EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs M O'Donnell	**v**	Wokingham Borough Council

Heard at:	Reading and In chambers	**On:** 11 to 15 February 2019 **On:** 25 April 2019
Before:	Employment Judge Hawksworth Members: Miss J Stewart and Mr J Appleton	

Appearances
For the Claimant: In person
For the Respondent: Ms N Hausdorff (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is:

1. The complaint of direct disability discrimination succeeds;

2. The complaints of failure to make reasonable adjustments succeed;

3. The complaint of unfair dismissal succeeds.

REASONS

Claim and evidence

1. By a claim form presented on 19 October 2017 after Acas early conciliation, the Claimant brought complaints of disability discrimination and constructive unfair dismissal. In essence, the complaints arise out of events leading up to and surrounding a restructure by the Respondent, and the termination of the Claimant's employment. The Respondent defended the claim.

2. There was a preliminary hearing for case management on 10 April 2018.

3. The merits hearing took place from 11 to 15 February 2019, with a further day in chambers on 25 April 2019. It was agreed at the start of the hearing that this hearing would determine liability only. A separate remedy hearing has been listed and notification of the hearing dates have been sent to the parties.

4. The parties had prepared an agreed bundle of 560 pages. They also provided at the start of the hearing:

   - an agreed chronology of three pages; and
   - a cast list (prepared by the Claimant).

5. The parties also provided on the penultimate and final day of the hearing:

   - a skeleton argument (Claimant); and
   - a schedule of issues outwith CMC directions (Respondent). This document highlighted key points of disagreement by the Respondent with points raised in the Claimant's witness statement which were not addressed at the hearing as they were not relevant to the claims and issues as narrowed in the Case Management Order.

6. At the hearing, we heard evidence on behalf of the Claimant from the following witnesses (in this order):

   - Ms Lynne McFetridge, the Respondent's former Head of Adult Social Care and Safeguarding (retired)
   - the Claimant
   - Mr Kevin O'Donnell, the Claimant's husband (interposed)
   - the Claimant.

7. The Claimant also relied on the written statements of three other witnesses who did not attend the hearing. The evidence of one of these witnesses, Mr Stuart Rowbotham, was accepted by the Respondent.

8. The Claimant relied on written statements by two other witnesses, Mr Peter White and Ms Helene Dyson. The Respondent did not accept the evidence of these two witnesses. We explained that we would consider these two statements and attach such weight to this evidence as we felt to be appropriate, bearing in mind that the Respondent had not had the opportunity to cross-examine these witnesses.

9. On behalf of the Respondent we heard evidence from the following witnesses (in this order):

   - Ms Hayley Rees, Category Manager in Strategy and Commissioning
   - Mr Rodney Hing, Lead Specialist (Head of Service) for the Property Team

- Mr Graham Ebers, Director of Corporate Services and Deputy Chief Executive
- Mr Mark Gibbons, Senior HR Specialist
- Mr Sean O'Connor, Lead Specialist (Head of Service) for the Legal Department

Issues to be determined

10. The issues to be determined were set out in the case management orders following the preliminary hearing on 10 April 2018, and there was further clarification of the issues on one complaint (issue 9.3) during the hearing itself (as detailed below).

11. The issues to be determined as set out in the case management summary and clarified at the hearing are as follows (adopting the numbering from the case management summary, and with the wording inserted in issue 9.3 at the hearing shown in bold):

Disability – Section 6 Equality Act 2010

6 The Claimant has a permanent neurological condition resulting in being unable to walk and being confined to a wheelchair. The effect of pushing the wheels on her wheelchair combined with her neurological condition resulted in injuries to both elbows requiring operations on 22 March 2017 and 3 May 2017.

7 The Respondent accepts that the Claimant was a disabled person within the meaning of the Equality Act at all material times.

Direct Disability Discrimination – Section 13 Equality Act 2010

8 Between June 2016 and December 2016, the Claimant was carrying out a more senior role as a temporary arrangement. She was interviewed for the permanent role but was not offered the job, instead it was given to Hayley Rees, who was less qualified for the position, and who was not a disabled person. The Claimant claims that she was treated less favourably than Hayley Rees because of her disability. Her line manager, Paul Feven, told her that she was not coping because of her disability.

Failure to Make Reasonable Adjustments – Section 20 Equality Act 2010

9 The Claimant claims that there was a failure to make reasonable adjustments as follows:-

9.1 Physical feature – Since 26 July 2013, there has been restricted access within the Claimant's office due to the layout of desks and other office furniture.

Substantial disadvantage – This causes difficulty in the Claimant moving around in a wheelchair.

Reasonable adjustment – Remove the obstacles.

9.2 Provision, criterion or practice – Failure to carry out a risk assessment for at least two years prior to the termination of the Claimant's employment on 31 May 2017.

Substantial disadvantage – Because the Claimant is a wheelchair user, she would be more at risk than others in the event of an emergency.

Reasonable adjustment – Conduct a risk assessment and put in place a personal evacuation plan.

9.3 Provision, criterion or practice – The requirement to go through an interview **and** selection procedure as part of the Respondent's restructuring of her department between 2 January and 31 May 2017.

Substantial disadvantage – Due to pain and the after effects of the two operations and the side effects of strong medication, the Claimant was unable to attend an interview. If she had attended an interview, she would have been unable to give a proper representation of her abilities and experience due to these matters.

Reasonable adjustments – (1) Assimilation to one of the jobs applied for (Senior Specialist commissioning) as the Claimant was already performing most of the tasks required by this role in her role as the Policy, Strategy and Commissioning Manager. (2) Use the Claimant's expression of interest as a selection tool (instead of a job interview which she was medically unfit to take part in) for the Senior Specialist Commissioning job and the Category Manager. **(3) Waiting for the Claimant to recover from her operations and take part in a selection process**.

9.4 Provision, criterion or practice – The requirement to attend work rather than take annual leave after the Claimant's operations. However, the Respondent refused to allow her to take three weeks of her annual leave at the end of her sick leave.

Substantial disadvantage – The Claimant required leave to recover from the operations which were caused by her disability.

<u>Reasonable adjustment</u> – Allow the Claimant to take leave as requested.

<u>Unfair Constructive Dismissal – Section 95(1)(c) and 98 Employment Rights Act 1996</u>

10 The Claimant relies upon the following conduct by the Respondent as amounting to a fundamental breach of contract entitling her to resign, and in response to which she did resign, on 31 May 2017:-

10.1 All the above matters relied upon as disability discrimination.

10.2 The Claimant was not offered assimilation into the Grade 11 job but instead was offered a lower status, lower paid job at Grade 9.

10.3 The job description for the Grade 11 job was changed after the Claimant had submitted her expression of interest and she was not told that the job description had been changed.

12. The tribunal also has to determine whether the Claimant has complied with the relevant time limits. We have dealt with this at the end of our judgment.

Clarification of issues to be determined

13. At the start of the third day of the hearing (13 February 2019), the Tribunal raised a case management issue with the parties regarding the issues for determination as summarised in the preliminary hearing summary. At this point in the hearing, the Claimant was part way through her re-examination points, ie clarification of any points arising from her own evidence,

14. Paragraph 9.3 summarised one of the PCPs as *“The requirement to go through an interview selection procedure as part of the Respondent’s restructuring of her department between 2 January and 31 May 2017”.* The Tribunal noted that in the Claimant’s claim statement (attached to her ET1 form), her complaint was put more widely than this. She complained about the requirement to go through a *selection procedure* more generally, not only the requirement to have an interview. For example, in the claim statement at pages 16 and 17 of the bundle, the Claimant complained that *“no reasonable adjustments were put in place to enable me to participate in the selection process for an alternative job”* and that the Respondent “*failed to make reasonable adjustments for me not to be disadvantaged by the selection process”.*

15. In addition, the reasonable adjustments to the interview selection procedure which were set out at paragraph 9.3 of the case management summary omitted an adjustment which the Claimant had clearly suggested in her claim statement (for example at page 19): *“waiting for me to recover*

from my operations and take part in a selection process would have been a reasonable adjustment".

16. The Tribunal indicated that it proposed to treat paragraph 9.3 as amended by deleting the word "interview" from the PCP, and by adding a third suggested reasonable adjustment of allowing the Claimant to apply for the posts once she had recovered in June 2016.

17. The Tribunal considered this to be in line with the overriding objective of dealing with cases fairly and justly. The Tribunal bore in mind that the Claimant had been unrepresented throughout. Lists of issues (including those in preliminary hearing summaries) are not set in stone and should not be treated as replacing a Claimant's statement of claim. Given the length and scope of the issues in the Claimant's claim, it was clear that the preliminary hearing record could only be a summary of the matters in issue. The summary of the complaint about the PCP at paragraph 9.3 of the case management order did not seem to the Tribunal to fully set out the Claimant's case as she had clearly put in her statement of claim.

18. The Respondent requested a short break and further time for cross-examination of the Claimant on the wider issues, which the Tribunal allowed. When the hearing restarted after a break of around 20 minutes, the Respondent applied for the hearing to be postponed.

The Respondent's postponement application

19. The Respondent submitted that the amendments to the issues as set out in the preliminary hearing summary would lead to a broadening of the issues to such an extent that it would prejudice the Respondent and compromise its ability to fairly defend itself. The Respondent was not in a position to continue and would need time to consider whether to serve additional evidence. For example, the Respondent may wish to enquire as to the availability of an additional witness, Mr Feven, and any other additional witnesses who might be required to give evidence as to the selection process as a whole.

20. The Claimant objected to the Respondent's postponement application, pointing out that the suggestion that it would have been a reasonable adjustment to wait for her to recover, had been dealt with in the Respondent's ET3 and included in her witness statement. She was concerned that there would be an unfair advantage to the Respondent if the hearing was postponed after the evidence of the Claimant only.

21. We took a break to consider the Respondent's application. We declined the application to postpone for the following reasons.

22. In the supplementary ET3, served by the Respondent after the preliminary hearing at which the issues were clarified, the PCP in issue 9.3 had been set out as "a requirement to go through an interview <u>and</u> selection procedure" (emphasis added). It was clear from the supplementary ET3 that, after the preliminary hearing, the Respondent had understood the

PCP as encompassing more than just the interview procedure, and had responded in respect of the whole selection procedure, not just the interview. Accordingly, the Tribunal decided to use the wording from the Respondent's amended ET3 in the summary of the issues, adding the word 'and' between 'interview' and 'selection', so that the PCP in paragraph 9.3 read "The requirement to go through an interview **and** selection procedure as part of the Respondent's restructuring of her department between 2 January and 31 May 2017".

23. The Tribunal did not consider that reframing the PCP in paragraph 9.3 in this way would prejudice the Respondent, as the Respondent had used this wording itself in the supplementary ET3.

24. In relation to the proposed addition of a third suggested reasonable adjustment in paragraph 9.3, the Tribunal regarded this as a discrete point and not one which would give rise to substantial additional evidence. It had been clearly included in both the Claimant's claim statement and her witness statement.

25. We directed that:

    25.1. the Respondent could put further questions on the amended points to the Claimant, who was still giving evidence;

    25.2. the Respondent's witnesses (all of whom were yet to give evidence) could be asked supplemental questions on these points if necessary; and

    25.3. if the Respondent wished to seek permission to adduce additional evidence on these points, it could do so, by producing the evidence and copying it to the Claimant by lunchtime on 14 February.

26. On the basis that the reframed paragraph 9.3 of the issues used the wording from the Respondent's supplementary ET3, the additional reasonable adjustment was a discrete point which was included by the Claimant in both her claim statement and witness statement, and with the directions set out above, the Tribunal did not consider that the Respondent would be prejudiced by the clarification of the issues, and declined the application by the Respondent for a postponement.

27. We considered that this approach was in line with the overriding objective of dealing with the case fairly and justly, including ensuring that the parties were on an equal footing. Paragraph 9.3 of the issues was therefore amended as set out in the issues above, where the changes are marked in bold.

28. After the postponement application, the Tribunal took an extended lunch break from 12:30 to 1:40 to allow the Respondent time to consider and prepare any additional questions for the Claimant.

29. During the course of the hearing the Respondent's representative put questions to the Claimant and its own witnesses on the amended points. The Respondent did not seek permission to adduce any additional evidence.

Findings of fact

30. The Tribunal heard and read a large amount of evidence. The facts set out here are those which we considered to be helpful to assist us in determining the issues we had to decide. Where we make no finding about an issue, or where we make a finding with less detail, this is not because of oversight or omission, but reflects the extent to which we found the point of assistance in determining the issues before us.

31. We made the following findings of fact from the evidence we heard and read.

32. The Claimant has a life-long disability which means that she is unable to walk and she has to use a wheelchair.

33. The Claimant began working at Wokingham Borough Council on 10 July 2000 as a Communications Team Manager. She was promoted to the role of Strategy Officer in Adult Social Care on 1 June 2006 and to Policy, Strategy and Commissioning Manager in Adult Social Care on 1 July 2014.

<u>Office layout and restricted access issue</u>

34. The Claimant was based at the Respondent's main offices at Shute End. In 2012 and 2013 the Respondent carried out some refurbishments to the offices and a number of departments were relocated. The Claimant and the team she worked with moved from the ground floor to the first floor towards the end of 2012.

35. These changes were made as part of the Respondent's move to a more flexible/smart working environment. The new arrangements included hot-desking, although certain sections of desks were allocated for certain teams to use. The Claimant was allocated a specific desk for her use and was not required to hot-desk.

36. The layout of the office on the first floor caused issues with accessibility for the Claimant. In particular, the Claimant was unable to access the middle desk in the section of desks which was allocated for her team's use, because the space between that desk and the window was too narrow to allow wheelchair access. This meant that if one of the Claimant's team was seated in that desk and the Claimant wanted to speak to them, she was unable to do so without asking them to move. There were times when the Claimant needed to speak confidentially to members of her team, for example two of her team had health issues and one was on a Performance Improvement Plan. Her inability to access one of the desks used by her team was therefore a substantial disadvantage to her.

37. The Claimant's access was restricted in this way from when she moved to the first floor. This situation continued after 26 July 2013 and until the Claimant's employment terminated.

38. The Claimant raised this access issue in discussions with the manager who oversaw office moves in her department, with her line manager, and with the building support officers. The issue regarding restricted access to the middle desk by the window was specifically raised by the Claimant with her then manager Mr Wooldridge. Rodney Hing, the Respondent's Lead Specialist (Head of Service) for the Property Team, confirmed that he was copied in to an email from Mr Wooldridge highlighting this issue.

Personal Emergency Evacuation Plan

39. For a period of at least two years prior to the termination of the Claimant's employment on 31 May 2017 the Respondent did not carry out any risk assessment to assess the Claimant's needs in a fire or emergency.

40. The Respondent's Fire Evacuation Procedures for Shute End (pages 266-280) do not give any specific guidance as to how a person using a wheelchair should be evacuated or assisted in an emergency. They state that:

> *"where safe to do so, fire wardens and deputies will help evacuate their zone and ensure that no one remains in their zone. The fire wardens and deputies will assist disabled individuals or anyone who requires assistance to evacuate the building or get to a safe area".*

41. The procedures also provide for a Personal Emergency Evacuation Plan (PEEP) to be drawn up where required (page 272). There was no PEEP in place for the Claimant.

42. Mr Hing's evidence was that risks in office areas are low level. He said that a PEEP is only needed for an individual employee if there is a heightened risk for them or if they need additional assistance. He was not informed of any special circumstances which would put the Claimant at a heightened risk. He said it was the Claimant's responsibility to know how to evacuate herself from the building in an emergency.

43. On one occasion when there was a fire drill, the Claimant went to a safe area. She remained there on her own. The fire wardens were not aware that they were responsible for assisting the Claimant. It appears that no-one was aware that she was there and the Claimant was left in the building and not evacuated. Mr Hing was not aware of this incident.

44. In the Respondent's Supplementary ET3 the Respondent referred to an accident that had happened to another employee who was a wheelchair user. Mr Hing was asked about this accident in cross-examination. He was not aware of the accident.

45. We find that, as the Claimant uses a wheelchair, she was at a greater risk than others in the event of an emergency, when the procedure requires that lifts should not be used. The Claimant's desk was on the first floor. She would not have been able to use the stairs to get to the ground floor. She may have had difficulty opening heavy fire doors. The Claimant was not aware who was supposed to assist her in case of a fire.

46. Further, if the Claimant had assistance with the stairs and doors, she would not then have been able to move around unless someone also brought her wheelchair down to the ground floor. Mr Hing said that it is standard practice to carry a wheelchair down the stars after the evacuation of a wheelchair user, but this was not written down in any of the Respondent's policies.

47. As there was no PEEP for the Claimant, the Respondent had no arrangements for any specific steps to be put in place for her in a fire or emergency situation.

48. We find that if a risk assessment had been carried out for the Claimant, these matters would have been raised and addressed. The additional risks to her in an emergency would have been identified, and a PEEP would have been put in place for her.

Claimant's additional management responsibilities

49. The Claimant worked in the role of Policy, Strategy and Commissioning Manager in Adult Social Care from 1 July 2014. This was a role at Grade 10. Other responsibilities over and above the job description for the role were added to the Claimant's Grade 10 role in August 2014, April 2015 and March 2016.

50. On 1 June 2016, the Claimant was asked by her then line manager, Brian Grady, the Respondent's Assistant Director, to take on additional management responsibilities to cover a vacant Grade 11 post. While this did not amount to a temporary promotion to the vacant post, it required the Claimant to undertake some of the responsibilities of a role which was a higher grade than her own. The additional responsibilities were in addition to her own role and included the management of a contracts team covering all children's and adult social care contracts, and the commissioning of all support services for adults.

51. When she took on the additional management responsibilities, the Claimant believed that this would be a temporary arrangement lasting around a month until a job interview for the vacant post took place. In fact, the Claimant retained these additional responsibilities for over six months, from 1 June 2016 until she began a period of sick leave on 12 December 2016.

52. With the additional responsibilities, the Claimant had management of 12 staff. While the Claimant was managing these staff, four posts were vacant, and in addition one of the staff was on long-term sick leave and

another became terminally ill. The Claimant's team was therefore at around half strength. At this time, there was a recruitment freeze by the Respondent, ahead of an impending restructure, and so the Claimant was unable to take steps to fill the vacancies in her team. This meant that the Claimant had to work longer hours than usual, including after her normal finish time and on her days off, in order to cover the vacancies in her team, and so that she did not put too much of a burden on her direct reports. The longer hours were unpaid as the Claimant was not entitled to paid overtime.

53. In August 2016, Paul Feven replaced Brian Grady as the Claimant's line manager (on an interim basis). Mr Feven was an external contractor and had not worked with the Claimant before. The Claimant felt that from an early point in their working relationship Mr Feven was critical and unsupportive of her.

54. On 8 September 2016 the Claimant had a supervision meeting with Mr Feven. At this time, the Claimant was still undertaking the additional management responsibilities as no interview for the vacant post had been held. In the meeting, Mr Feven told the Claimant that he was intending to offer the vacant post to an agency consultant. He told the Claimant that he did not think that she could do the job, saying, 'You're not coping and you need too much support'.

55. During the period September to November 2016, the Claimant asked Mr Feven for more resources to cover the vacancies and staff sickness in her team. Mr Feven replied that she "needed too much support". However, there was no issue with the Claimant's performance or abilities, she simply needed more resources to carry out her job and the additional responsibilities she had been given.

56. During this period Mr Feven also made a remark to the Claimant that "disabled people often take sick leave". This was a derogatory generalisation and was untrue in the Claimant's case as, prior to December 2016, she did not often take sick leave.

Claimant's 2016 application for the vacant Grade 11 post

57. Mr Feven apparently had a change of mind about offering the vacant Grade 11 post to an agency consultant, because on 19 October 2016 he started an internal recruitment process for the role, sending an email to all managers in the Commissioning team inviting Expressions of Interest (page 400). The post was called Service Manager Commissioning and Market Development.

58. The Claimant expressed an interest in the post. There was another applicant for the post, Hayley Rees. Ms Rees was from a different department, Procurement. She had become aware of the internal recruitment process because she was invited by Mr Feven to apply for the role.

59. Both applicants were interviewed by a panel made up of the Claimant's line manager Mr Feven, his line manager Judith Ramsden (Director of Children's Services) and Stuart Rowbotham (Director of Health and Wellbeing). The interviews took place on 21 November 2016.

60. The unchallenged evidence of Mr Rowbotham in his written statement was that, although both candidates performed well in their interviews, he preferred the Claimant. He said in his statement that he had used the scoring matrix, and he had clearly scored the Claimant's performance higher than Ms Rees. Mr Feven and Ms Ramsden preferred Ms Rees. The interviewers could not come to a consensus, and decided to defer making a decision until the following day. An email exchange the following day again proved inconclusive. As it was clear that they were not going to come to a consensus, Mr Rowbotham emailed the other two interviewers to say that as they were in the majority, their view should prevail.

61. Ms Rees was therefore appointed to the role of Service Manager Commissioning and Market Development. In her evidence to the tribunal, Ms Rees said that she 'would imagine that [the panel] took into consideration all relevant experience and the performance at interview'.

62. On around 24 November 2016 the Claimant was told that she had been unsuccessful in her application for the role. She emailed Employee Services on 24 November 2016 to ask for copies of the interviewers' notes and scoring sheets from the interview.

63. The Claimant had verbal feedback from Mr Feven on 2 December 2016. He said that she was unsuccessful because she did not have enough 'strategic commissioning experience or experience of managing teams'.

64. This was not an accurate reflection of the Claimant's work experience. She did have strategic commissioning experience and experience of managing teams. At the time of her internal application for the post, the Claimant had substantial strategic commissioning experience and experience of managing teams. She was the most experienced and qualified commissioning manager in the Respondent's adult social care service. She was responsible for all strategic commissioning activities including management of over 300 contracts in adult and children's social care. She had a £2 million budget and was managing staff responsible for activities at all stages of the commissioning cycle, including management, commissioning and decommission. She had a post-graduate level qualification 'Commissioning in Adult Social Care' certificate and a Diploma in Health and Social Care Management. She led council-wide projects, including the Care Act implementation project. She had written the Respondent's five-year commissioning strategy and plan (which had been approved by Mr Feven) (page 368). She had represented the Respondent at meetings in Whitehall and at the Association of Adult Social Care Directors.

65. The Claimant did not receive any response from Employee Services to her request for copies of the interview notes, so she emailed the three

interviewers themselves on 8 December 2016 (page 402). Her email was politely worded, she explained that she would like to have copies of the notes and scoring sheets "to help [her] understand better how [she could] be more successful at presenting [her] skills, knowledge and experience."

66. Mr Feven replied to this request by email; his response comes across as abrupt in tone (page 401). He did not mention the copies of the interview notes or scoring sheets which had been requested. He said, "I've already offered more detailed feedback in person…Written feedback isn't a standard feature in interviews. Please direct any further queries you have on this to me as your current line manager as I don't think it's appropriate for two corporate directors to receive this email." He offered to give further feedback at his next one-to-one meeting with the Claimant.

67. The Claimant was not at any stage provided with copies of the interview notes or scoring sheets (or even template scoring sheets). In its supplementary ET3 the Respondent said that the decision to offer Ms Rees the job was made by a panel of three experienced, senior members of staff based on the performance of both applicants during the interview process, and based on objective scoring criteria, however no scoring sheets (or template scoring sheets) were included in the bundle for the hearing.

68. The Respondent said that the Claimant asked for the panel's notes of Ms Rees' interview, and that she was advised that this was not appropriate. However, this is not what Mr Feven was advising was inappropriate in his email of 8 December 2016. He said it was inappropriate for the Claimant to be emailing corporate directors. Our interpretation of the Claimant's request is that she was requesting the notes from her own interview. If there was any doubt about whose notes were being requested, the Respondent did not ask the Claimant to clarify this.

<u>Claimant's sickness absence</u>

69. On 12 December 2016 the Claimant was signed off sick. This was initially for two weeks but became a period of long-term disability-related sick leave. The Claimant was diagnosed with entrapped nerves in her elbows, caused by the effect of pushing the wheels on her manual wheelchair, combined with her neurological condition

70. The Claimant had to have two operations on her elbows, the first on 22 March 2017 and the second on 3 May 2017. The Claimant was expected to recover fully after her operations and return to work. However, as things developed, her employment was terminated on 31 May 2017 before she returned to work.

71. While the Claimant was on sick leave, she was in immense pain. The pain kept her awake at night and regularly reduced her to tears. She was prescribed strong painkillers which numbed the pain but did not eliminate it. The painkillers had side effects, which in the Claimant's case included loss of concentration, dizziness and lethargy.

72. The Claimant experienced painful sensations in her arms including electric shocks, numbness, tingling and muscle weakness. It was difficult for her to hold things or to type. While on sick leave, both before and after the operations, she had to spend most of her time in bed.

21st Century Council restructure

73. In February 2017, while the Claimant was on sick leave, the Respondent began a council-wide restructure called 21st Century Council. One of the intended outcomes of the restructure was to deliver savings of at least £4m and to reduce staff numbers by around 100 posts (page 115).

74. Core briefings with staff about the restructure took place during the week of 2-9 February 2017. The Claimant was unable to attend as she was on sick leave. Ms Rees, the successful applicant for the Grade 11 role, had taken up her post in January 2017 and on doing so had become the Claimant's line manager. Ms Rees sent the Claimant an email on 1 February 2017 with a link to the core briefing paper.

75. The Claimant was sent a letter on 9 February 2017 informing her that her post was affected by the proposed new structure and she was therefore at risk of redundancy (page 410). The formal consultation period of 30 days started on 9 February 2017 and continued until 10 March 2017.

76. On 23 February 2017 the Claimant emailed the Respondent's HR consultant Peter Southwell to update him as to her health (page 413). She explained that she had been diagnosed with ulnar nerve compression in both elbows and that she would have to have two operations, on 22 March 2017 and then on 3 May 2017. After the operations she would return to full health, and she anticipated being able to go back to work in May/early June. She had been signed off sick for 2 months and her doctors advised limiting all activities to reduce further nerve damage. She said the situation was difficult for her as she was unwell but had to apply for jobs in the new structure. In another email later that day the Claimant said she would keep it short as typing was hard for her and her earlier email had caused her a lot of discomfort.

77. An occupational health report of 27 February 2017 summarised the Claimant's difficulties and gave the opinion that she would not be able to return to work until June 2017 at the earliest (page 415).

78. The Claimant was provided with a hard copy file containing the consultation documents. Ms Rees told her that she should still check the intranet regularly for updates to the documents and information (page 419).

79. The Claimant's individual consultation meeting with her line manager Ms Rees and Mark Gibbons, a member of the 21st Century Council HR team, took place at the Claimant's home on 3 March 2017. The note of the meeting records that the Claimant was 'in constant pain, on painkillers'.

80. The procedure adopted by the Respondent was set out in a number of documents including a detailed Frequently Asked Questions (FAQ) document. It provided that:

80.1. At the outset, consideration was to be given as to which employees could be assimilated into new posts in the new structure. This would happen where roles had not significantly changed. Staff assimilated to roles in the new structure did not have to undergo any competitive process. The assimilation process required job assessments to be carried out by HR in conjunction with managers (Heads of Service). Staff would be assimilated into the new role if there were only minor differences between their existing role and the new role in relation to duties, responsibilities and accountabilities. The FAQ document said that assimilation would be determined by comparing the scope of responsibility, for example budgetary responsibility or the number of people managed, essential qualifications required to do the role and the similarity of content between the current and new role (page 150). The staff briefing presentation said that staff would be assimilated where there was an 80% or higher match between the scope of responsibility in the existing and proposed roles (page 122);

80.2. After the preliminary assimilation process was carried out by managers and HR, if a member of staff wished to challenge a decision not to assimilate them into a new role, they had the opportunity to make a case as to why they should have been assimilated into one of the new roles, and this was reviewed on a case by case basis. In practice, these requests were considered by the Corporate Leadership Team (CLT);

80.3. If there were no roles to which an at-risk staff member could be assimilated, they were invited to submit Expressions of Interest (EOI) for any vacant posts. This was the first stage in an internal selection process which included an interview. Initially, there were limitations on who could apply for vacant posts as there was some 'ring-fencing' of posts, but if the posts remained unfilled after this stage, the cohort of possible internal applicants was widened;

80.4. The procedure also provided that a Personal Development Plan would be created to address any personal development needs and to ensure that staff, including those assimilated to roles, were provided with the skills and knowledge in deliver in their new roles (page 141 and page 166).

The Claimant's request for assimilation and completion of EOI forms

81. On 7 March 2017 the Claimant emailed the Respondent's HR team (page 428 to 432) about the restructure and how it would affect her, and requesting reasonable adjustments. The Claimant's post, a Grade 10 post, was being removed from the structure. The proposed new structure for the

Claimant's team, the Strategy and Commissioning team, did not have any grade 10 roles at all. It had been designed by Mr Feven.

82. The closest match to the Claimant's role was a Grade 11 post called Senior Specialist (Strategy and Commissioning – people). In her email, the Claimant asked the Respondent to consider assimilating her to this Grade 11 role. She attached a note setting out additional Grade 11 responsibilities she had been performing since January 2016, which were not in her Grade 10 job description. She said that she thought her activities and level of responsibility were closely aligned to the Grade 11 post in the new structure. She suggested that assimilation to the Grade 11 role would be a reasonable adjustment for her. The Claimant gave the names of a number of colleagues who would be able to provide additional information in support of her assimilation request (page 428 to 429) and included a link to the Respondent's Adult Social Care Commissioning Strategy which she had written.

83. The Claimant's skills and experience were very similar to the skills and experience required for the Grade 11 role, particularly when the Grade 11 responsibilities she had taken on from June 2016 to December 2016 were taken into account. The Grade 11 responsibilities had increased the Claimant's budgetary responsibilities, and the size of the team the Claimant was managing.

84. In addition to her assimilation request, the Claimant submitted an Expression of Interest for the Grade 11 post (page 287-292). This was the first step in the internal selection process which would be required if the Claimant was not assimilated into the Grade 11 role. She also submitted an Expression of Interest for a more senior role at Grade SM1 (the grade above Grade 11). She was aware that she was not in the cohort of staff who were entitled to apply for the SM1 role initially, but she would be able to apply later if it remained unfilled.

85. The Claimant submitted her EOI forms around a week before the deadline. She used the job descriptions which were available to her at that time. Her health was deteriorating and she was concerned that she would be unable to complete the forms at a later date. She asked the Respondent to accept her application for the SM1 post early, as she would not be able to complete it after her operations.

86. The Claimant was required by the Respondent to complete EOI forms, despite the fact that she had informed the Respondent's HR department on 23 February 2017 that her doctors advised limiting all activities to reduce further nerve damage. The EOI forms were lengthy documents. An applicant was required to insert (type in) each of the criteria from the person specification of the job description for the role they were applying for, and then give evidence of how they met those criteria. To complete her EOI form for the Senior Specialist role, the Claimant used a job description which described the post as 'Grade 10 or 11' (page 337). It had 19 criteria. The Claimant had to type all of the 19 criteria from the job description into the EOI form and then provide evidence addressing each of these. The

EOI form also had a final section headed 'Anything else you would like to say' which the Claimant also completed. When finished, the Claimant's EOI form for the Grade 11 role was 6 pages long.

87. The Claimant had to go through the same process for the SM1 role for which she also submitted an EOI.

88. It was extremely difficult for the Claimant to submit her assimilation request and the EOI forms for two roles because of her ill health. To avoid feeling drowsy, she had to stop taking her medication (opiates) for several hours. This meant she was in severe pain which hindered her ability to concentrate. After 2-3 hours she would have to take her medication again, and she would then drift in and out of sleep. An A4 page would take her around 4 hours to complete. She had to repeat this cycle several times to complete the paperwork required by the Respondent.

89. In her email of 7 March 2017 the Claimant also asked the Respondent to make reasonable adjustments to the selection process because of her health issues. She said she would not be able to attend an interview. She asked for her Expression of Interest form to be used as a selection tool and for consideration of her request for assimilation. She explained that it had taken her 4 hours to type her email and that there was a steady decline in her ability to do anything involving concentration, because of increasing pain.

<u>The Claimant's request for assimilation</u>

90. The Claimant's request for assimilation to the Grade 11 role was considered by the Respondent and rejected. On 15 March 2017 the Claimant was informed by Mr Gibbons that her request for assimilation to the Grade 11 post had been turned down (page 442). Mr Gibbons said that this was because the Claimant was deemed not to have significant responsibility for children's social care, and it had not been determined that the evidence supplied by the Claimant demonstrated that the Claimant was sufficiently matched to the new role to agree an assimilation.

91. The job description for the Grade 11 post did not specifically include a requirement to have significant responsibility for children's social care. In any event, the Claimant had significant experience of children's social care, including being the lead commissioner for carers' services including young carers' services since June 2014, being the commissioner of voluntary sector services spanning both adults and children's services and managing the contracts team covering adults' and children's contracts from June 2016 to December 2016.

92. The Respondent's evidence was that the decision to reject the Claimant's assimilation request was made by the Corporate Leadership Team (CLT) at a meeting. We were not provided with any minutes of the meeting, and there was no other written record of this decision being considered or made by the Respondent.

93. Graham Ebers, the Respondent's Director of Corporate Services and Deputy Chief Executive, was a member of the CLT. He did not have any details of the consideration that was carried out in relation to the Claimant's assimilation request. He was able to describe in general terms the process that was worked through when dealing with 'any such request'. His evidence was that the Claimant's assimilation request was turned down because the Grade 11 role was a higher grade role than the Claimant's existing Grade 10 role, and therefore it was not a role she could be assimilated to, based on the available evidence.

94. There was no evidence:

94.1. that any assessment of the similarities between the Claimant's existing role/responsibilities and the Grade 11 role was carried out. The Respondent's restructure briefing documents said that a detailed analysis of the two roles, considering factors such as essential qualifications, budgetary analysis, number of people managed would be carried out to enable the Respondent to see whether there was an 80% or higher match between the roles. There was no evidence that any such matching exercise was carried out between the Claimant's existing role and duties and the Grade 11 role. This was in contrast with the position later in the process, when the Respondent carried out a detailed spreadsheet-based comparison between the Claimant's existing role and a lower graded (Grade 9) role which was offered to the Claimant (pages 293-295);

94.2. that when considering the Claimant's assimilation request, the CLT took any of the following factors into account: the additional Grade 11 responsibilities she had been performing for over 6 months, the fact that there was no Grade 10 role in the Claimant's team in the new structure and the Grade 11 role had initially been graded as "Grade 10 or 11", the Claimant's disability, her circumstances on long-term sick leave and her need for adjustments to the selection process;

94.3. that the Respondent considered obtaining information from any other sources to enable it to assess the Claimant's request, for example to obtain more information about the additional Grade 11 responsibilities she had been performing. The Claimant had suggested a number of colleagues who would be able to provide additional information in support of her assimilation request (page 429);

94.4. that the Respondent considered assimilating the Claimant into the role with a Personal Development Plan to address any development needs, or on a trial basis.

95. On 16 March 2017, after being told that her assimilation request had been refused, the Claimant sent further information to the Respondent and said that she disagreed with the Respondent's assimilation assessment (page 433 to 435). On 17 March 2017 the Claimant's union representative also

asked for the assimilation request to be reconsidered (page 435). The Respondent did not reply to these emails.

96. Sean O'Connor, the Respondent's Head of Service for the Legal Department, later considered this point in the context of his consideration of the Claimant's grievance. He relied on the Respondent's policy as to assimilation as an explanation as to why the Claimant could not be assimilated to the role, and concluded that 'it would not have been possible to ascertain whether the Claimant was suitable or able to carry out the requirements of the grade 11 role without some form of assessment/interview for the role'.

97. We find that, given the similarities between, on the one hand the Claimant's existing role and the additional responsibilities she had been performing, and, on the other, the Grade 11 role in the new structure, the Claimant would have been able to perform the Grade 11 role. We find that if the Claimant had been assimilated into the Grade 11 role it would have been found to have been a suitable role for her and would have been made permanent.

The Claimant's application for the Grade 11 and SM1 roles

98. As the Claimant had not been assimilated to a role, she had to undergo the internal application process for the Grade 11 and SM1 roles, the two roles for which she had completed Expression of Interest forms. The process included a shortlisting stage which if passed was followed by an interview. The Claimant was not able to attend an interview while she was on sick leave. She had requested reasonable adjustments when she submitted her Expression of Interest (EOI) forms on 7 March 2017.

99. In his email of 15 March 2017, Mr Gibbons responded to the Claimant's request for reasonable adjustments to the selection process. He suggested that an interview could be carried out at the Claimant's home, or additional time/breaks could be allowed. The Claimant did not consider these suggested adjustments to be suitable. There was a sense in the correspondence and the Respondent's evidence about this that the Claimant was being unhelpful in refusing these suggestions, for example the Respondent said that the Claimant 'did not agree' to the adjustments which it considered were reasonable and suitable and would have enabled her to participate in the selection interview process (page 550). We do not consider the Claimant was being unhelpful about this; we agree with the Claimant that the proposed adjustments were clearly not suitable for her and would not have assisted her given her medical condition at the time.

100. Mr Gibbons agreed that, if none of the suggestions were suitable, the Claimant's EOI forms could be used as a selection tool. In a further email on 20 March 2017, Mr Gibbons said that the Respondent would have to wait to see whether there were any other Expressions of Interest for the role the Claimant had applied for, before determining what reasonable adjustments could be made and that once all applications had been

submitted, the Respondent would confirm the intended approach. The Claimant's union representative told the Respondent that he believed this was inadequate (page 439). Mr Gibbons replied that the Respondent did not have a clear approach as to how to assess the Claimant's suitability for the role because they did not know whether there would need to be a comparison exercise (if there were other applicants) or whether (if there were not) it would simply be a question of assessing the Claimant's suitability. It was not made clear how the two approaches would differ.

101. On 22 March 2017 the Claimant had her first operation (on her right elbow). After her operation, the Claimant needed 24-hour care. She remained in bed for much of the time. She was prescribed morphine to help with the pain and this made her extremely drowsy and unable to speak or think clearly. She also experienced headaches and sickness.

102. The Respondent continued the internal application processes for the two roles for which the Claimant had submitted Expressions of Interest. The panel for the Grade 11 role was Mr Gibbons, Mr Feven and Mr Ebers. The panel for the SM1 role was Mr Gibbons, Mr Feven and Ms Ramsden.

103. The first stage of the internal appointment process for the Grade 11 role was a shortlisting stage carried out on paper by Mr Gibbons and Mr Feven. Mr Gibbons scored the Claimant's EOI form by working through the job description for the Grade 11 role and adding comments and scores to the required criteria (page 297-301). However, the job description which he used was an updated one which was different to the version used by the Claimant when she completed her EOI form. The updated job description had a more generic job title (Senior Specialist, rather than Senior Specialist Strategy and Commissioning). It referred to the Grade as Grade 11 rather than "Grade 10 or 11". It included additional criteria. For example, there were five bullet points in the technical skills section in the version used by the Claimant, three of which were essential and two desirable, but there were 9 bullets points in the technical skills section (all essential) in the version used to score the Claimant's application.

104. It is not clear precisely when the Grade 11 job description was updated. The Claimant had been told by Ms Rees in general terms that updated documents would be available on the intranet, but the Respondent did not make the Claimant aware of the update or send a copy of the updated job description.

105. When the Claimant's EOI was scored, it was said that the Claimant had failed to provide evidence of some critieria. The reason for this was that, as explained above, these criteria were not on the job description which the Claimant had used. She had only inserted and provided evidence on the criteria from the earlier version of the job description. The outcome of the shortlisting was recorded on a shortlisting scoring sheet (page 296). The Claimant did not score highly enough to progress to the next stage, however it was decided that she would be progressed to interview stage as a reasonable adjustment.

106. The Respondent decided to carry out a paper-based interview for the Claimant as she was unable to participate in an interview (even with adjustments). Mr Gibbons told the Claimant in an email dated 12 April 2017 that a paper-based interview was to be carried out, and invited her to provide any further information she wished to be considered (page 452-453). This was after the Claimant's first operation, and the Claimant replied to say that she was not well enough to do so (pages 451 to 452).

107. On 25 April 2017 Mr Gibbons and Mr Feven carried out the paper-based interview of the Claimant for the Grade 11 role. There was no meeting of the panel members to discuss the Claimant's application, it was dealt with on paper and by emails between them. Mr Feven scored the Claimant and sent his scores to Mr Gibbons. Mr Gibbons agreed with Mr Feven's scores save on one point which was left as before as Mr Gibbons did not feel that it would make any difference.

108. When scoring the Claimant in the paper-based interview, Mr Feven used the same competency-based interview form which was being used to conduct and record the in-person interviews. This form had detailed guidance for both interviewees and interviewers. It said that each interview would last around 50 minutes. Interviewees were asked to talk about a specific event or example for each of a number of competencies. The guidance to interviewers was to 'ask questions to try to understand and gather evidence' of each competency, to 're-phrase the question if the candidate doesn't understand, or move on to another question if the candidate struggles to provide an answer', and to 'use probing open questions'. The interviewers were provided with specific questions to ask the interviewees.

109. There were four competencies being assessed for the Grade 11 role. They were different to the criteria which the Claimant had been asked to address in the EOI form. The Claimant was scored 1 out of 4 for all four of the competencies. 1/4 meant 'Little evidence of positive behaviours/high level of negative behaviours/failed to meet the competency'. Mr Feven scored the Claimant as achieving 4 points out of a possible total of 16.

110. After the initial scoring, Mr Gibbons emailed the Claimant on 28 April 2017 (pages 450-451) to say that the information she had submitted was 'not sufficient' to appoint her to the role, and inviting her to submit further information. The Claimant said she was still dependent on painkillers, and that she was struggling to type and concentrate. She asked what sort of information would assist. Mr Gibbons replied giving a list of the names of the four competency descriptions. He asked her to provide specific examples outlining how she worked to these competencies. He did not provide the Claimant with a copy of the interview form, the candidate guidance or the questions which would have been asked at interview. He said, 'I understand that you are struggling to type, but maybe someone could type it on your behalf'.

111. The Claimant provided more information in an email of 2 May 2017 (pages 464 to 467). This was the day before the Claimant's second operation.

The Claimant was unable to type, so she dictated the email and her husband typed it for her. She sent four typed pages with examples and information for each of the four competencies.

112. Also on 2 May 2017, Mr Feven conducted the shortlisting stage for the Claimant's application for the higher grade role, the SM1 post. He decided that the Claimant did not merit an interview. Mr Gibbons asked the third member of the SM1 post interview panel, Judith Ramsden whether 'she differed from [Mr Feven's] scores'. Ms Ramsden did not reply to Mr Gibbons and the Respondent did not wait for her to do so. The Claimant was told that she was not suitable for the SM1 role.

113. The Claimant's second operation took place on 3 May 2019.

114. By 5 May 2017 Mr Feven had reviewed the additional information provided by the Claimant in support of her application for the Grade 11 role. Mr Gibbons' evidence was that Mr Feven concluded that the additional information given was not compelling enough to appoint the Claimant to the role. Mr Gibbons summarised this in an email to Mr Ebers. Included in the papers sent to Mr Ebers was the version of the competency-based interview form which included the standard questions for interviewers to ask the applicants to elicit their specific events/examples for each competency. The questions were much more detailed than the competency name, they included for example: 'Give me an example of how you have continued to work effectively during periods of uncertainty' or 'Tell me about a time when you had to change your point of view or your plans to take into account new information or changing priorities'. The Claimant had not been asked or shown these questions when she was asked to provide more information for her paper-based interview.

115. Mr Ebers confirmed by email around 20 minutes later that he agreed with the assessment by Mr Feven and Mr Gibbons that the Claimant should not be appointed to the Grade 11 Senior Specialist role (page 483). Mr Ebers' evidence was that the panel were not able to conclude that the information provided by the Claimant evidenced the necessary requirements at the appropriate levels in all areas required. He said that given his very significant workload, he relied largely on the view of the managers to decide who should be appointed to roles in the new structure.

116. The Claimant's application for the Grade 11 role in the new structure was therefore unsuccessful.

117. At around this time the Respondent was also engaged in filling other roles in the Claimant's team. On 26 April 2017 Ms Rees sent a text to the Claimant to say that five more junior members of the Claimant's team had been successful "in reapplying for their jobs".

<u>The Claimant's request for annual leave</u>

118. The Claimant also complained about a decision by the Respondent to refuse to allow her to take annual leave while she was unfit for work.

119. The Claimant's period of long-term sick leave had started on 12 December 2016. She was entitled to full pay while on sick leave for a period of six months and then half pay for a further six months. Her full sick pay was due to come to an end on 12 June 2017. During her sick leave she accrued annual leave.

120. On 19 April 2017 the Claimant emailed her line manager Ms Rees to say that her GP and consultant had indicated that she would not be fit to return to work until 30 June 2017 but that she had asked her GP to sign her off until 9 June 2017, and she proposed to take the three weeks from then until 30 June 2017 as annual leave. This would be advantageous for the Claimant as annual leave would be paid at full pay rather than sick leave which would be at half pay. Also, it would assist her to use up her accrued annual leave, which was quite substantial.

121. In addition to being financially advantageous to the Claimant, this arrangement would also have been financially advantageous to the Respondent, as it would have reduced the total amount of sick pay and annual leave payable by the Respondent.

122. The Respondent's policies on sick leave and annual leave did not deal with whether an employee on sick leave was permitted to take annual leave before they were certified as fit to return to work.

123. Ms Rees replied to the Claimant's request on 25 April 2017 to say that the Claimant was not permitted to take annual leave while she was still sick (page 457) because there was no provision in the Respondent's policies to permit annual leave to be taken in place of sick leave. The Respondent said 'the intention of annual leave is to enable the employee to take a proper period of rest'.

<u>The Respondent's offer of redeployment to a Grade 9 role</u>

124. As the Claimant had not been assimilated and had been unsuccessful in being appointed to either of the roles in which she had expressed an interest, the Respondent considered whether there was any suitable alternative role for her.

125. The Claimant was considered for roles within the Strategy and Commissioning department. It does not appear that the Claimant was considered for any Grade 10 or 11 roles outside her immediate service area.

126. The Claimant was considered for a vacant Grade 9 role called Strategy and Commissioning Specialist. Mr Feven carried out a detailed matching exercise. A spreadsheet was completed comparing the responsibilities of the Grade 9 role with those of the Claimant's existing role, and it was concluded that there was an 83.75% match and that this role could be offered to the Claimant as suitable alternative employment (page 293 to 295).

127. On 12 May 2017 Mr Gibbons emailed the Claimant to let her know that she had not been appointed to the Grade 11 role (Senior Specialist Strategy and Commissioning), but she could be redeployed into the Grade 9 role (Specialist level 3 Strategy and Commissioning) without an interview, subject to a 4 week trial period. He said that her application for the Grade 11 role was not 'compelling enough'. The salary and pension contributions for the Grade 9 role were about £9,000 per year lower than the Claimant's exising role, but her salary would be protected for a period of 18 months in line with the Respondent's policy (page 509). This was confirmed to the Claimant in letter from Mr Feven on 15 May 2017. Mr Feven said that 'there was not sufficient evidence provided' to appoint her to the Grade 11 role (page 505).

128. On 19 May 2017 the Claimant wrote to Mr Feven and Mr Gibbons saying that she did not consider the Grade 9 role to be a suitable alternative for her. The Grade 9 and Grade 11 job descriptions were very similar, except that the Grade 9 role had no management responsibilities. The Claimant's existing Grade 10 role (which she had been performing since 2014) had management responsibilities, and she had also been performing some Grade 11 management responsibilities for over 6 months. In the Grade 9 role, colleagues previously managed by the Claimant would become her peers. It was a lower status and lower paid role. The Claimant felt it was a demotion. She requested a more suitable offer of redeployment, or if there was no more suitable role available, redundancy (page 507).

Redundancy

129. The Claimant was very upset after being told that the only suitable role for her was a lower-paid non-managerial role. She felt rejected, degraded and humiliated. On 22 May 2017 she wrote to Mr Ebers to say that as there were currently no suitable jobs available, she felt that redundancy was the best option for her (page 513).

130. Mr Ebers wrote back to the Claimant on 26 May 2017 (the Friday before the May bank holiday weekend) to say that he was prepared to accept her request for voluntary redundancy and that her date of departure would be 31 May 2017 (two working days later) (page 513). He said that HR would follow up with written notification in respect of the severance details.

131. On 30 May 2017, the Tuesday after the bank holiday, the Claimant wrote to Mr Ebers. She thanked him for accepting her request for redundancy but said that the termination date of 31 May 2017 did not give her a lot of time to consider the offer and that she had not had the breakdown of payments. She was still recovering from her operations and would like more time to respond. She ended her email by saying 'Can I please have a week to consider your offer of redundancy and respond to you by 7th June?'

132. On 31 May 2017, the Claimant received an email from Barbara Batchelor of HR confirming that the redundancy letter was sent on 30 May 2017 and notifying her of the payments that would be due (page 529).

133. The redundancy letter was dated 30 May 2017. It said:

"We have since received a formal request for you for Voluntary Redundancy. After careful consideration this has been accepted.

I am therefore writing to give you formal notice of the termination of your employment by way of redundancy on 31st May 2017. "

134. In his evidence, Mr Ebers was not able to provide any explanation as to why the termination of the Claimant's employment was almost immediate and why the Claimant received (largely) pay in lieu of notice rather than the period of notice to which she was entitled. Her minimum statutory notice period, given her length of service, would have been 12 weeks. The Respondent's restructure procedure FAQs document stated that those staff who were made redundant would normally leave at the end of their notice period.

135. On the Claimant's last day of employment, 31 May 2017, she received a job alert from a public sector vacancies website which included advertisements for the two jobs for which she had applied (page 386 to 390). The posts had not been filled during the internal process, and they were now being advertised externally. There were 1.5 Grade 11 roles available (ie one full time, one part time at 0.5 FTE). There were two SM1 roles available. The interviews were due to take place at the end of June.

136. The Claimant had told the Respondent on 16 March 2017 that she expected to have recovered sufficiently to be able to take part in a job interview in June 2017 (page 441). By 19 April 2017 her likely return to work date was clearer: she had been advised that the expected recovery period would be 6-8 weeks after her second operation on 3 May 2017. She was signed off sick until 9 June 2019 and had requested a further three weeks off as annual leave to complete her recovery period (page 519). Her intended return to work date was 3 July 2017.

<u>The Claimant's grievance</u>

137. On 31 May 2017 the Claimant made a formal grievance complaining about her treatment during the restructure.

138. As the grievance was submitted on the Claimant's last day of employment, the Respondent's view was that it was not appropriate to deal with the grievance under the grievance procedure. However, the Respondent's Lead Specialist (Head of Service) for the Legal Department, Sean O'Connor, reviewed the Claimant's complaints and responded to her in a letter dated 21 June 2017 (page 548 to 552). Mr O'Connor did not meet with the Claimant to discuss her grievance before providing his response

to the grievance. None of the issues raised in the Claimant's grievance were upheld.

139. The Claimant was not have the opportunity to appeal against the decision of Mr O'Connor.

Freedom of Information request

140. After her employment ended, the Claimant made a Freedom of Information request. The Respondent replied to the request on around 22 March 2018. The response includes information about the impact of the restructure on staff jobs (page 382). The information shows that 247 staff (219.4 full time equivalent (FTE) staff) were affected by phase 1 of the restructure. Of those 247 staff, 7 had a declared disability.

141. In terms of outcome, 114.79 FTE staff were assimilated or did not have a change to their role. This represents 52% of affected staff. Eight employees were redeployed to a lower grade. This represents around 3% of affected staff.

142. The Respondent's FOI response also showed that around 10.5% of all staff (26 people out of 247 staff) were made redundant in the restructure. For disabled staff this figure was much higher, around 43% (3 disabled staff were made redundant out of a total of 7 members of staff with declared disabilities).

143. The Freedom of Information response also showed that the two vacancies for the Grade 11 role for which the Claimant had applied were not filled until 14 August 2017 and 18 October 2017. As at 14 March 2018, one of the SM1 posts for which the Claimant had applied was vacant and the other was held by a temporary agency worker.

144. The Freedom of information response also showed that there were a number of unfilled vacancies at Grade 10 which were still vacant as at 14 March 2018. These included Senior Specialist (Commissioning Support), a grade 10 role.

The Claimant's claim

145. The Claimant notified Acas for early conciliation on 24 August 2017 and an early conciliation certificate was issued on 24 September 2017. The Claimant's claim was presented on 19 October 2017.

The law

Disability discrimination

146. Disability is a protected characteristic under section 9 of the Equality Act 2010.

Direct discrimination

147. Section 13 of the Equality Act 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."

148. Section 23(1) provides that:

"On a comparison of cases for the purposes of section 13 [direct discrimination] ... there must be no material difference between the circumstances relating to each case."

149. The question of whether a comparator is appropriate is one of fact and degree. Where a possible comparator's circumstances differ materially from those of the claimant, they may still be useful in constructing a hypothetical comparator.

Burden of proof

150. Sections 136(2) and (3) provide for a reverse or shifting burden of proof:

"(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) This does not apply if A shows that A did not contravene the provision."

151. This means that if there are facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent. The respondent must then prove that the treatment was in no sense whatsoever on the grounds of disability. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

152. In Igen v Wong [2005] ICR 931 the court set out 'revised Barton guidance' on the shifting burden of proof. We bear in mind that the court's guidance is not a substitute for the statutory language and that the statute must be the starting point.

153. The bare facts of a difference in status and a difference in treatment 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 has committed an unlawful act of discrimination. "Something more" is needed, although this need not be a great deal: "In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred..." (Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.)

154. If the burden shifts to the respondent, the respondent must then provide an "adequate" explanation, which proves on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of disability. The respondent would normally be expected to produce "cogent evidence" to discharge the burden of proof.

Reasonable Adjustments

155. The Equality Act also imposes on employers a duty to make reasonable adjustments. The duty comprises three requirements. Here, the first and second requirements are relevant, these are set out in sub-sections 20(3) and 20(4). In relation to an employer, A:

"(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."

156. Paragraph 20(1)(b) of Schedule 8 of the Equality Act provides that an employer is not subject to a duty to make reasonable adjustments if they do not know, and could not reasonably be expected to know, that the relevant employee has a disability and is likely to be placed at the identified disadvantage.

Time limit

157. The time limit for a complaint of disability discrimination is set out in section 123 of the Equality Act. This provides that a complaint may not be brought after the end of:

"(a) the period of 3 months starting with the date of the act to which the complaint relates, or

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

158. In promotion cases, time may run from the date of appointment of the comparator where this is the discriminatory act which is the subject of the complaint (Amies v Inner London Education Authority 1977 ICR, 308 EAT).

159. Conduct extending over a period, often referred to as a 'continuing act', is treated as done at the end of the period over which it extends. In Barclays

Bank pls v Kapur and others 1991 ICR 208 HL, the House of Lords held that where an employer operates a discriminatory policy, rule, scheme, regime or practice, that will amount to an act extending over a period. In Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530 CA, the Court of Appeal clarified that these concepts are examples (although not the only ones) of when an act extends over a period.

160. In Aziz v FDA 2010 EWCA Civ 304, CA the Court of Appeal suggested that in considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'.

161. In Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/16/LA, the EAT held that the various steps taken under a disciplinary procedure amounted to conduct extending over a period, rather than a series of separate acts:

"42. By taking the decision to instigate disciplinary procedures, it seems to me that the Respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the Respondent would subject the Claimant to further steps under it from time to time. Alternatively, it may be said that each of the steps taken in accordance with the procedures is such that it cannot be said that those steps comprise "a succession of unconnected or isolated specific acts."

162. Pursuant to section 123(3)(b), a failure to do something is treated as occurring when the person in question decided on it. Sub-section 4 provides more assistance with identifying the date from which the time limit runs where the claimant complains of a failure to act or a discriminatory omission:

"(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

163. The calculation of the time limit in the context of a failure to make reasonable adjustments was considered by the Court of Appeal in the case of Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170, CA. In this case the Court of Appeal held that, for the purpose of claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, the employer is to be treated as having decided upon the omission at one of the two alternative dates set out in section 123(4). The first is when the person does an act inconsistent

with doing the omitted act. If there is no such inconsistent act, the second applies, and this requires consideration of when, if the employer had been acting reasonably, it would have made the reasonable adjustments.

164. Further, the Court of Appeal highlighted that cases where there is no clear communication of a refusal to make adjustments can create very real difficulties for claimants in knowing when or whether a time limit has started to run and that when deciding whether time should be extended in those cases, tribunals 'can be expected to have sympathetic regard' to those difficulties.

165. However, when considering whether to hear a complaint which is on the face of it out of time, 'there is no presumption that [the tribunal] should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule' (Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA).

166. When considering whether to hear a complaint which is out of time, all relevant factors must be taken into account, and relevance will depend on the facts of the individual case. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that the tribunals may have regard to the factors in section 33 of the Limitation Act 1980. Two factors which are almost always relevant are i) the length of and reasons for the delay, and ii) whether the delay has prejudiced the respondent.

167. In Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA the Court of Appeal emphasised that the discretion under section 123 for an employment tribunal to decide what it 'thinks just and equitable' is clearly intended to be broad and unfettered. It held that there is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, only that whether there is an explanation and the nature of the explanation are relevant matters to which the tribunal ought to have regard.

Annual leave and sickness

168. Under the Working Time Regulations 1998, workers are entitled to take paid annual leave during a period of sickness absence if they wish. This has been confirmed by the Court of Justice of the European Union in a series of decisions (Stringer and ors v Revenue and Customs Commissioners; Schultz-Hoff v Deutsche Rentenversicherung Bund and Pereda v Madrid Movilidad SA).

Unfair dismissal

169. Employment may be terminated by the employee (resignation), by mutual agreement between the parties, or by the employer (dismissal, including

constructive dismissal). The form a termination takes is a question of fact and law for the tribunal to determine.

170. The right to complain of unfair dismissal will only arise where there has been a dismissal. Section 95 of the Employment Rights Act 1996 sets out the circumstances in which an employee is dismissed for the purposes of an unfair dismissal claim. It provides:

“(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)1, only if)—
(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.”

171. Section 95(1)(c) refers to the situation known as constructive dismissal. This form of dismissal arises where the employer’s conduct involves a repudiatory breach of contract, entitling an employee to regard herself as dismissed. The leading authority is Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA in which constructive dismissal was described as follows:

‘If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.’

172. In the context of a redundancy or voluntary redundancy situation, careful consideration may be needed to distinguish between termination by mutual agreement and dismissal. Each case will turn on its own facts. It is a matter for the tribunal to decide whether there has been a consensual termination of employment, in which case there will have been no dismissal, or whether an employee has volunteered to be dismissed as redundant, in which case there will have been a dismissal.

173. For example, in Burton, Allton and Johnson Ltd v Peck 1975 ICR 193, QBD, the Claimant had been off work for several months and on his return there was no work for him. He claimed a redundancy payment. The employer argued that because he had been ‘only too willing to be dismissed for redundancy’, there had been a termination by mutual consent. The High Court held that an employee’s agreement to redundancy is no ground for holding that a dismissal did not take place.

174. In Optare Group Ltd v Transport and General Workers' Union 2007 IRLR 931, EAT, the EAT upheld an employment tribunal's decision that three employees who volunteered to leave their posts at the start of a redundancy exercise were dismissed.

175. It is not necessary that an employee has been put under pressure to agree to termination for there to be a dismissal. In Khan v HGS Global Ltd and anor EAT 0176/15 the EAT commented, following Optare, that even a non-pressured termination may still amount to a dismissal. However, the tribunal needs to consider the reality rather than the form of the termination. For example, a formal dismissal by an employer may amount to the mechanism by which a mutual agreement is put into effect.

176. Section 98 of the Employment Rights Act sets out the tests for determining whether a dismissal is fair or unfair. Subsection 1 provides:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

177. Redundancy is a reason falling within subsection (2).

178. If the reason for dismissal is a potentially fair reason within sub-sections (1) and (2), then the tribunal must go on to consider whether the dismissal is fair in all the circumstances of the case, and, under sub-section (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."

Conclusions

179. We have considered the issues for determination in the light of our findings of fact and the legal principles set out above.

Disability – Section 6 Equality Act 2010

180. The Respondent has accepted that the Claimant was a disabled person within the meaning of the Equality Act at all material times.

181. The Claimant's sickness absence from 12 December 2016 to 31 May 2017 and the operations she had on 22 March 2017 and 3 May 2017 were as a result of pushing the wheels on her wheelchair, combined with her neurological condition. Her sickness absence arose from and was related to her disability.

Direct Disability Discrimination (Issue 8)

182. The Claimant complained about the failure to appoint her to the vacant Grade 11 role on 22 November 2016. The Claimant's comparator Ms Rees was appointed to the role and took up the post in January 2017.

183. We have found that between June 2016 and 12 December 2016, the Claimant was carrying out additional management responsibilities as a temporary arrangement. The additional responsibilities were part of a vacant Grade 11 Service Manager role.

184. The respondent conducted an internal appointment process to fill the vacant Grade 11 Service Manager role. The Claimant was unsuccessful in her application for that role. The Claimant was treated less favourably than Ms Rees, who does not have a disability and who was appointed to the role. We conclude that Ms Rees is an appropriate comparator.

185. We have considered whether there are facts from which we could properly and fairly conclude that the difference in treatment was because of the Claimant's disability. We have concluded that there are facts from which we could properly and fairly conclude that the Claimant was not appointed to the permanent Grade 11 role because of her disability. These are:

185.1. The earlier comment by Mr Feven (one of the members of the interview panel) that 'disabled people often take sick leave'. This could suggest that a generalised and negative view of the ability of disabled employees to maintain a good attendance record may have played a part in Mr Feven's consideration of the Claimant's application;

185.2. The earlier comments by Mr Feven that the Claimant was 'not coping' with her role when she raised issues about under-resourcing with him. In the light of our findings that there was in fact nothing to suggest that the Claimant was not coping with her role, these comments are suggestive of a negative view of the Claimant's abilities which could be related to her disability, and this may have formed a part of Mr Feven's reasoning in deciding that the Claimant was not suitable for the role;

185.3. The fact that the Claimant had already been performing a number of elements of the role for six months;

185.4. The fact that Mr Rowbotham, who knew the Claimant's work better than the other two members of the panel, considered her to be the better candidate and clearly scored her performance higher;

185.5. The inaccurate summary of the Claimant's previous work experience which was given in feedback to the Claimant by Mr Feven to explain why her application was unsuccessful;

185.6. The failure by HR and Mr Feven to provide the Claimant with notes and scoring sheets from her interview when she asked, and the abrupt tone of Mr Feven's email response to the Claimant's second request for notes.

186. We therefore concluded that the burden of proof shifts to the Respondent to provide an adequate explanation, which proves on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of disability.

187. We have assessed the explanation provided by the Respondent as to why the Claimant was not appointed to the role of Grade 11 Service Manager. In the Supplementary ET3, the Respondent says that the decision to offer Ms Rees the job was made by a panel of three experienced, senior members of staff based on the performance of both applicants during the interview process, and based on objective scoring criteria.

188. However, we were provided with no notes or scoring sheets from either of the interviews to show the areas on which the Claimant was scored lower than her comparator by Mr Feven and Ms Ramsden (the two interview panel members who in fact made the decision to appoint Ms Rees). We were not told what the scoring criteria were. We did not have copies of any of the emails which were exchanged between the panel on the day after the interviews, which culminated in the decision to appoint Ms Rees.

189. In terms of the witness evidence which we heard, the Respondent did not call either Mr Feven or Ms Ramsden to give evidence. The Claimant provided a written statement from Mr Rowbotham; he considered the Claimant to be the better candidate. The Respondent did not dispute Mr Rowbotham's written statement.

190. Ms Rees, the successful candidate and the Claimant's comparator, gave evidence that she 'would imagine that [the panel] took into consideration all relevant experience and the performance at interview'. However, she was of course not actually able to give evidence as to the decision making process itself, as she was not part of the panel which made the decision. We have not been given any evidence as to why Mr Feven and Ms Ramsden preferred Ms Rees to the Claimant other than the limited feedback which was provided by Mr Feven to the Claimant, and which we have found was not an accurate summary of her work experience and therefore not a cogent reason for the decision not to appoint her.

191. We have concluded that the Respondent has not met the burden of providing cogent evidence to satisfy us that, on the balance of probabilities, the decision by Mr Feven and Ms Ramsden to appoint Ms Rees rather than the Claimant was in no sense whatsoever on the grounds of the Claimant's disability.

192. We have considered the question of whether the Claimant's complaints are in time in a separate section below.

Failure to Make Reasonable Adjustments (Issue 9.1)

193. The Claimant complains that there was a failure to make reasonable adjustments in respect of the layout of the office on the first floor which caused her accessibility issues.

194. We have concluded that a physical feature (the width of the space between the desk in question and the window) put the Claimant at a substantial disadvantage compared with people who do not use a wheelchair.

195. The disadvantage was that the Claimant was unable to access the middle desk in the section of desks which was allocated for use by her team, because the space between that desk and the window was too narrow to allow wheelchair access. The desks and chairs were obstacles preventing access by the Claimant's wheelchair. The Claimant was therefore unable to speak to a member of her team if they were sitting in that middle desk, without having to speak to them across two desks. This was a substantial disadvantage to her ability to manage her team, particularly as there were times when the Claimant needed to speak confidentially to members of her team. A manager who did not use a wheelchair would have been able to access the desks of all of their team. They would have found it much easier to manage their team, including dealing with sensitive health and performance issues.

196. The Respondent was aware of the Claimant's disability and the disadvantage at which she was placed because of the problems with accessibility. She had informed the relevant managers of the issue and the disadvantage to her.

197. In the circumstances, the Respondent was under a duty to make reasonable adjustments to avoid the disadvantage to the Claimant. It could have done so by moving or arranging the desks and chairs so that there were no obstacles to wheelchair access (or by allocating a different section of desks to the Claimant's team). It failed to do so and we have concluded that there was a failure to make reasonable adjustments in this regard.

Failure to Make Reasonable Adjustments (Issue 9.2)

198. This issue concerns the Claimant's complaint that there was a failure to carry out a risk assessment for at least two years prior to the termination of her employment on 31 May 2017.

199. We have found that for a period of at least two years prior to the termination of the Claimant's employment on 31 May 2017 the Respondent did not carry out any risk assessment for the Claimant and

that, if a risk assessment had been carried out for the Claimant, the evident additional risks to her arising in a fire or emergency would have been identified by the Respondent, and a PEEP would have been put in place for her.

200. We bear in mind here the scope of the duty to make reasonable adjustments and limits to the duty clarified in the EAT decision in the case of Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664. That case and subsequent cases following Tarbuck make clear that the duty to make reasonable adjustments does not include a duty to actively consult the employee about what adjustments should or should not be made.

201. The Claimant's complaint here is not about a failure to consult with her about what reasonable adjustments would be appropriate in her case, but rather a complaint about the failure to assess whether additional emergency arrangements were required in her case, and to record any additional arrangements in a PEEP. This is different to the type of assessment which was being considered in Tarbuck.

202. The failure to carry out a risk assessment of the risks in emergency situations amounts to a practice by the Respondent, and is a PCP within the meaning of section 20.

203. We have found that the failure to carry out a risk assessment for the Claimant put her at a substantial disadvantage. The Claimant was evidently at a greater risk than others in the event of a fire or emergency because she uses a wheelchair and worked on the first floor. This amounted to a substantial disadvantage.

204. It was very clear from the Respondent's evidence that no consideration had been given to the arrangements which were required to protect the Claimant in the event of an emergency. There was no satisfactory explanation as to how, in the absence of an assessment and a PEEP, the Respondent expected its fire wardens to be aware that they may need to assist the Claimant to evacuate the building or that they may need to check the safe area in which she may have been waiting for assistance. There was no consideration of how the Claimant and her wheelchair would be taken to the ground floor if the building had to be evacuated.

205. Because of the greater risk the Claimant was at and the Respondent's failure to consider how to address it, the Claimant felt less safe in the office than she would have done if an emergency risk assessment had been carried out and a PEEP put in place. This was also a substantial disadvantage. The Respondent was aware of the Claimant's disability and it should have been apparent that she would have been at a disadvantage in an emergency situation compared to employees who do not use a wheelchair.

206. In the circumstances, the Respondent was under a duty to make reasonable adjustments to avoid the substantial disadvantages to the Claimant. It could have done so by carrying out a risk assessment of the

risks to the Claimant during an emergency, and by putting in place a PEEP for the Claimant. The risks would have been identified, and specific arrangements for the Claimant in the event of an emergency could have been made and recorded in a PEEP. This would have reduced the risks to the Claimant and made her feel more safe. These would have been reasonable adjustments for the Respondent to have made.

207. We have concluded that the failure to carry out an assessment of the risks to the Claimant in emergency situations and the failure to put in place a PEEP for the Claimant amounted to a failure to make reasonable adjustments.

Failure to Make Reasonable Adjustments (Issue 9.3)

208. This issue concerns the Claimant's complaint about the 21st Century Council restructure programme.

209. The PCP relied on by the Claimant as identified at the preliminary hearing (and clarified at the full hearing) was the requirement to go through an interview and selection procedure as part of the restructuring of her department, which was part of the Respondent's 21st Century Council restructure. We conclude that the interview and selection procedure (under which all staff including the Claimant who had not been assimilated to a role in the new structure were required to apply for a role in the new structure) was a provision, criterion or practice which was applied by the Respondent.

210. The Claimant was unable to attend an interview in person due to pain and the after effects of the two operations and the effects of strong medication. If the Claimant had been able to attend an interview in person, this would have given an additional opportunity (over and above her paper application) for the selection panel to clarify and seek further information about the Claimant's application, and for the Claimant to provide more evidence as to her suitability for the posts she was applying for. As a result of not being able to attend an interview, she was at a substantial disadvantage compared with staff who are not disabled and who were going through the interview and selection procedure.

211. The selection procedure further substantially disadvantaged the Claimant because she had to complete her Expressions of Interest forms and other paperwork at a time when she was in pain, on medication and had great difficulty typing, concentrating and staying awake. For both reasons, her ability to prepare strong applications and give a proper representation of her abilities and experience in the interview and selection procedure was significantly compromised by her health issues at this time.

212. The Respondent was aware of the Claimant's ill health arising from her disability and the effect it had on her ability to participate in the interview and selection procedure and the manner in which she was disadvantaged. The Claimant had made this clear to HR and her managers on a number

of occasions. The Respondent was therefore under a duty to make reasonable adjustments to avoid the substantial disadvantage to the Claimant.

213. The Respondent initially suggested adjustments which would permit the Claimant to undergo an adjusted in-person interview. The Respondent proposed an interview with breaks, a longer interview, or an interview at the Claimant's home. Given the Claimant's health at this time, these adjustments would not have avoided the disadvantage to the Claimant. It would not have assisted her to have had a longer interview, or for the overall time to have been longer because of breaks, or to have had an interview at home where she may not have been well enough to get out of bed. With any of these adjustments her concentration would still have been likely to have been restricted because of pain and the effects of medication. It is very unlikely that she would have been able to demonstrate her skills and experience fully at an adjusted in-person interview at this time. We did not consider that the Claimant was being unhelpful or unreasonable in refusing these adjustments. We conclude that, given the Claimant's health at the time, it would clearly not have been appropriate to interview the Claimant, even with these adjustments, and that these adjustments would not have avoided the disadvantage to the Claimant.

214. We have next considered each of the three adjustments set out in the amended list of issues, and asked whether the adjustment would have avoided the disadvantage to the Claimant and whether it would have been reasonable for the Respondent to have taken that step. The proposed adjustments were: (1) Assimilation to one of the jobs applied for (Senior Specialist Commissioning) (2) Use the Claimant's expression of interest as a selection tool (instead of a job interview which she was medically unfit to take part in) for the Senior Specialist Commissioning job and the Category Manager (3) Waiting for the Claimant to recover from her operations and take part in a selection process.

215. We have started with the second suggested adjustment, which was to use the Claimant's EOI form as a selection tool. We have found that this adjustment was partially put in place by the Respondent. The Respondent used the Claimant's EOI form as a selection tool instead of requiring the Claimant to attend a job interview for the Grade 11 Senior Specialist Commissioning role. The Respondent described the use of the EOI form in the selection process for the Senior Specialist Commissioning role as a 'assessment in lieu of an interview' (page 302).

216. This adjustment was not put in place in relation to the SM1 Category Manager role. The Respondent did not consider that the Claimant was sufficiently qualified to merit an interview for this role, and therefore used the EOI form only for the shortlisting stage of the procedure, not instead of an interview.

217. As part of the interview and selection process for the Senior Specialist Commissioning role, the Respondent also gave the Claimant two opportunities to provide further written information, on 12 April 2017 and 28 April 2017. On 12 April 2017 the Claimant was not well enough to provide further information. In response to the request of 28 April 2017, the Claimant did provide information with the assistance of her husband.

218. We have concluded that the adoption by the Respondent of this second adjustment in respect of the Senior Specialist Commissioning role did not avoid the substantial disadvantage to the Claimant compared to other staff who were not disabled, for two reasons:

218.1. First, the Claimant was still required to complete the forms as part of the selection process for the role. Because of her ill health, the Claimant was not performing to her full capability when she had to to complete the forms. The Claimant had made the extent of her ill health and the impact it had on her ability to complete paperwork very clear to the Respondent, and had explained the pain she was in while doing so. Her completed EOI forms may not have been a fair reflection of her abilities/experience;

218.2. Secondly, conducting a paper-based interview denied the Claimant the opportunity to respond in person to questions and queries by the panel on areas of her application where they felt more evidence or information was required. It would have been much more obvious to an applicant in an interview what sort of examples were required. Specific guidance to interviewees spelled this out. It is also clear from the guidance to interviewers that questions were to be re-phrased or a different question put if a candidate did not understand. Candidates would have had the opportunity to clarify exactly what the panel was seeking and would have been probed by the panel to ensure they could give a proper representation of their abilities and experience. The Claimant did not have that opportunity. Mr Gibbons' email on 28 April 2017 asking the Claimant for further information in writing set out only in very generic terms the kind of additional details which were being sought. As the Claimant said in her response, it was not clear what was being asked of her. The information she did provide was felt by Mr Feven and Mr Gibbons to be inadequate.

219. Further, the disadvantage which the Claimant was under, as a result of being required to complete the selection process paperwork whilst unwell and not being able to attend an interview, was compounded by the fact that the Respondent placed the burden on the Claimant to persuade them of her suitability for the roles she had applied for. The reasons given by the Respondent's witnesses as to why the Claimant could not be appointed to the Grade 11 role for which she applied were that the additional information she had given "was not compelling enough" (Mr Gibbons) and that "the panel were not able to conclude that the information provided by the Claimant evidenced the necessary requirements at the appropriate levels in all areas required" (Mr Ebers).

220. The panel members considered only the information the Claimant had provided in her EOI forms, and placed the burden on the Claimant to convince them of her suitability for the role, rather than considering the Claimant's suitability for the roles themselves, and conducting any wider enquiry they considered necessary to fill any gaps. This was despite the Claimant having made clear that she was not performing to her full capability when she completed the forms and despite the Claimant providing other sources of information for the Respondent to consider, such as information about projects she had carried out for the Respondent and managers they could speak to (page 428-429).

221. We have concluded that the Claimant remained at a substantial disadvantage in the interview and selection process even though the Respondent put in place an adjustment permitting her to undergo a paper-based interview and selection procedure for the Grade 11 role.

222. We have next considered whether the other two adjustments set out in the amended list of issues would have avoided the disadvantage to the Claimant and would have been reasonable steps for the Respondent to have taken.

223. Reasonable adjustment (1) suggested by the Claimant was assimilation to the Grade 11 role of Senior Specialist (Strategy and commissioning). Assimilating the Claimant to the Grade 11 role would have avoided the substantial disadvantage to her from the interview and selection procedure because she would not have been required to complete documents (or would at least not have been required to provide any further information after completing her assimilation request and EOI forms) and she would not have been required to go through an interview (or an alternative paper-based interview) and selection procedure while she was unwell.

224. In the light of our conclusion that assimilation to the Grade 11 role would have avoided the substantial disadvantage that the Claimant was under, we have considered whether it was reasonable for the Respondent to have taken this step. In doing so, we have considered the procedure which the Respondent followed when considering the Claimant's request for assimilation to the Grade 11 role and the reasons the Respondent gave for not assimilating the Claimant to the Grade 11 role.

225. The request for assimilation was considered by the Corporate Leadership Team (CLT) but declined. Mr Ebers was a member of the CLT. He did not recall any specific detail of the consideration of the Claimant's request. His evidence was that, based on the information available, the Claimant could not be assimilated to the Grade 11 role as it was a higher-grade role with additional responsibilities and status compared to her existing role.

226. The Respondent's consideration of the Claimant's request for assimilation was inadequate and did not comply with the procedure set out in its restructure briefings. No matching exercise was carried out and there does not appear to have been any detailed comparison of the role the Claimant

was performing and the role she asked to be assimilated with, other than to note that there was a difference in grade. There was no evidence to suggest that the CLT took into account the fact that the Claimant had performed some of the duties of a Grade 11 role during the period June 2016 to 12 December 2016. As with the selection procedure, the onus was very much on the Claimant to provide information about her suitability, even though she was on disability-related sick leave. The Claimant had suggested a number of colleagues who would have been able to provide additional information in support of her assimilation request, but the Respondent did not follow this up (page 429).

227. The lack of a detailed analysis of the Claimant suitability for the Grade 11 role was in stark contrast with the Respondent's approach when, later in the process, it was considering a lower-grade role for the Claimant. At that stage, Mr Feven carried out a detailed spreadsheet-based comparison of each element of the Claimant's existing role and the Grade 9 role which she was offered. A figure showing a match of 83.75% was arrived at. No percentage match was calculated when the Respondent was considering the Claimant's suitability for the Grade 11 role. This was contrary to the Respondent's procedure which clearly anticipated that a detailed analysis would be carried out, as it provided that assimilation would be appropriate where there was a match of 80% or more.

228. If the Respondent had properly compared the Claimant's existing role and experience, and the Grade 11 role to which she asked to be assimilated, it would have been apparent that the Claimant's skills and experience were very similar to the Grade 11 role, particularly when the additional management responsibilities which the Claimant had performed were taken into account.

229. We conclude that it would have been reasonable to assimilate the Claimant to the Grade 11 role to avoid the disadvantage to her from the restructure process. Alternatively, it would have been reasonable to assimilate the Claimant to the Grade 11 role with a performance development plan as provided for in the restructure procedure or on a trial basis (as was proposed with the Grade 9 role). We have found that in either case the Grade 11 role would have been made permanent for the Claimant.

230. We have concluded that the following factors, none of which appear to have been considered by the CLT at the time it took its decision, also suggest that it would have been reasonable for the Respondent to assimilate the Claimant to the Grade 11 role:

230.1. The role and additional responsibilities being performed by the Claimant before her sick leave were very similar to the Grade 11 role;

230.2. the Claimant had 17 years' service with the Respondent;

230.3. there was no Grade 10 role available in the Claimant's department and the Grade 11 role was initially described as 'Grade 10 or 11';

230.4. the Claimant was on long-term disability-related sick leave and required adjustments to avoid being disadvantaged by the interview and selection process, and a paper-based assessment for a candidate who was being required to make a compelling case for assimilation or appointment to the role was unlikely to avoid that disadvantage.

231. We conclude that assimilation of the Claimant to the Grade 11 role without requiring her to go through an interview and selection procedure was, in the Claimant's circumstances, a reasonable adjustment which the Respondent should have made, even if assimilation to a higher grade was not normally done. It would have wholly avoided the disadvantage to the Claimant.

232. Lastly in relation to this complaint, we have considered reasonable adjustment (3) in the amended list of issues, which was to wait for the Claimant to recover from her operations and take part in a selection process once fit to return to work. In the light of our conclusion that assimilation to the Grade 11 role would have been a reasonable adjustment, we do not need to consider this alternative adjustment, but we have done so for completeness.

233. We have concluded that the third adjustment would have reduced (although not avoided entirely) the substantial disadvantage the Claimant was under, because it would have given the Claimant the opportunity to attend an interview (for either the Grade 11 or SM1 roles) once she was well enough. She would still have been disadvantaged by having to have completed the documentation while unwell, but allowing her an interview would have avoided some of the disadvantage of a purely paper-based assessment.

234. The Claimant expected to be well enough to return to work on 3 July 2017. The Respondent's witnesses said that it would not have been reasonable to wait for the Claimant to return to work then offer her an interview, as they wanted to fill the more senior posts first, and they did not wish to hold up recruitment for more junior posts. However we have found that the Respondent did not wait for all the senior roles to be filled before filling the more junior roles in the team, since Ms Rees told the Claimant by text on 26 April 2017 that 5 members of the Claimant's team had been successful in reapplying for their jobs. On this date, according to the FOI response, neither the SM1 or Grade 11 roles for which the Claimant had applied had been filled.

235. Further, as it turned out, neither of the 1.5 Grade 11 roles or the two SM1 roles which the Claimant had applied for were filled on the date she left the Respondent's employment, and they were not filled by the date the Claimant would have been fit to take part in a selection process.

236. We have concluded that in the Claimant's circumstances it would have been reasonable for the Respondent to wait for the Claimant to return from

sick leave and then take part in the interview and selection process for the Grade 11 and/or SM1 roles; the Respondent failed to make this reasonable adjustment.

237. There were no other suitable internal applicants for the Grade 11 role. We have concluded that if the Respondent had waited and allowed the Claimant an interview in person for the Grade 11 role (and assuming this interview was conducted fairly), she would have been appointed to the role.

238. In summary on this complaint, we have found that the Respondent failed to make reasonable adjustments to the interview and selection procedure, and specifically that it failed to assimilate the Claimant to the Grade 11 role and it failed to wait for the Claimant to return to work to allow her an interview for the Grade 11 and/or SM1 roles.

<u>Failure to Make Reasonable Adjustments (Issue 9.4)</u>

239. The Claimant's fourth complaint of failure to make reasonable adjustments concerns the Respondent's refusal to allow her to take annual leave for three weeks for the period 12-30 June 2017.

240. We conclude that the Respondent's sick leave and annual leave policies, and the refusal to allow the Claimant to take three weeks of her annual leave at the end of her sick leave amounted to a provision, criterion or practice.

241. The PCP put the Claimant at a substantial disadvantage because she required leave to recover from her operations which were disability-related. A non-disabled employee who did not have to have operations would not have been unfit to work and would not have required time off work. As the Respondent would not permit the Claimant to take annual leave during her recovery period, she would have to take sick leave. The Claimant would have been financially disadvantaged by this: sick leave during the period 12 – 30 June 2017 would have been paid at half pay, whereas annual leave during the same period would have been paid at full pay.

242. The Respondent's policies on sick leave and annual leave did not expressly say that an employee on sick leave is permitted to take annual leave before they are certified as fit to return to work. Equally, the policy did not say that an employee is not permitted to do so. The policies did not expressly deal with the point.

243. The Respondent refused to allow the Claimant to take annual leave while unfit for work. Ms Rees told the Claimant that as there was no provision in the Respondent's policies to allow her to take leave in these circumstances, she was unable to agree it.

244. Ms Rees had discussed the issue with HR and both had concluded that to allow the leave would not be line with the purpose of annual leave which is

to allow an employee proper rest and a break from work. The tribunal does not consider that this means that that an employee who is unfit for work is not permitted to take annual leave. Under the Working Time Regulations 1998, workers are entitled to take paid annual leave during a period of sickness absence if they wish. This has been confirmed by a series of decisions of the Court of Justice of the European Union.

245. The Claimant was not expressly seeking to take statutory annual leave under the Working Time Regulations and her request may have been for contractual annual leave (or a mixture of both). However, we have concluded that the position established by the CJEU decisions makes clear that there is no reason in principle why an employee should not be permitted to take annual leave during or after a period of sick leave, even if they are not at that time fit for work. In other words, there is no requirement that to take annual leave an employee must be fit for work.

246. Allowing the Claimant to take annual leave for the period in question would have been financially advantageous for the Respondent as well as the Claimant, as the Respondent would then have paid the Claimant full pay for one three week period of annual leave, rather than half pay for a three week period of sick leave plus full pay for a further three week period of annual leave at a later date.

247. The Claimant would have been absent from work for the period from 12 to 30 June 2017 in any event. She had been open with the Respondent about her health position during this time, and the reason why she was seeking to take annual leave for the last three weeks before her return to work.

248. We have concluded that it would have been a reasonable adjustment to have allowed the Claimant to take annual leave for the period from 12 to 30 June 2017 as she requested, and that the Respondent failed to make this adjustment. The Respondent's policy or practice of not allowing the Claimant to take annual leave because she was not fit to work was discriminatory.

249. In the event, this was superseded by the termination of the Claimant's employment on 31 May 2017, as the Claimant was no longer employed during the period for which she had sought to take annual leave.

Unfair Constructive Dismissal (issue 10)

250. The Claimant's final complaint is of unfair constructive dismissal.

251. We have first considered the nature of the termination of the Claimant's employment and whether there was a dismissal (constructive or otherwise).

252. The termination of the Claimant's employment was prompted initially by her request for redundancy sent on in an email of 26 May 2017 to Mr

Ebers. We bear in mind however that an employee's request for or agreement to redundancy does not mean that a dismissal has not taken place, even where the employee was under no pressure to agree.

253. In the Claimant's case, although it was a request by the Claimant which prompted the Respondent's decision to proceed with redundancy, the Claimant did not actually agree to the termination by reason of redundancy on 31 May 2017. The correspondence does not support a conclusion of either resignation by the Claimant or termination by mutual agreement.

254. The Respondent's decision to dismiss the Claimant on 31 May 2017 was recorded in its letter of 30 May 2017, and was described as a termination by way of redundancy. In her email of 30 May 2017, the Claimant did not agree to redundancy, but rather asked for the termination date to be delayed by one week to allow her to consider the redundancy offer. The Respondent did not agree to the delay requested by the Claimant. It is clear from this chronology and the wording of the redundancy letter that the termination on 31 May 2017 was not a termination by the Claimant or a termination by mutual agreement but was a dismissal for redundancy by the Respondent.

255. As we have found that the Claimant was dismissed, we have considered whether the dismissal was fair or unfair.

256. We find that the dismissal was for redundancy. Following the restructure, the Respondent no longer required an employee to carry out work of the kind previously done by the Claimant in her Grade 10 role. This is a potentially fair reason for dismissal.

257. We also need to consider whether the dismissal of the Claimant was fair in all the circumstances, taking into account the size and administrative resources of the Respondent.

258. We have concluded that the Claimant's dismissal was not fair. In terms of the broad features of the restructure procedure, the Respondent did take some modified steps best it could given that the Claimant was on sick leave throughout the process. It notified her that she was at risk and that a 30 day consultation period would follow, it held an individual consultation meeting with her at home and provided some assistance with the redundancy selection process.

259. Importantly however, the Respondent failed to give proper consideration to suitable alternative employment. This overlaps to some extent with the matters considered in relation to the reasonable adjustments claim at issue 9.3. We conclude that the Respondent failed to give sufficient consideration to whether the Grade 11 role was a suitable alternative role for the Claimant. We conclude that it was. She should have been offered the role as a suitable alternative, or at least offered a trial period in this role. We have found that the Claimant would have been able to perform the Grade 11 role.

260. Further, the Respondent failed to consider whether there were other suitable roles which the Claimant could have been offered before redeploying her to a Grade 9 role. We have found that there was at least one other Grade 10 role in commissioning support which was vacant until 30 August 2017.

261. It was reasonable for the Claimant to reject the offer of the Grade 9 role which had no management responsibilities, when she had been working at Grade 10 and had been given additional management responsibilities at Grade 11 for a period of over six months. The Grade 9 role was a lower status and lower paid job. Although the Claimant would have had pay protection, this was for a limited 18-month period only.

262. Finally, we conclude that the failure to give the Claimant her full notice is another factor suggesting the dismissal was unfair. The Respondent was unable to explain why termination took effect so quickly, despite the Claimant asking for more time. If the Respondent had complied with its restructure procedure and given the Claimant full notice of her redundancy rather than terminating her employment almost immediately, she would have returned to work and could have been considered for alternative roles during her 12 week notice period. There were a number of posts still vacant for some weeks after 31 May 2017, including both of those the Claimant had applied for and another job at Grade 10.

263. Bearing in mind these factors and the Claimant's lengthy (17 year) service, we have concluded that the Claimant was dismissal for redundancy was unfair.

264. Issues relating to the Acas Code of Practice will be considered at the remedy hearing. These include whether there was a requirement in this case for the Respondent to follow the Acas Code of Practice on Disciplinary and Grievance Procedures once the Claimant had left her employment, and if so whether the Respondent's failures to follow the Code (such as the failure to have a meeting with the Claimant and the failure to allow an appeal) were unreasonable in the circumstances of the case.

Time limits

265. Finally, we have considered the time limits for each of the various complaints.

266. We have concluded that the Claimant's complaints at issues 9.3, 9.4 and 10 were presented within the three month time limit.

267. The Claimant's complaint at issue 9.3 was that she was subject to a restructure process which included a requirement to go through an interview and selection procedure during the period from 9 February 2017 to the end of her employment on 31 May 2017. We conclude that the

interview and selection process under the restructure programme is similar to a disciplinary process such as that considered in the case of Hale v Brighton and Sussex University Hospitals NHS Trust. By its decision to notify the Claimant that she was at risk of redundancy as her role was being removed, the Respondent created a state of affairs that would continue until either it was confirmed to the Claimant that she had been appointed to a new role, or until her employment came to an end. The actions the Claimant complains about concerning the requirement that she go through an interview and selection process amounted to conduct extending over a period, starting with the notification on 9 February 2017 that her role was at risk under the restructure programme and ending with the termination of her employment on 31 May 2017.

268. The three month time period under section 123(1)(a) for bringing a claim about the requirement to go through an interview and selection procedure therefore started on 31 May 2017 and ended on 30 August 2017. The Claimant notified Acas for early conciliation on 24 August 2017 (Day A) and an early conciliation certificate was issued on 24 September 2017 (Day B). The time to present a claim would be extended by section 140B (3) of the Equality Act by one month, to 30 September 2017. As this date was within one month of Day B, the time limit was extended by section 140B (4) to 24 October 2017. The Claimant's claim form was presented on 19 October 2017 and so the complaint of failure to make reasonable adjustments at issue 9.3 was in time.

269. Issue 9.4 concerned the Respondent's refusal to allow the Claimant to take annual leave while unfit for work. The reason relied on by the Respondent for this refusal was that there was no provision in the Respondent's policies to allow the Claimant to take annual leave in these circumstances. We have concluded that the Respondent operated a discriminatory policy or practice in this regard, and that this amounted to an act extending over a period while the policy remained in place, which was, for the Claimant, while she remained employed by the Respondent. The time period therefore started on 31 May 2017 (as with the complaint under issue 9.3) and this complaint was also brought in time.

270. For the complaint of unfair dismissal (issue 10), the Claimant's effective date of termination was 31 May 2017. This was the date on which the Respondent's notice of dismissal given on 26 May 2017 took effect. Under section 111 of the Employment Rights Act, the time limit for her complaint of unfair dismissal was 30 August 2017. The impact of Acas early conciliation is dealt with at section 207B of the Employment Rights Act and is to the same effect as section 140B of the Equality Act, meaning that the time limit for the complaint of unfair dismissal was 24 October 2017, and so it was in time when presented on 19 October 2017.

271. We have next considered the complaints at issues 8, 9.1 and 9.2, starting with the dates on which these complaints should have been presented.

272. Issue 8 is the Claimant's complaint about the failure to appoint her to the vacant Grade 11 role on 22 November 2016. The Respondent decided on the same day to appoint her comparator Ms Rees, although she took up the role in January 2017. We conclude that the time limit should run from the date of the decision not to appoint the Claimant and to appoint her comparator instead, ie 22 November 2016. Although she did not take up her role until January 2017, the Claimant's comparator Ms Rees was appointed on 22 November 2016. This gives a deadline of 21 February 2017. The Claimant's claim was not presented until 19 October 2017. Acas early conciliation had no effect on this, as the time limit had already expired before Day A.

273. In respect of issue 9.1, the complaint relates to the period starting on 26 July 2013. The Claimant's access to the middle desk was restricted from this date until the last day she was at work before starting sick leave on 12 December 2016. Whilst she was on sick leave, the Claimant was not substantially disadvantaged by the restricted access. The failure to make adjustments in this respect did not impact on the Claimant's ability to remain at or return to work; she would have had to take sick leave even if the adjustment had been made, and would not have been able to return to work any sooner if the adjustment had been made.

274. We conclude therefore that the Respondent's failure to make this adjustment amounted to conduct extending over the period from 26 July 2013 to 11 December 2016. The Respondent's failure to make adjustments during this period was a discriminatory omission. There was no suggestion or finding that there was any deliberate failure to act. The Respondent did not, during this period, do any act inconsistent with making this adjustment and did not assert that it would have been reasonable to have expected it to have made an adjustment by an earlier date. We have concluded that the Respondent might reasonably have been expected to have made the adjustment of arranging the office furniture/allocation of desks to ensure that the Claimant was not disadvantaged at any point up to 11 December 2016.

275. In relation to issue 9.2, the complaint relates to the two year period from 31 May 2015 to 31 May 2017. Whilst she was on sick leave, the Claimant was not substantially disadvantaged by the lack of emergency arrangements and PEEP. The failure to make adjustments in this respect did not impact on the Claimant's ability to remain at or return to work; she would have had to take sick leave even if the adjustment had been made, and would not have been able to return to work any sooner if the adjustment had been made.

276. We conclude that the Respondent's failure to make this adjustment amounted to conduct extending over the period from 31 May 2015 to 11 December 2016. The Respondent's failure to make adjustments during this period was a discriminatory omission. Again, there was no finding or suggestion that there was any deliberate failure to act. The Respondent did not, during this period, do any act inconsistent with making this

adjustment and did not assert that it would have been reasonable to have expected it to have made an adjustment by an earlier date. We have concluded that the Respondent might reasonably have been expected to have made the adjustment of carrying out a risk assessment and putting in place a PEEP at any point up to 11 December 2016.

277. The three-month time period within which each of the Claimant's first three complaints of disability discrimination should have been brought therefore ended on the following dates:

    277.1. Issue 8: 21 February 2017 (in respect of the Respondent's appointment of the Claimant's comparator on 22 November 2016 to the vacant Grade 11 role);
    277.2. Issue 9.1: 10 March 2017 (in respect of the Respondent's failure to make adjustments to address accessibility issues over the period from 26 July 2013 to 11 December 2016);
    277.3. Issue 9.2: 10 March 2017 (in respect of the Respondent's failure to carry out a risk assessment and put in place a PEEP over the period from 31 May 2015 to 11 December 2016

278. However, having carefully considered the time frame for each of the Claimant's complaints, we conclude that the matters complained about in issues 8, 9.1 and 9.2 formed part of a continuing act of discrimination with the later complaints of disability discrimination at issues 9.3 and 9.4.

279. All of the Claimant's complaints took place within a period of just over six months, from 22 November 2016 to 31 May 2016. There was an overlap in terms of those complained about: the complaint relating to the Grade 11 appointment in November 2016 concerned a decision by Mr Feven and Ms Ramsden. The later complaint about the decision not to appoint the Claimant to a Grade 11 role in the restructure also concerned Mr Feven, and Ms Ramsden was involved in the decision as to the SM1 role.

280. The complaints about the failure to make adjustments in respect of accessibility and the risk assessment/PEEP are of a similar nature to the complaint about the restructure, where we have found that the Respondent did not take sufficient steps to prevent the Claimant from being disadvantaged by her disability.

281. Overall, when we consider the substance of the complaints as a whole, we consider that they can be said to be part of one continuing act of disability discrimination by the Respondent.

282. In case we are wrong about this, we also conclude that the complaints were brought within such further period as we think just and equitable. We bear in mind that exercise of discretion is the exception rather than the rule. We have carefully considered the length of the delay in presenting the claims. On the face of it, the delay appears to be of 7-8 months, from February/March 2017 when the claims should have been presented, to 19 October 2017 when the claim was presented. This is not an insubstantial

delay. However, we consider the following to be important factors weighing in favour of extending time:

282.1. The Claimant was engaged in the Respondent's grievance procedure for a period of around 3 weeks;
282.2. The Claimant was engaged in Acas early conciliation for a further month;
282.3. All of the acts complained about by the Claimant took place over a period of just over 6 months, from 22 November 2016 to 31 May 2017;
282.4. For almost the whole of this period, from 12 December 2016 to 31 May 2017 the Claimant was on sick leave and was very unwell, to the extent that she found it very difficult to deal with work and completing documents;
282.5. The Claimant was, during the period 9 February 2017 to 31 May 2017 having to prioritise dealing with the restructure programme.

283. We have also considered whether the delay has prejudiced the Respondent. In relation to the direct disability complaint at issue 8, the Respondent did not suggest that it would have been able to rely on additional evidence if this complaint had been made earlier. In relation to the complaints of failure to make reasonable adjustments at issues 9.1 and 9.2, the Respondent was able to rely on the evidence of Mr Hing who was the relevant Head of Service, and, again, there was no suggestion that additional evidence would have been available if the claim had been brought earlier.

284. On balance, we have concluded that, if our conclusion about the continuing act of discrimination is wrong, it would in any event be just and equitable to hear the Claimant's complaints numbered issues 8, 9.1 and 9.2 out of time.

<u>Summary</u>

285. In summary, it is the unanimous decision of the tribunal that the Claimant's complaints of direct disability discrimination, failure to make reasonable adjustments and unfair dismissal succeed.

286. The case has been listed for a remedy hearing; separate notification of this hearing has been sent to the parties.

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Employment Judge Hawksworth

Date: ……… 24 June 2019 …………..

Sent to the parties on: ....

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For the Tribunals Office

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