engage directly with external health specialists or organisations and has a nominated external OH provider to provide an occupational health service. The advice to managers from Occupational Health is formed from the available information drawn from the individual, the referring manager and as required, the medical professionals directly involved in the care of the individual (see pages 456 and 458).

113. Ms Dean assessed the matter in detail as part of the appeal hearing. She considered that matters had been addressed in line with the Respondent's policy and it was part of that Policy that external medical specialists outside the nominated OH provider were not allowed in to the process save for liaising with that OH provider.

114. On balance the Tribunal concludes that the Respondent's process in this regard and moreover its consideration and assessment of it during the capability procedure, was objectively reasonable.

115. Further, the Tribunal concludes below that the remaining procedure fell within the general test of fairness in section 98(4) of the Employment Rights Act 1996. The Report of Dr Attrill makes the Claimant's health position and the prognosis moving forward clear at the time of the appeal hearing. In all the circumstances, the workplace assessment single issue does not place the Respondent's procedure outside the general test of fairness when considered in the round.

(b) "The Respondent failed to take into account the Claimant's changing prognosis".

116. The Tribunal finds as fact that the Respondent clearly took into account the Claimant's changing prognosis. The Respondent referred the Claimant to OH for advice on numerous occasions, held many sickness guidance meetings and return to work meetings. As a consequence, the Respondent took action, for example, by implementing phased working arrangements, and adjustments to duties.

117. The report of Dr Attrill of the The Wolfson Centre dated 31 May 2017 was the last report produced before the decision to dismiss was confirmed. It was before the appeal panel, and regrettably confirms that given the time since the Claimant sustained her brain injury "she is unlikely to make any significant improvements in her cognitive functioning at this point . . ." and recommended "reduced hours, extra time for duties and a structured working day". The final report from OH also confirmed that the focus should be on increasing duties while keeping hours the same and at that time to remain working three and a half days a week.

118. The Tribunal concludes that it was reasonable for the Respondent to conclude at the appeal and final stage of the dismissal process that there was no reasonable prospect of the Claimant being in a position to increase hours worked for the foreseeable future and that this position was unlikely to change, particularly to the extent that she could work at, or close to, her full contractual hours. The medical and OH input at that stage supports that view.

119. The Tribunal accepts the Respondent's submissions that the Claimant's circumstances can be distinguished from those in the case of *O'Brian -v- Bolton St Catherine's Academy* [2017] EWCA Civ 145 where in that case there was medical evidence at the appeal stage of the dismissal that demonstrated an improving ability to work. There was no such evidence in the Claimant's circumstances.

(c) "The Respondent failed to take into account the Claimant's suggested substantive amendments to OH reports or sickness capability meeting minutes".

120. The Tribunal finds as fact that by the stage of the appeal hearing the Respondent had all relevant documentation before it. An appeal document pack was provided by the Respondent to the Claimant and additional documents, including those supplied by the Claimant, were accepted, considered and taken into account during the appeal. Therefore, if there was any earlier defect, the matter was remedied on appeal.

(d) "The sanction of dismissal was too harsh taking into account the Claimant's submissions and was not reasonable"

121. The Tribunal finds as fact that alternatives to dismissal were considered. The focus was on possible part-time work. There were no reasonable adjustments that could be made regarding the Claimant's Principal Enforcement Officer role and there were no other vacancies.

122. The Claimant undertook part-time work and reduced duties for a considerable period, but the Tribunal accepts the Respondent's evidence that this could not continue indefinitely due to the regulatory function of the Respondent; the repercussions of any mistakes; the pressure on staff, the backlog in inspections; the increase in workload; the reduction in overall resources; a job share not being viable; the cost of agency workers; plus the fact that agency workers did not do complex inspections and would not cover the Claimant's full role.

123. The Tribunal refers in this regard to the written and oral evidence of Mr Legister, the Management case presented by Mr Legister at the capability hearing and the written and oral evidence of Mr Mellish and Ms Dean.

124. The Claimant was unable to give any clear evidence on what part-time working arrangement she would have preferred or would have been capable of working. Indeed, her own case is that since dismissal she has not been capable of performing *any* work, which is inconsistent with the proposition that she could have continued working on a part-time basis.

125. The Claimant failed to make an application for alternative work under the Respondent's procedures despite her and her trade union representative being reminded of the requirement to do so.

126. The Claimant had been on reduced hours and duties since 02 February 2015, had not returned back to full-time duties even on reduced hours and the medical evidence indicated that she could not do so for the foreseeable future.

127. There were no other part-time roles available and the Claimant went through a twelve-week redeployment process on full pay. At the appeal hearing Mrs Dean doublechecked that the redeployment period had been correct.

128. Ms Dean also reviewed potential alternatives to dismissal, including job redesign and a medical transfer, which were reasonably discounted for the reasons set out in her witness statement. A job redesign and medical transfer were not matters pursued by the Claimant.

129. The Tribunal concludes that in the circumstances it was reasonable for the Respondent to reach a decision that the Claimant could not undertake her substantive role, it was not reasonable for that role to be undertaken on reduced hours and there was no part-time work identified that the Claimant could do.

130. The Tribunal concludes that, unfortunately, in those circumstances dismissal was objectively reasonable.

(e) "The Respondent failed to give serious consideration to the possibility of of ill-health retirement".

131. The Respondent's policy on 'Early Retirement – Ill Health" is at page 449 of the Tribunal bundle. It provides:

"From 1st April 2008 where the Council determines to terminate employment on the grounds that the person is incapable of discharging efficiently the duties of his/her current job and has a reduced likelihood of obtaining gainful employment (in local government or elsewhere) before normal retiring retirement age, he/she will be classified under the following tiers:

- Tier 1 - the person has no reasonable prospect of obtaining gainful employment before age 65. Benefits will be based on accrued membership +100% of prospective membership between leaving and age 65.
- Tier 2 - the person is unlikely to obtain gainful employment within a reasonable period of time but is likely to be able to obtain gainful employment before age 65. Benefits will be based on accrued membership +25% of prospective membership between leaving and age 65.
- Tier 3 - the person is judged to be permanently incapable of their local government authority employment but is capable of undertaking gainful employment elsewhere in the workforce in a reasonable period after cessation. It will be reviewable, i.e. stops of the person gets a job."

132. The policy also defined "gainful employment" as: "paid employment for not less than 30 hours in each week for a period of not less than 12 months. The judgment is whether the person's condition prevents them obtaining gainful employment, other factors, e.g. economic climate, motivation, or skill, don't apply".

133. The Policy also requires an independent doctor from the nominated occupational health provider to agree that the employee is incapable of discharging efficiently the duties of their employment on medical grounds and specifying the relevant tier.

134. In an Occupational Health report dated 27 January 2017 Dr Cooper advises: "She would not meet criteria for IHR at this time in my view". The Respondent has posed that question to OH on previous occasions, with a similar response.

135. On 17 May 2017 the Claimant raised with the Respondent the issue of it not having given ill health retirement proper consideration at the capability hearing.

136. This matter was addressed at the appeal hearing. By an e-mail dated 05 July 2017 Ms Hallahan from OH wrote to Ms Clement, HR Business Partner regarding ill health retirement stating: "I have been speaking with our Senior OHA in relation to Samantha Coe and what we need to know is she still working because if she is it would be unlikely however if she is off on the sick you can submit an application for ill health retirement attaching a pension certificate and a job description and on the form endure it states that you have discussed ill health early retirement with Samantha and I can get her

booked in with Dr Haseldine for a paper review for Monday and we can take it from there".

137. Ms Clement returned an IHR form and a job description and received a reply: "I have given the file to the Dr and he has just come back to say that she does not qualify as she returned to work and Dr Baileys report said that she was capable with adjustments".

138. Ms Clement provided OH with the May report of Dr Attrill and received the reply: "He says the report just reinforces what he says that there are still adjustments that could be done and that she is still able to work".

139. The Tribunal enquired of Mrs Dean whether she considered that she could/should have sought further clarification on ill-health early retirement from Dr Haseldine on the basis that a decision was to be made by the Respondent that the Claimant was to be dismissed from her employment on the ground of capability where no reasonable adjustments could be made to her post.

140. Ms Dean's evidence, accepted by the Tribunal, was that she is not a medic and does not know about HR decisions, particularly regarding gainful employment and reasonable adjustments under the Respondent's Ill Health Early Retirement Policy. She considered that there were no reasonable adjustments that could be made that would get the Claimant back to work on full time hours within the foreseeable future. Ms Dean had seen the report of Dr Attrill and the medical advice that that the Claimant was unlikely to make any improvement. Ms Dean argued that she had asked the question of HR and OH regarding ill-health early retirement, others had chased the matter, the answer conveyed to her was in the negative and she had not seen the e-mail exchange on the issue.

141. The Tribunal, being conscious of not substituting its view for that of the employer, concludes that on balance it was objectively reasonable for Ms Dean to rely on the advice from both an OH doctor entrusted to make decisions on ill-health early retirement under the Respondent's Policy together with input from HR that ill-health early retirement was not available. Ms Dean took reasonable steps to ascertain whether the Claimant was entitled to ill-health early retirement

142. Incidentally, the ultimate decision on whether ill-health early retirement is to be granted lies with the Local Government Pension Service and it still remains permissible for the Claimant to apply to that body even now.

(f) "The Respondent failed to increase the Claimant's duties in line with the OH recommendations and so failed to give the Claimant the opportunity to reintegrate into her role".

143. The Tribunal finds as fact that the Respondent increased the Claimant's duties, involving administrative work, complaints handling and permitting her to carry out lower risk inspections.

144. The Tribunal accepts Mr Legister's evidence that he decided in the circumstances of the Claimant's medical condition and absence from work that he wanted to accompany the Claimant on inspections before allowing her to progress onto the more complex inspection work and that the most appropriate way to achieve this was for the Claimant to undertake reactive complaints initially and then progressing to more complex and demanding inspection work. The Tribunal concludes that this was a reasonable approach by Mr Legister given the Respondent's regulatory function.

145. Unfortunately, a combination of the Claimant's absences from work and OH restrictions on the Claimant's work duties made arranging accompanied inspections problematic.

146. By way of example, Mr Legister first raised the issue of arranging accompanied inspections upon his return from annual leave on 22 February 2016. After being absent from work for a long period in March, the Claimant was absent from work from 05 April 2016 to 02 October 2016, at which time her duties were subject to recommended OH restriction.

(g) "The Respondent failed to follow a fair procedure as alleged at paragraph 62vi, 62viii and 63 of the Grounds of Complaint".

147. Paragraph 62vi of the Grounds of Complaint is: "The Respondent did not wait for the outcome of the Claimant's prognosis before dismissing her, despite recommendation of Occupational Health".

148. The only report that was outstanding at the capability hearing dismissal stage was the Wolfson Centre report of Dr Attrill of 31 May 2017, which was available for consideration at the appeal hearing. That report was clear about the Claimant's condition and her condition for the foreseeable future. For example, the Claimant was "unlikely to make any significant improvements in her cognitive functioning at this point". There is no indication in that report of advice to wait further for an outcome of her prognosis.

149. Paragraph 62viii of the Grounds of Complaint is: "The Respondent failed to consider the Claimant's submissions, given the short length of time between the capability panel hearing and the time at which she was dismissed".

150. The Tribunal concludes that this allegation has not been made out in fact. Mr Mellish had given the matter due consideration and most certainly all matters had been fully aired and considered at the conclusion of the appeal hearing.

151. Paragraph 62vi of the Grounds of Complaint contains the following allegations:

152. “The Claimant was unable to discuss her condition and prognosis in full because the Respondent would not wait for important, imminent medical reports”;

153. This matter has been addressed above, the Respondent had all of the relevent medical reports at the time of the appeal hearing and these were considered and discussed.

154. “The Claimant was unable to discuss her condition and prognosis in full because the Respondent would not engage with or take into account the views of the Claimant specialist clinicians and vocational rehabilitation specialists, despite the specialist requested to speak with the Respondent”;

155. This matter has been addressed above, principally at issue (a).

156. “The Respondent was unclear about what reason they have bought the Claimant to a capability panel; the Claimant was informed that it was due to her sickness only, but at the hearing on 25 April 2017 the significant focus was on the Claimant's competency”; and “The Claimant was not informed at all about the Respondent's concerns about her competency until the capability panel, by which time she was not in a position to gather evidence to argue the point”;

157. The Tribunal concludes that the reason for the matter being brought before a capability hearing was evidently clear. The invite letter set the matter out. The issue was confirmed at the outset of the capability hearing (page 340) and Mr Legister took the Claimant through the management case in detail and the basis for dismissal was confirmed in the dismissal letter. The Tribunal finds as fact that the focus of the capability hearing was not on the Claimant’s competency. There was reasonable consideration of what tasks the Claimant was and was not doing. The Claimant was able to address the matters raised. The Claimant or her representative could have sought clarification and requested time to argue any points they wished to address. An adjournment was given to the Claimant at the end of the hearing to consult with her trade union representative, who then addressed the meeting, but did not raise any matter of concern over competency issues or a need to obtain further evidence.

158. “The Respondent failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures by failing to deal with the issues fairly”;

159. The Tribunal concludes this allegation has not been made out as fact. Indeed, the Claimant has not identified how it is said the Respondent fell into error.

160. “The Respondent failed to provide the Claimant with notes of the capability panel hearing despite her request, until she received the appeal pack, only several days prior to the appeal hearing”;

161. The Claimant received the notes in advance of the appeal hearing at which she was able to raise all the points upon which she wished to rely.

162. “The Respondent would not allow the Claimant to appeal any of the facts considered in the capability panel hearing, alleging that they had been established 'beyond reasonable doubt', despite the Claimant's concerns about the Respondent's understanding of the facts of her situation”.

163. At the appeal hearing the Claimant was provided with a full opportunity to argue her case. The notes confirm: “We are happy for you to refer to anything relevant to the appeal”; “you may now present the grounds of your appeal”. The notes demonstrate that the Claimant’s trade union representative was able to forward the Claimant’s case unimpeded. At the Claimant’s request there was a ten-minute break before summing up and the Claimant was given 15 minutes to do so.

164. The Tribunal concludes on balance that the procedure adopted by the Respondent was fair in all the circumstances.

165. With regard to the facts and conclusions made above, the Tribunal concludes that the Respondent’s decision to dismiss the Claimant with a twelve-week paid redeployment period was reasonable in all the circumstances, including having regard to the size and administrative resources of the Respondent’s undertaking, equity and the substantial merits of the case. Reasonable adjustments had been explored, there was no realistic prospect of the Claimant returning to her full contractual duties at the time of dismissal, as medically confirmed, and the Tribunal accepts the Respondent’s reasons for it not being practicable to continue with a permanent adjustment to the Claimant’s working role, particularly given the position she held, the serious Regulatory duties of the Respondent, the work level required, staff and budgetary concerns and the lack of alternatives.

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Employment Judge Freer
Date: 11 March 2019