EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
Ms M Labongo	**v Medicines and Healthcare Products Regulatory Agency**

Heard at: London Central
On: 4– 8, 11 - 12 March 2019
In chambers: 2 and 4 July 2019

Before: Employment Judge Lewis
Ms S Samek
Ms L Jones

Representation

For the Claimant: In person.
Assisted by Mr T Akinsanni on several days.

For the Respondent: Mr S Murray, Counsel

RESERVED JUDGMENT

The unanimous decision of the tribunal is that:

1. The respondents failed to make reasonable adjustments by enlarging the font in emails and hard copy correspondence in the period November 2017 – January 2018.

2. The claimant's other claims are not upheld.

3. A remedy hearing will be held as agreed on Tuesday 3 December 2019 when compensation for the successful claim will be resolved. In general, compensation for discrimination can be a sum for injury to feelings attributable to the actions

which were found to be unlawful; compensation for any financial loss attributable to those actions (there may not be any financial loss in this case) and interest. A tribunal can also make recommendations for any action by the respondents which would obviate or reduce the effect on the claimant of any matter to which the claim related.

4. By **1 October 2019** the claimant must do two things:

    a. Provide both the tribunal and the respondents a written statement setting out what compensation she will be seeking by way of remedy and how it is calculated. This must relate solely to compensation for the fact that font was not enlarged between November 2017 and January 2018. It is not necessary for the claimant to calculate interest. If she would like the tribunal to make any recommendations, she should also set these out. This statement must be no more than 500 words.

    b. A short witness statement relevant to compensation for the claim which has been upheld, eg explaining the claimant's feelings about the matter. As a rough guide, this can be anything between 500 and 3000 words, depending on what the claimant wants to say.

5. By **21 October 2019** the respondents must provide the claimant (in front size 20) and the tribunal with a written response to the claimant's written statement.

6. The notice pay claim will also be decided at that hearing. It is not necessary for either side to put anything in writing about this.

7. Ideally, the parties will be able to agree compensation and any recommendations without the need to come back to the tribunal. If so, the tribunal should be notified as soon as possible and in any event, by **1 November 2019.**

REASONS

Claims and issues

1. The claimant brought claims for unfair dismissal, disability discrimination, holiday pay and notice pay. The respondents accepted that the claimant was a disabled person at the relevant time by reason of her visual impairment.

2. The issues were those set out in the claimant's particulars at pages 75 – 79 of the trial bundle and are set out in a more user-friendly form as follows.

3. Whether the respondents failed to make reasonable adjustments to enable the claimant to do her job successfully from 2014 to her dismissal by:
   3.1. Providing working software for visual impairment compatible with the hardware needed by the claimant.
   3.2. Providing the hardware ie a large monitor.
   3.3. Providing a permanent desk as opposed to requiring the claimant to hot desk.
   3.4. Providing glasses for visual impairment to use with the software.

4. Whether the respondents treated the claimant unfavourably because of something arising in consequence of her disability by dismissing her because of her level of sick leave.

   The claimant says her level of sick leave was because of her disability or because of related-stress as a result of:
   (i) the disciplinary action taken against her, ie the final written warning in April 2014. The two allegations which were upheld against the claimant were selectively processing non-serious cases and manipulating workflow. The claimant says these actions were because she was unable to meet her targets because of her visual impairment and because of the failure to make reasonable adjustments (see (iii))
   (ii) the prolonged stage 4 process followed by the respondents
   (iii) the failure to make the reasonable adjustments set out at paragraph 3.1 – 3.3 above and to ensure they continued to work
   (iv) the failure to give her time to familiarise herself with the adjustments so she could effectively carry out her role.

5. If so, whether the respondents can show that the dismissal was a proportionate means of achieving a legitimate aim.

6. Whether the respondents treated the claimant unfavourably because of something arising in consequence of her disability by failing to obtain up-to-date medical and disability-related advice on her condition so as to make an informed decision regarding her continued employment.

7. If so, whether the respondents can show that this was a proportionate means of achieving a legitimate aim.

8. Whether the respondents failed to make a reasonable adjustment in the period November 2017 – January 2018 including the December 2017 dismissal letter by communicating with the claimant in a suitable way, eg using a font size which she could read. The claimant says she was put at a disadvantage by having constantly to read communications from the respondents.

9. Whether from 2014 to her dismissal, the respondents treated the claimant unfavourably because of something arising in consequence of her disability by not following and implementing an internal Managing Absence Policy and Sickness Policy prior to her dismissal.

10. If so, whether the respondents can show that this was a proportionate means of achieving a legitimate aim.

11. Whether in December 2017 the respondents treated the claimant unfavourably because of something arising in consequence of her disability by offering the claimant a choice between dismissal or ill-health retirement and by placing a time-limit on making her choice in a letter in small font.

12. If so, whether the respondents can show that this was a proportionate means of achieving a legitimate aim.

13. Whether the respondents treated the claimant unfavourably because of something arising in consequence of her disability by failing to consider her for flexible working by which she means reduced hours.

14. If so, whether the respondents can show that this was a proportionate means of achieving a legitimate aim.

15. Whether from 2014 to date the claimant was victimised as a result of having alleged in her grievance that the respondents contravened the Equality Act. The respondents accept this was a protected act. The alleged acts of victimisation are:
    15.1. Being subjected to attendance levels
    15.2. Being dismissed.

16. Whether any claims which are upheld were in time (including as part of an act of discrimination extending over a period). Alternatively whether it is just and equitable to allow them in as late claims.

Unfair dismissal

17. Have the respondents shown the reason for the dismissal?

18. Was the dismissal fair or unfair, applying the band of reasonable responses?

Holiday pay

19. The claim was for unpaid holiday in respect of periods when the claimant was off sick. At the start of the hearing, the claimant had not set out how much she claimed or the relevant periods and the respondents appeared also to have overlooked this claim. The claimant was asked to provide a schedule once her evidence was completed.

Notice pay

20. The respondents did not pay notice because the claimant was off sick through the notice period and her sick pay had run out. The tribunal drew their attention to s87(1) and s88(1)(b) of the Employment Rights Act 1996.

Procedure

21. The tribunal heard from the claimant and, for the respondents, from Sarah Vaughan, Sarah Morgan, Tahira Jan, Kendal Harrison, Mick Foy, June Raine and Claire Vigurs. There were four lever arch files of documents, two consisting of the respondents' disclosure and two of the claimants' disclosure.

22. At the start of the hearing, the respondents applied to the tribunal to confirm that the claims should stand as struck out because of the claimant's failure to comply with EJ Goodman's Unless Order dated 26 February 2019. The Order had been made on a telephone case management preliminary hearing on 26 February 2019 which the claimant did not attend. The claimant said this was because she was busy preparing the case.

23. The Unless Order said that the claims would be struck out unless the claimant provided the respondents with her witness statement by noon on Friday 1 March 2019. The claimant provided her witness statement 5 minutes before the deadline. The respondents argued that what she provided did not amount to a 'witness statement' either as defined by the rules or by the previous Orders, because it was incomplete and page numbers in the trial bundle were not cross-referenced. The claimant had originally been ordered on 20 July 2018 to provide her witness statement on 18 January 2019. By Order dated 5 October 2018, this was postponed to 22 February 2018.

24. Without repeating the entirety of the evidence and submissions here, suffice it to say that the tribunal was not convinced that there was non-compliance in any material respect. The claimant's witness statement ran to over 290 paragraphs. It is true that there were gaps, but the bulk of her evidence appeared to be there. The Unless Order did not replicate the precise wording of each of the prior Orders. It was simplified. It did not refer back to the earlier Orders. As for the requirement to refer to page numbers, this was contained in a separate paragraph in the Unless Order and not bracketed within the strike out paragraph. We do not think it was intended that, with the severity of sanction, the claimant should have to read into the Unless Order what previous Orders said about the minutiae of how a witness statement is constructed.

25. Nevertheless, proceeding on the basis that we were wrong about this and the claims stood struck out for non-compliance, we considered whether the strike out could be set aside under rule3 8(2). The respondents agreed we could deal with the two matters together and on the spot.

26. We decided that if the Unless Order did operate to strike out the claims, we would set aside the strike out because it was in the

interests of justice to do so. Regarding the reason for the claimant's default, she must take some responsibility. The Order for a witness statement was originally made a long time ahead. Nevertheless, running a large case as a litigant in person, let alone one with a visual impairment having to deal with a large number of documents, can be overwhelming. The claimant had made a considerable effort with what she did produce. She only had access to her advice centre once a week.

27. Regarding the prejudice to the respondents, they knew the case they had to meet. There was enough in the claimant's witness statement. They had experienced Counsel, who accepted they were in a position to proceed if the claim was not struck out. Looked at in context, it is not at all unusual in this kind of case with a litigant in person to have a disorganised and inadequate witness statement. As for the failure to cross-reference the numbers in the trial bundle, in our experience, that is rarely done by litigants in person. Finally considering whether a fair trial remains possible, we find that it does, for the reasons we have already set out.

Reasonable adjustments

28. In case preparation, it was agreed that the witness statements would be provided in font 20 and the trial bundle would be made available in electronic format to the claimant and for use in the tribunal, so that she could zoom in. The electronic solution was agreed because of the difficulty and expense of providing thousands of hard copy pages in font 20.

29. The claimant was able to bring a laptop to the tribunal which could access the encrypted memory stick. The latter would not work on the respondents' government computers. The tribunal was also unable to provide a laptop on which the USB could be used for security reasons.

30. Unfortunately the claimant had not been provided with the USB stick until the Friday before the hearing. This was because of the respondents' delay in finalising the trial bundle, which in turn was the result of the claimant's delay in providing all her disclosure

31. Day 1 of the hearing was taken up with the strike out application followed by the tribunal reading witness statements. At the start of day 2, the claimant asked for a day to read the

documents on her laptop. She was advised this might well lead to a long delay in her case finishing as it would eat into the tribunal time for making a decision. She was also told that arrangements could be made for documents to be read to her while she was giving evidence and/or for more time to be given to her to find and read them. She could also be helped to find her way round the electronic files. However, as her concern also related to familiarity with the documents in general including her ability to question the respondents, the tribunal agreed that she need not start her evidence until day 3 and that she could have the remainder of day 2 to go home and look at the documents. As a result, the tribunal panel booked itself time in July in case the current 7 days proved insufficient to hear the evidence and reach a decision. July was the first occasion when the full panel could meet again. This in turn knocked back the provisional date for remedy until December, looking at when diaries could be matched.

32. As we told the claimant, many of these difficulties could have been sorted out in advance if she had attended the telephone preliminary hearing on 26 February 2019.

33. On day 2, the claimant was accompanied by Mr Akinsanni from the Disability Advisory Service. The claimant said he was there to support her application for a day to look at the files. Mr Akinsanni seemed to have a different understanding and spoke generally as her representative. The tribunal allowed the claimant time in the waiting room to discuss what role she wanted him to have, at the same time as discussing whether she still wanted a day to look at the documents bearing in mind the likely delay in completing the case. On return, the claimant said that she would be presenting her case but she would like when necessary to ask Mr Akinsanni to step in. The tribunal agreed those arrangements, provided they were structured. The claimant also confirmed that she wanted the remainder of day 2 to look at the documents.

34. From day 3, the laptop was working. During the claimant's evidence, she was referred to the pdf page on the laptop at the same time as the tribunal was referred to hard copy in the trial bundles. On day 3, the claimant's support, Ms Hunter, sat next to her, and helped her find the relevant pages. On day 4, the claimant's aunt helped instead and Mr Murray calculated the correct page number on the pdf. In addition, when part of a document was referred to during cross-examination, Mr Murray

generally read it out loud. The tribunal's pace slowed to allow for these arrangements.

35. The claimant's cross-examination was not completed until 3.15 pm on day 4. The tribunal allowed the claimant a 15 minutes break after her cross-examination to consider what she might want to say by way of her own 're-examination'. The tribunal also told the claimant that she could if she wished give us the page numbers of diary entries she had referred to on day 5. The tribunal decided it was too late on day 4 to start cross-examination of any of the respondents' witnesses and, apart from anything else, it would be too much to ask the claimant to go straight into cross-examining opposing witnesses. We stopped at 4 pm.

36. The two witnesses who had been planned for day 4 – Ms Vaughan and Ms Jan – therefore could not be fitted in. Mr Murray informed us that not only could they not attend on day 5, which the tribunal already knew, but they could not attend until day 7. This was very unfortunate as the tribunal had set aside day 7 to start reaching its decision. The respondents were told that it could mean further delays in the tribunal panel finding a further date, as well as what had already been fixed in July. However, the witnesses' both had significant caring responsibilities and said there was no one else who could cover. As the situation had partly arisen because of accommodations made earlier in the hearing for the claimant, the tribunal thought it only fair to accommodate Ms Vaughan and Ms Jan's needs. It was therefore agreed that they could come in on day 7.

Fact findings

37. The respondents accept that the claimant has the disability of Primary Open Angle Glaucoma (POAG). This was diagnosed in 2008. Her condition has become worse over time.

38. The claimant started work for the respondents on 18 May 2009 as a Pharmacovigilance Information Scientist. Her job title later changed to Associate Signal Assessor. The respondents are an executive Agency of the Department of Health. The Agency is responsible for safeguarding public health by ensuring that all medicines, healthcare and medical equipment meet appropriate safety and quality standards. Associate Signal Assessors were

responsible for the efficient and accurate processing of suspected Adverse Drug Reaction ('ADR') reports onto the Sentinel computer system. There were strict Agency targets for processing ADR reports and Associate Signal Assessors had their own daily targets. If an individual did not meet their own target, others in the unit had to do the work. The claimant's duties also involved analysing data, answering queries and participating in special projects.

39. The claimant was assessed by Occupational Health ('OH') on her acceptance of her job offer. OH said she had an underlying medical condition which was well-controlled by medication and that she was fit for normal duties.

40. The claimant's initial line manager was Sarah Vaughan. From 2012, Ms Vaughan became Pharmacovigilance Information Unit Manager and Rauf Pathan took over as the claimant's line manager.

41. The claimant had an operation on her right eye on 13 May 2010. She was off work for three weeks. Ms Vaughan, kept in touch with her regularly. On her return to work, there was no referral to OH. Ms Vaughan discussed with her whether she wanted an OH assessment. The claimant said she did not see the point as OH could not restore her lost sight. Ms Vaughan did not insist on a referral. She had a good relationship with the claimant at that point. She simply said the claimant should come to see her if she had any difficulties.

42. While Ms Vaughan was the claimant's line manager, they had fortnightly one-to-ones. Ms Vaughan did not continue to ask the claimant how her eyes were and the claimant did not tell her that she was having any difficulties.

43. In 2013, Ms Vaughan referred the claimant to OH for the first time. This was the result of receiving an anonymous letter saying that the claimant's eyesight had deteriorated. Mr Pathan had also raised concerns that the claimant was having difficulty managing her workload generally and failing to meet her targets for case processing.

44. The OH report dated 3 April 2013 noted that there were concerns with the claimant's performance following surgery as she

appeared to be struggling with her workload. It noted that the vision in the claimant's right eye remained blurred and that her left eye had developed tunnel vision. It said that her concentration was affected by her eyes watering and headaches as well as her impaired vision. OH said that her visual impairment was likely to impact on her performance. Although she was being reviewed by management on a daily basis, OH recommended reducing her targets by 25% and monitoring this. OH also recommended that the claimant contact Access to Work for additional support and gave her the telephone number.

45. On 8 April 2013, Ms Mandalia in HR emailed the claimant to ask whether she was happy for her OH report to be released to her line manager and Ms Vaughan. The claimant's line manager was Mr Pathan at that time, though Ms Vaughan was managing the OH referral. The claimant did not reply and Ms Mandalia wrote a chaser email on 15 April 2013. On 19 April 2013, Ms Mandalia wrote a further email. She said that although the claimant had told her verbally that she was happy for the report to be sent to her line manager, she needed it in writing. She also needed to know whether the claimant was happy for the report to be sent to Ms Vaughan. The claimant continued not to give her written consent, though there were some verbal conversations. On 22 July 2013, Ms Mandalia emailed the claimant to ask her to let her know by the next day whether she could release her report to Ms Vaughan. She said she had explained that the claimant's line manager would need to see the report and the OH recommendations in order to ensure adjustments were put in place. On 24 July 2013, the claimant finally confirmed in writing that her report could be released to Ms Vaughan. Ms Mandalia asked if it could be released to Mr Pathan too. The claimant said only to Ms Vaughan in the first instance. Ms Mandalia promptly replied 'OK will do'. The claimant told the tribunal that she had been happy all along for Ms Vaughan to see the report but the respondents caused the delay by wanting Mr Pathan also to be involved. However, whatever conversations may or may not have been going on in between, the email chain shows that it was not until 24 July 2013 that the claimant gave the requested written consent for Ms Vaughan to see the report.

46. The claimant was not told at any stage that her targets were reduced. However, Ms Vaughan did not press the claimant on her targets. Instead, she told the claimant how much time to spend on

processing. So she would say, for example, 'Spend 3 hours on your ADR processing and see how far you get'. The claimant thanked Ms Vaughan and we accept that the claimant would have understood from this that she did not need to meet the full target. However, as the targets were not formally reduced, the claimant still felt the stress of not meeting them.

47. Ms Vaughan estimates that the claimant was by now doing only about 50% of her workload, so the 25% reduction suggested by OH would not have been sufficient anyway if approached in that way.

Ms Vaughan says that the claimant was having weekly catch-ups with Mr Pathan who was helping her manage her workload and prioritise.

<u>The suspension and final written warning</u>

48. A few months later, Ms Vaughan and Mr Pathan discovered evidence of serious fallings by the claimant in processing the ADR reports and apparent manipulation of workflow. On 24 October 2013, the claimant was suspended. The allegations were (i) that data on 3 cases received in 2010 had not been captured until 17 September 2013 and had sat in the claimant's personal work queue for that period, (ii) selective processing if cases which had not been allocated to her, ie choosing non-serious ADR reports which were quicker to do, (iii) manipulating the case processing workflow to inflate the number of ADR reports she had completed to artificially meet work targets, and (iv) lying when questioned about these incidents.

49. Following an investigation and disciplinary process, the claimant was given a final written warning at a stage 4 hearing by Sarah Morgan. The disciplinary hearings took place on 31 March 2014 and 10 April 2014. Ms Vaughan appeared as a witness. The disciplinary decision was taken by Group Manager, Sarah Morgan. The respondents have no good reason for such a long delay in getting to the disciplinary hearing. It appears just to have been administrative inefficiency.

50. The claimant was given a final written warning. With regard to the first allegation, Ms Morgan said there was insufficient evidence that the three reports were in the claimant's work queue since

2010. The second and third allegations were upheld. The allegation of lying was not upheld. Ms Morgan was aware of the claimant's health issues and that this was impacting her ability to manage her workload. However, she still issued a final written warning because the claimant had not told Ms Vaughan that she was struggling. Although the claimant said she did not have a good relationship with her manager, Mr Pathan, she did at that time have a good relationship with Ms Vaughan.

51. The claimant's suspension ended in April 2014 and it was suggested she return to work on 1 May 2014. Ms Woodward in HR liaised with her to discuss return to work arrangements. On 28 April 2014, Ms Woodward emailed the claimant to ask whether she would be interested in a role in PASU at the same grade which had become available. The claimant did not express an interest. As the claimant had said that she was uncertain whether she was well enough to return to work, Ms Woodward told her she was arranging an OH appointment.

52. The claimant did not return to work on 1 May 2014 because she went off sick. Her GP signed her off work because of 'depression reactive to work stress'. At around the same time, the claimant appealed against her final written warning. In the event, she did not return to work until 27 April 2015.

The respondents' Attendance Policy

53. The respondents use the Department of Health's 'Managing Sickness Absence' policy. The statement of principles says, amongst other things,

> 'The Department aims to provide a healthy and safe environment and to demonstrate its commitment to the wellbeing of staff. It encourages and promotes health and safe working practices including adopting a sensitive and caring approach to health problems…..The best approach to helping you is to enable you to remain in the workplace wherever possible. Intervening early can avoid or limit the need for any period of absence. At the outset and before taking any formal action, managers will consider whether any early interventions are appropriate. For example, considering reasonable adjustments…'

At paragraph 2, the policy states:

> 'There are a range of steps or Early Interventions (set out in the management guidance) that can be taken by managers to reduce the need for you to take sick leave. As soon as there is cause for concern, your managers should consider whether any of these interventions are appropriate.'

54. The management guidance says that line managers should proactively manage poor attendance, initially on an informal basis, by considering early interventions. There is then a non-exhaustive list of interventions including reasonable adjustments for disabled staff; use of OH; referral to the Employee Health portal; access to Corecare counselling services; and flexible working – consider whether a temporary or permanent adjustment to the working pattern is practicable.

Informal case conference July 2014

55. On 1st July 2014, Ms Vaughan emailed the claimant, inviting her to an informal case conference in line with stage 1 of the Managing Sickness Absence Policy – Long term Sickness Process. The meeting would take place on 9 July 2014. The letter said its purpose was to discuss the claimant's recent absence with the aim to give her further support and to discuss the arrangements for when she was able to return. Ms Vaughan added that if the claimant wanted any additional support, she should contact her managers or HR and there was also a confidential staff assistance programme.

56. The informal case conference took place with Ms Vaughan on 9 July 2014 as arranged Mr Chapman attended from HR. The claimant said she had been diagnosed with work-related stress but she hoped to be able to return soon after she had had some further diagnostic tests. She agreed to a new OH referral.

57. Regarding the Access to Work assessment recommended in the previous OH referral, the claimant said she had not yet had the chance to arrange it. The claimant said it would need to be her who contacted Access to Work and arranged an appointment, and it was agreed that she would now do this.

58. The claimant said her previous OH report had mentioned reducing her workload by 25% and she asked how the respondents would feel about that. Ms Vaughan said she would have to refresh her memory of the report but her recollection was that it was mainly about the supply of the right visual equipment, after which the claimant and her managers would look at her workload.

59. Ms Vaughan said that they would arrange a case conference every 4-6 weeks in line with the policy should the claimant continue to be off sick. It was important to be aware that if someone was off sick for 3 months or more, under the long-term procedure, a first formal job at risk warning may be considered. So if the claimant was not well enough to return, the next case conference meeting was likely to be a formal one, at which a first job at risk warning might be considered.

60. The importance of keeping in touch was discussed. There were times when HR and Ms Vaughan had been unable to get in touch. The claimant said that was because her mobile was broken. It was arranged that she and her line manager would 'keep in touch' every Monday morning.

61. Ms Vaughan went onto emergency maternity leave earlier than expected on 11 July 2014. Tahira Jan took over as Pharmacovigilance Unit Manager. The meeting and action points were confirmed in a letter from Mr Chapman dated 16 July 2014, which was copied to Ms Jan as acting line manager. However, the making of the OH referral was overlooked.

<u>Stage 2 case conference: September 2014</u>

62. On 17 September 2014, Ms Jan wrote to the claimant inviting her to a case conference under stage 2 of the Managing Sickness Absence Policy – Long Term Absence Procedure. The case conference was arranged because of the claimant's continuing sickness absence. She was told the outcome might be a First Job at Risk Warning.

63. The case conference took place on 24 September 2014 with Ms Jan and Mr Chapman from HR. The claimant did not bring anyone with her. The claimant pointed out that the OH referral intended at the last case conference had not been made. It was

agreed that an OH referral would be arranged as soon as possible. Ms Jan decided not to issue a first job at risk warning at this stage until they had OH advice. However, the claimant was told that continued attendance issues could lead to warnings and ultimately dismissal. A further case conference would be arranged in 4 weeks and the keep-in-touch arrangements would be changed to fortnightly.

64. Regarding Access to Work, the claimant explained that she had been unable to attend her first assessment due to suspension and that a second assessment had been set up for 23 September, but that had been cancelled because there was not time to arrange laptops, desks and meeting rooms. The respondents told the claimant to schedule another assessment as soon as possible.

65. On 6 October 2014, Ms Jan emailed the claimant attaching her proposed referral to OH. The referral was for the claimant's stress-related sickness. Ms Jan noted that the claimant had provided a home telephone number but that she would continue to email her as this was the claimant's preferred mode of contact.

66. There were then some delays as the claimant missed some OH appointments and failed to answer her phone or return calls.

67. The Access to Work assessment was carried out by Action for Blind People and took place on 30 October 2014. The report recommended magnification software with the support of speech output. Specifically, it recommended ZoomText Maghnifier Reader. It added' 'Although it might have been possible to suggest the alternative of SuperNova Access Suite, it is important to note that the employer has already approved ZoomText, whereas SuperNova is not, and would require extensive testing'. This was because another employee was already using ZoomText. The features of ZoomText and Supernova were essentially the same. Other technology was also recommended together with 'getting started' courses. The report said the claimant would be at significant disadvantage if untrained because she would make little or no use of the many features available within the technology. The claimant had the opportunity to try out the software during the assessment and she was very positive about it. The report also mentions that the claimant 'prefers to read a 14 – 16 point font but with a reduced reading speed' as a result of her blurred and tunnel vision in both eyes.

68. On 10 November 2014, the OH report was provided. It said that the clamant had been absent due to anxiety and depression since 1 May 2014 following the investigation and suspension. She was not currently fit to return. A phased return to work was likely to be needed in due course together with a stress risk assessment (ideally the 'return to work questionnaire' on the health and safety executive website). The claimant was made aware of support through the Employee Assistance Programme.

69. Access to Work had made two separate referrals, one for an assessment regarding the claimant's visual needs. The other, for a mental health support assessment by Remploy. On 12 November 2014, Remploy wrote a Mental Health Support Service Supplementary Absence Plan for Access to Work.

November 2014 case conference and First Job at Risk warning

70. On 13 November 2014, a further formal case conference was held. The Remploy assessment had not yet been received. Ms Jan and Mr Chapman discussed the OH report. The claimant had received it, but she had not yet read it, so Ms Jan went through it with her. Ms Jan said that the stress risk assessment was normally completed by the employee and the manager together. She offered to meet the claimant off site to go through it. Ms Jan said that when the claimant was ready to return, they would get another OH report to discuss how the phased return should be structured.

71. By letter dated 20 November 2014, Ms Jan issued the claimant with a First Job at Risk warning. The claimant was told her absence would continue to be reviewed over the next 6 months with a view to a further case conference in the next 4 – 6 weeks. If her absence continued, further formal action could be taken such as a final written warning and ultimately dismissal.

72. The claimant appealed unsuccessfully against this first job at risk warning.

73. In a telephone discussion on 1 December 2014, Ms Jan asked whether the claimant had had a chance to think about a good time and place to meet and go through the stress return to work questionnaire recommended by OH. The claimant said she would think about it and have suggestions at their next keep in touch

discussion. Ms Jan asked about the Access to Work assessment report on the claimant's eye condition, as she could not work on the recommendations till she received it. The claimant said she had received it and intended to send it, but her focus had changed after receiving the warning. Finally Ms Jan reminded the claimant that her last sick note had ended on 19 November and she needed to provide a new one. The claimant sent in the Access to Work report a few days later.

74. On 3 December 2014, the claimant's GP wrote to express severe concern about the claimant, who was suffering from severe depression and anxiety as well as glaucoma and anaemia. The GP said:

> 'The added pressures from your procedures to get her back to work are actually making her worse. I am seeking specialist help for her but it is my opinion that she should cease being pressurised to partake in all meetings and procedures until further notice. I feel she should urgently be referred back to your occupational health doctor with whom I am happy to liaise.'

Stage 3 case conference March 2015

75. On 11 February 2015, the claimant was notified that her appeal against her First Job at Risk warning was rejected.

76. On 26 February 2015, the claimant was invited to a further case conference under Stage 3 of the Policy on 18 March 2015. This was postponed to 25 March 2015 because of delays in obtaining the most recent OH report. The OH report dated 17 March 2015 said that the claimant was fit to return to work. Although she continued to describe symptoms of anxiety, she was keen to return and was working actively with Remploy with a view to organising a phased return. The report advised that, in order to pave the way for her return to work appropriately, IT equipment including the Supernova software should be in place. Management should contact the claimant directly to tell her which equipment had been installed and the claimant could then contact Remploy to arrange a return to work schedule. Once Remploy had made specific recommendations, OH would be happy to provide further advice if desired. (It is not clear where the idea that Supernova software

should be used came from. The OH report does not read as if it is the physician's specific recommendation.)

77. On 16 March 2015, Ms Jan met the claimant at Costa Coffee in Victoria station to complete the stress questionnaire. However, the claimant said this was not possible as she had not previously read the questions, and she was resistant to Ms Jan's attempts telephone help her complete it. Ms Jan followed up with an email the next day again urging her to read the questions.

78. On 23 March 2015, the claimant emailed Ms Jan to ask that her Rehabilitation Consultant, Mr Ekundayo (from Remploy) could attend the meeting with her as moral support. She said this would be a reasonable adjustment under the Equality Act.

79. The case conference took place as arranged on 25 March 2015. Ms Jan told the claimant that Mr Ekundayo could not be present in the room during the meeting 'as per the Agency's policy', but he had been allocated the next door room where the claimant could consult him for support at any point during the case conference. The claimant said several times at the start of the meeting that she would like Mr Ekundayo in the room. When asked the purpose, she said just to have someone sitting next to her, just as Mr Chapman and Ms Jan were sitting next to each other. The claimant was told that she was welcome to have a trade union representative or work colleague. The claimant said she was not a trade union member. Ms Jan said she did not need to be a member to have a trade union representative present. The claimant asked if she could have the meeting at a later date, but Mr Chapman said it would be in her best interests to go ahead now she was in the office. The claimant eventually agreed. However, she was plainly stressed and did not want the meeting to be more than about 10 or 15 minutes.

80. The claimant's most recent medical certificate said, 'anxiety with depression, anaemia, chest-pain, glaucoma and eye-symptoms'. There was discussion about the claimant providing an up-to-date sick note as the last one expired on 19 February. This was a recurring issue.

81. Ms Jan noted that the OH report had said the claimant was fit to return. She said the reasonable adjustments were in place and laptop set up, ready for when she returned. Ms Jan said she

needed a return to work plan from Remploy. That was something the claimant had to progress – Ms Jan was unable to. The Agency would then implement the plan.

82. Ms Jan asked if there was anything else they could do to help the claimant's return. The claimant produced a list of support measures and started reading from it. As she was conscious the claimant did not want a long meeting, Ms Jan asked for a copy. The claimant said she was not sure. She never did provide a copy.

83. Towards the end of the meeting, the claimant asked whether she could have a week to confirm her return to work date. Ms Jan agreed, but she said they had been awaiting a return to work plan from Remploy since November.

84. The claimant left the meeting two or three times to speak to Remploy. She did not announce she was doing this. She had been told she could speak to Mr Ekundayo when she needed to and she just did it.

85. At the end of the meeting, Mr Chapman asked the claimant if he could have a quick word with Mr Ekundayo. She agreed. The claimant says that after that private discussion, Mr Ekundayo's manner towards her changed and he became more distant. She says that when it came to devising the return to work plan, he would not let her have a say, except regarding her annual leave and who she wanted her line manager to be.

86. Ms Jan told the tribunal that the reason Mr Chapman went to talk to Mr Ekundayo was because they felt he was not conducting himself professionally in that he should himself have asked them whether he could attend the meeting in advance of the day. They also felt, watching him in the waiting room speaking to the claimant, that he was 'over-friendly' with her. We can make no findings on this second-hand and vague piece of evidence.

87. In a telephone conversation with the claimant on 31 March 2015, Ms Jan again asked for a copy of the support measures. She also chased on the return to work stress questionnaire. The claimant said she would later confirm a time and place to complete it. The claimant said she was shocked that ZoomText had been installed as she thought Supernova was the requested software. Ms Jan said they had been advised that the functionality was very

similar. Further, the Access to Work RBLI report had recommended ZoomText.

88. On 13 April 2015, Ms Jan wrote to the claimant to confirm the decision taken following the 25 March case conference. Ms Jan noted that the OH report said the claimant was not fit to return to work. She confirmed, as discussed in the meeting, that the recommended software had been set up on the claimant's computer. She said Remploy had now sent in a 5-week return to work plan, which she was happy to accommodate. She said specialist training on the new equipment had been arranged. She asked the claimant to think about a good time and place to meet to complete the stress risk assessment. Ms Jan said it had been agreed during the meeting to extend its outcome so the claimant could provide her written suggestions for support to facilitate her return to work. To date, nothing had been received from the claimant. Finally, it had been decided to issue the claimant with a Final Job at Risk Warning under Stage 3 of the Absence procedure.

89. The claimant appealed against the warning, saying it had increased her anxiety and had a negative impact on her mental health.

<u>The first return to work: 27 April 2015 – 21 June 2015</u>

90. On 7 April 2015, Mr Ekundayo for Remploy sent Ms Jan a phased return to work plan which he said he had compiled with the claimant. He recommended this be monitored in one-to-one meetings with her line manager. The plan was as follows, starting 27 April 2015:

Week 1: 4 hours on each of Monday and Friday (Inputting data)
Week 2: 4 hours on each of Monday, Wednesday and Friday
Week 3: 6 hours on each of Monday, Wednesday and Friday (Inputting Data, Signal, Side role'
Week 4: 6 hours on each of Monday, Tuesday, Thursday and Friday
Week 5: 8 hours on each of Monday, Tuesday, Thursday and Friday (Inputting Data, Signal, Side role, Dealing with queries)
Week 6: 8 hours each day, Monday – Friday, full duties.

91. Ms Jan had expected Remploy to consult her over the plan. But she accepted it anyway.

92. The claimant subsequently told Ms Jan she had no hand in devising the plan and was not happy with it. We have found it difficult to understand during these proceedings what she thought was wrong with it.

93. The claimant returned to work on 27 April 2015. Kendal Harrison was her new line manager, though Ms Jan was still involved. The claimant suggests that her return to work had been delayed because she was waiting for the equipment to be installed. That is not what happened. The claimant was not well enough to return at an earlier date. As soon as she indicated the date when she felt able to return, the software and hardware was ordered and everything was in place.

94. Ms Jan and Ms Kendal met the claimant on her first day and gave her a copy of the return to work plan. They gave her a brief update on developments while she had been away. The claimant was assigned a buddy for the whole return to work period who could show her how to do tasks and work with her. The claimant was given a reduced workload and refresher training on key areas. Training was also arranged on the new software, starting with Readit Air

95. The respondents found it difficult to communicate with the claimant because they felt she did not absorb verbal information. However, she also did not read her emails. For example, the claimant arrived for work on Tuesday on week 3 even though it was not her scheduled work day. She said she had attended for the training, but she had been told verbally and in writing that the Readit training was fixed for Friday, a scheduled work day.

96. Zoomtext training was fixed for 29 May 2015. This was the earliest date when a trainer was available on the claimant's schedule

The desk and the large monitors

97. In their workplace assessment, RBLI for Access to Work suggested the respondents replace the claimant's 17 inch monitors with 19 inch monitors, as other staff had these. It was

easier to see all the information on screen at once with a larger monitor. The effect of the enlargement is that some information disappears off a smaller screen and it is necessary to keep adjusting the view. By the time of the claimant's return to work, employees all had 20.1 inch monitors anyway. Nevertheless, Ms Jan was prepared to provide the claimant with even larger monitors.

98. Ms Jan allocated the claimant a temporary desk and left a 'keep clear' note on it. This was kept free for her, even on days when she was not in. There was only one occasion when someone had borrowed the chair.

99. The claimant says that a desk was only saved for her on the first few days and after that, she had to find a desk for herself. We found her evidence inconsistent and extremely vague on this point. At one point she said she did not know she had been given a temporary desk. Then she said vaguely that other people used it. When asked where she had sat if the desk was not available, she was unable to give any detail at all. We therefore find Ms Jan's memory (as confirmed by Ms Harrison) more reliable on this point.

100. When Ms Jan selected the temporary desk, she was careful to select a desk in a well-lit area with natural light and overhead lights. She chose an area that was near to the entrance and it was half way between the bathrooms and a tea point with easy access to the claimant's lockers. It was also next to the person who had been allocated as her training buddy.

101. Ms Jan told the claimant that she should choose a desk which suited her. This would then become her permanent desk, at which point, they could install the larger monitor which they had already purchased for her. There was a height adjustable desk in the department too and Ms Jan suggested the claimant could also try that.

102. The claimant never chose a desk, even though Ms Jan and Ms Harrison kept asking her to. The claimant told the tribunal she did not have time to find a fixed desk and that time should have been specifically allocated within her return to work plan for her to do so. She said she needed to work out where was a good position taking account of light and the location of toilets, lockers, tea facilities and so on, since having to walk long distances was

difficult with her restricted vision. We accept that the claimant needed to take all those considerations into account. But the evidence does not suggest that she did not have time to make a decision. It is something she could have done fairly easily and quickly. We think it is more a case that she could not cope with making decisions. We noted this with regard to a number of matters and we will come back to it in our conclusions.

103. Ms Jan and Ms Harrison did not want to impose a permanent desk on the claimant as they felt she would have objected

Problems with the software

104. ZoomText had a number of teething problems. There was initially a particularly bad period when the claimant was using a smaller laptop which she had wanted for portability. It helped once a larger laptop was tried out, but it still tended to crash at some point on most days. Usually the problem was fixed fairly quickly so, for example, there might be a 15 minute disruption, perhaps while the computer was rebooted, followed by 3 hours satisfactory working time. It was understandably stressful for the claimant that this kept happening. Ms Jan and Ms Harrison were aware of the problem and they told the claimant that she should liaise with IT when there were problems. They had a number of theories as to what might be the cause of the difficulty including that the claimant had not emptied a very full inbox on her Outlook.

105. On 16 June 2015, Jamie in IT emailed the claimant, Ms Jan and Ms Harrison to say

> ‘Quick update I have been in contact with zoomtext about issues they have acknowledged the current version causes crashes in internet explorer and office. I have asked them about changing to an older version Zoomtext to get around the problem.’

Ms Jan responded, ‘That’s great news Jamie – fingers crossed we can revert back to the older version as yesterday was a particularly tricky day with the software.’ A few hours later, Jamie emailed to say he could immediately install version 9.

106. Version 9 worked. The respondents had another employee who had been using ZoomText satisfactorily for a while. It was one of

the reasons why ZoomText was recommended by Access to Work rather than the equally appropriate Supernova. However, it transpired that the version of ZoomText used by the other employee was version 9. Ironically, the more up-to-date version which had been ordered for the claimant was less effective.

Further period of sickness starting 22 June 2015

107. The claimant went off sick again on 22 June 2015. She had at that point still not chosen a permanent desk and she had not done the stress risk assessment, despite being repeatedly chased by Ms Jan.

108. On 6 July 2015 the claimant submitted a grievance about her treatment while off sick and since her return to work.

109. Ms Vaughan returned from her maternity leave on 1 August 2015 and took over from Ms Jan.

110. The claimant was still signed off sick. She unexpectedly arrived for work on 24 August 2015. She had not told anyone that she was coming in. Ms Vaughan thought she did not seem very well and asked HR for guidance. HR advised sending the claimant home and telling her to see her GP as soon as possible. It was also recommended that the respondents get a new OH report. Ms Vaughan followed the advice. She sent the claimant home. On 27 August 2015, she emailed her to say that she needed to get her GP to confirm she was fit for work as her last sick note had expired on 22 August. Ms Vaughan said it was also necessary to get an OH assessment. On 3 September 2015, Ms Day in HR emailed the claimant chasing up confirmation from the GP and noting that she had not attended a couple of OH appointments. HR asked the claimant to get in touch urgently to confirm she was well and explain her absence.

111. On 11 September 2015, Waterloo Legal Advice Service emailed Ms Vaughan stating that the claimant had had an appointment with her consultant the previous day and was told her eye condition had markedly deteriorated. She had now lost 90% of her eyesight and was at serious risk of losing her remaining vision. The email said the respondents' failure to make reasonable adjustments had greatly increased the claimant's anxiety and worsened her depression. Therefore they asked that, apart from a

referral to OH, she receive no further communication until WLAS or another representative advise the respondents otherwise. The claimant also asked for her grievance to be decided without any further input from her as she was too unwell to provide it.

112. In a report dated 3 November 2015, OH advised that the claimant was unfit for work for a further two – three months, but it was difficult to predict at that point whether she would be able to return. She required further treatment for her eye condition and she also had significant symptoms of anxiety and depression.

113. On 10 February 2016, the claimant again arrived at work without any forewarning. She was unclear if her current sick certificate had expired and she had been unable to fix a GP appointment, so she had felt she had better come in. She was met by Ms Harrison and a Mr Tregunno who told her she needed to get a doctor's appointment and they could not let her work until they had confirmation from her doctor that she was fit to do so.

114. On 7 April 2016, Dr Assoufi at Imperial College Healthcare saw the claimant and provided an OH report, having also received a report from her GP and from her consultant. He said her eyesight had deteriorated and she would probably need another operation. She had also been suffering from stress following her suspension from work and had been diagnosed with anxiety and depression. She had been receiving regular counselling and attending support groups regarding her visual problems. She was currently unfit for work. Dr Assoufi advised that she was unfit for work for 6-8 weeks that that she would be able to return to work a few weeks after her eye operation.

115. On 13 April 2016, the claimant was invited to a Stage 4 Absence meeting on 3 May 2016 to discuss her continued absence following on from the Final Job at Risk warning which had been issued on 25 March 2015. She was told the outcome of the meeting could be dismissal. After several difficulties with the date, the claimant was notified by letter dated 4 June, sent by post and email, that the hearing would take place on 9 June 2016. Having heard nothing, the respondents spoke to the claimant's mother on 7 June to check she would be coming. At 00.06 on 9 June, the claimant emailed to say that she would not be attending the meeting due to short notice. The respondents replied that they

would be going ahead because this was the third rearrangement, but she could dial in if she wanted to. The claimant did not dial in.

116. The hearing went ahead. It was heard by Mr Foy. Ms Vaughan presented management's case. HR were also present and the meeting is minuted. It was decided to write to the claimant offering her the possibility of ill-health retirement since they had been unable to discuss it with her at the meeting. The minutes note that if she did not take up this option, they would terminate her employment.

117. On 28 June 2016, Ms Vigurs from HR wrote to the claimant to say that while Mr Foy was considering the outcome of the Stage 4 meeting, 'he has asked that you are given the opportunity to consider if you would like the Agency to explore the possibility of you applying for ill-health retirement, as this is something that he would have liked to explored with you at the meeting. We ask that you respond to us within 5 working days to let us know if this is something that you would like to explore. A conclusion to the final absence hearing will not be reached while you are considering this.' This email was sent in ordinary font size for an email, as indeed was all subsequent email correspondence which we have seen regarding the possibility of ill-health retirement.

118. The 5 day deadline was not enforced and the outcome of the Stage 4 hearing remained in a state of limbo. In July, the claimant emailed to ask for more information on ill-health retirement. Ms Vigurs emailed on 20 July 2016 to say that although it was outside the 5 day timeframe, she was happy to respond as a reasonable adjustment. The claimant answered on 27 July 2016 saying that she was awaiting for the decision on her capacity meeting and asking whether she could apply on a cautionary basis? As a result of this request, the claimant was sent the ill-health retirement application form on 3 August 2016.

119. On 8 August 2016, Ms Vigurs emailed to explain the difficulty was that Mr Foy needed to decide whether she was fit to return to work. If not, one of the options may be dismissal. It was important that the claimant had the opportunity to consider whether she wanted to apply for ill-health retirement before that decision was made. She had more chance of a successful application while she was still employed. Therefore Mr Foy wanted her to explore that

first before he reached his conclusion. She was asked to complete and return the form by 15 August 2016.

120. After further OH reports, a case conference which was eventually set up for 23 February 2017 and attended by the claimant, and an Absence hearing on 10 April 2017 (unattended by the claimant), the claimant was issued with a Final Job at Risk warning by Ms Vaughan. This appears to have superseded any decision by Mr Foy from the earlier meeting.

The grievance outcome

121. Meanwhile, the claimant's grievance was decided on 23 October 2015 but at the claimant's request, the outcome letter was not sent to her until 9 June 2016. The grievance was rejected. The claimant appealed on 16 June 2016. However, she did not submit any grounds of appeal as required. The appeal was rejected on 3 August 2016.

The second return to work

122. The claimant returned to work on 20 April 2017 under a plan for a phased return. She went off sick again on 23 May 2017, having been absent for a number of occasions during that period.

123. By this time, all staff had a 34 inch screen, which the claimant was also given. She was also allocated a fixed desk. Ms Vaughan and Ms Harrison met with the claimant on 20 and 27 April to welcome her back. Ms Vaughan provided the claimant with a written copy of the return to work plan and talked it through but the claimant did not provide any input. Ms Vaughan felt the claimant was confused and disorientated during the meetings and could not coherently enter conversation.

124. Ms Vaughan had the impression that the claimant was very unwell. She found it difficult to give support because the claimant would not engage. There is evidence that the claimant was finding it difficult to cope with being back at work. For example, the claimant seemed unaware of the days when she should be attending work on the return to work plan and did not keep her managers informed of specialist appointments. Ms Harrison noted in her line manager's diary that on 11 May, after her appeal, the claimant sat at her desk for two hours without turning on her

computer. Ms Harrison agreed she could go home early. Then on 19 May, the claimant did not come in at all in the morning. When Ms Harrison asked her to have a catch up later with HR, the claimant asked for a toilet break and did not return to the meeting. She then asked for time to calm down and disappeared for an hour and a half so the meeting could not go ahead.

125. On Monday 22 May 2017, the claimant did not attend for work or make contact. The respondents had no emergency contact details. They were very worried about her state of mind. After taking advice from HR, Ms Harrison drafted a letter for the claimant saying Ms Harrison felt she was not fit for work and telling her an OH appointment had been arranged for 25 May 2017. It said that the claimant would remain on sick leave until OH said she was fit for work. Ms Harrison planned to give the claimant the letter when she saw her the next day.

126. Ms Harrison filled in an OH referral form. She said that the claimant had behaved in ways which made her believe she may not be fit for work. She gave a number of examples including that she had left meetings on several occasions saying she felt overwhelmed and unable to continue; on a meeting to discuss the return to work plan, she had asked for a break and did not return and was eventually found staring out a window; she had failed to attend work on several of the intended days and had attended on scheduled non-work days; on one occasion she had been found sitting at her desk without her computer switched on. When asked, she had said the computer was not working but she had not contacted IT and when the manager switched it on, it was working. She had several times said she did not have her glasses with her so she could not use the computer, but when asked, she had said she could not get new glasses yet because her eyes could not be assessed during recovery from the operation. Ms Harrison asked if the claimant was fit for work and if not, when she may be able to return. She attached the return to work plan and her line manager's diary.

127. The claimant came in at 2.45 pm on 23 May. Ms Harrison told her she had been worried when the claimant did not attend the previous day and asked for an emergency contact number. The claimant said she would 'have to get back' to Ms Harrison and asked for time to calm down. Ms Harrison went away and made several attempts to reapproach the claimant, but each time the

claimant asked for more time and walked away. Ms Harrison tried to tell the claimant that she should go home and give her the letter, but the claimant would not engage. Ms Harrison knew the claimant lived with her mother, so she would not be alone there. The claimant was wandering into other departments and sitting on the floor or by the lockers. Ms Vigurs also tried unsuccessfully to speak to the claimant. The claimant said 'Why are you following me?' as Ms Vigurs approached and would move away. Eventually the claimant spoke to a colleague who recommended that she go home.

128. Ms Harrison found this an extremely distressing day and was very worried about the claimant's mental health. Ms Vigurs also found it distressing. Ms Harrison had been unable to give the claimant the letter, so she put it in the post together with a copy of the OH referral and attached documents.

129. Dr Giagounidis saw the claimant on 25 May 2017. In his OH report of 30 May 2017, Dr Giagounidis had said he could not provide meaningful advice on a number of Ms Vigurs' questions because he was unable to discuss matters fully with the claimant, mainly because she had been unaware of the contents of the referral and supportive documentation. The respondents found this frustrating because they had posted the documents to the claimant, who had apparently not read them. This was an ongoing issue with the claimant who did not answer emails or respond to ordinary post and did not have a working telephone number.

130. There was a further OH consultation on 3 July 2017. In his report on 4 July 2017, Dr Giagounidis gave a similarly vague response. He did not answer the fundamental question about the claimant's fitness to return to work.

131. On 25 July 2017, Ms Harrison wrote to the claimant by letter and email. She said she assumed the claimant was too unwell to return since she had not contacted her or provided a medical certificate since 23 May. She asked the claimant to let her know by 2 August 2017 whether she would like the respondents to organise an assessment by a Psychiatrist, which Dr Giagounidis had suggested was an option. If not, the respondents would have to assess the claimant's health and well-being based on the information which they had. Ms Harrison also enclosed the ill-health retirement forms. She reminded the claimant this was most

likely to be successful if applied for while she was still employed by the respondents. Ms Harrison said if she did not have the completed forms back by 2 August 2017, she would assume the claimant was not interested in that option. Finally she reminded the claimant of the Employee Assistance Programme (Workplace Wellness).

132. In the event, the claimant did not want to attend a Psychiatric assessment.

133. As Dr Giagounidis had not answered the key question about fitness to work, the respondents decided to get a report from an independent OH consultant, Dr Sterland, an Occupational Physician from the OH department at Watford General Hospital. Dr Sterland was asked to write a report based on several years of OH notes and documents. Most recently, he had OH notes from meetings with the claimant in May and July 2017. The reason he was not asked to see the claimant was that Ms Vigurs was concerned an additional face to face referral would cause the claimant additional distress.

134. On 18 August 2017, Dr Sterland, provided his report. He said that the claimant's ongoing long-term problems were a combination of physical and psychological. The physical condition had affected her psychologically by reducing her self-confidence so that she suffered from a combination of anxiety and depression. Trigger factors including compliance targets at work which became progressively harder to attain because of her condition. Pressures at work made her more anxious and this further reduced her capacity. The return to work on 20 April 2017 was extremely challenging for the claimant. It was also likely that embitterment factors were involved which affected her behaviour.

> 'Taking the situation as a whole it now seems unlikely that she will ever be able to return to this employment because she is not physically or psychologically able to do so. Either on its own would be a sufficient barrier and taken together there is not no possibility of return to this role.'

Dr Sterland said redeployment was not practicable for similar reasons and reduced hours would not help because she would continue to be unable to meet the requirements of the demanding role.

> 'The inescapable fact is that she found herself in an increasingly demanding role when she was becoming more disabled and this is an unsustainable combination. The rest of the story is embitterment and well-meaning but ineffective support from all parties because the essential elements are not compatible'.

The claimant's dismissal

135. Meanwhile it was decided to restart the formal absence procedure. Mr Foy had responsibility for this. On 7 August 2017, the claimant was invited to attend a Stage 4 Formal Absence Meeting on 22 August 2017. The claimant did not attend, providing a letter on the day of the hearing to say her representative was unavailable. Mr Foy wrote again on 23 August 2017, notifying her that the date had been rescheduled for 5 September 2017. The letter said that if she did not attend the rescheduled date, the hearing would go ahead in her absence.

136. The claimant did not attend on 5 September either. She wrote a letter dated 5 September, which the respondents did not receive until 6 September 2017. She said she was not attending because she had not had sufficient time to discuss the matter with her support team.

137. The hearing went ahead in the claimant's absence. On 2 October 2017, Mr Foy wrote to the claimant with the outcome. He summarised the hearing and what he had considered. He said Ms Harrison had given examples of incidents which she felt were symptomatic of the claimant's mental ill-health. We have mentioned some of these above. She also explained the claimant was unable to engage in discussions about her return to work plan and unable to absorb more than one or two items of information at a time. Mr Foy had also looked at Dr Sterland's report and the dates of absence and unsuccessful attempts to return to work. Mr Foy said he had also looked into the claimant's allegation in her letter of 6 September 2017 that Ms Harrison and Ms Vigurs had chased her round the office, threatening to call security if she did not leave. Mr Foy spoke to both Ms Harrison and Ms Vigurs. They said they had been worried that the claimant was not fit to work and was refusing to go home. That is why they had said they would have to call security if she did not leave as they suggested. In conclusion, as two phased return to work attempts had failed,

especially the latter occasion when the claimant had not requested any other adjustments which could help her, and given the recent medical advice, Mr Foy had concluded that the claimant was unable to return to the workplace. The options now were either ill health retirement or dismissal on capability/medical inefficiency. If the claimant wanted to progress the ill-health retirement option, she should complete and return the forms by 16 October 2017. If she did not do this, the claimant would be dismissed with effect from the date of this letter.

138. Mr Foy told the claimant that she would be eligible for compensation under the Civil Service Compensation Scheme if she did not apply for ill-health retirement. He did not know how much that would be at this stage. He asked for current bank account details so she could be paid this sum if it arose and any sums owing to her. HR had been chasing her for up-to-date details for a while.

139. The claimant did not apply for ill-health retirement.

140. The claimant appealed to Dr Raine (the Director of Vigilance and Risk Management of Medicines Division). Her letter was in large font. Dr Raine responded by email and post, using what looks like ordinary font 12. Correspondence continued. We cannot analyse the font size of every letter sent by either party, but generally speaking, Dr Raine was using ordinary rather than enlarged font. The letters were all sent by email as well as post. On 24 November 2017, when sending in her more detailed grounds of appeal, the claimant asked for hard copies of the documents which the respondents were going to use at the appeal as she had minimal access to email.

141. The letter of 24 November 2017 asks for ‘special spectacles’ for the first time, but then seems to raise issues which had long been resolved such as a permanent desk and larger monitor. The claimant asked for a delay to get an up-to-date report from her GP on her fitness to work. Dr Raine agreed.

142. An appeal hearing took place on 14 December 2017. The claimant provided an up-to-date report on her eye condition from Guys Hospital. This did not add anything. The claimant did not provide a report from her GP on her fitness to work.

143. By letter dated 21 December 2017, Dr Raine rejected the appeal. The letter pointed out that apart from the spectacles, which the respondents did not fund, all the other adjustments had already been provided. The medical report provided by the claimant had not outweighed the OH report from Dr Sterland. The claimant was also told that the ill-health retirement option was still open but she must return completed forms before the last day of her employment (13 January 2018). The claimant did not do this.

Glasses

144. The claimant's case regarding glasses was not clear at any point. We found it impossible to establish what kind of glasses she needed at what point and for what purpose. Glasses were not specifically recommended in the Access to Work assessment. The claimant told the tribunal that she did not have glasses when she returned to work the second time because after an operation, it took a while for her eyes to settle. Ms Harrison had recorded in her contemporaneous line manager's diary that the claimant said she had forgotten her glasses a couple of times and then subsequently said she was waiting for a new prescription. During her appeal against dismissal, she said she needed glasses from the optician but could not pay for them. In her witness statement, the claimant said that at the appeal, 'We spoke about my glasses … I now have my glasses … they cost £45 for 2 pairs. I do not understand why the company could not pay for my glasses'. The claimant does not appear to have asked for the respondents to pay for glasses at any earlier point.

Law

Unfair dismissal

145. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), eg capability.

146. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

147. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own decision.

Discrimination arising from disability

148. Section 15 of the Equality Act 2010 prohibits discrimination arising from disability. This occurs if the respondents treated the claimant unfavourably because of something arising in consequence of the claimant's disability. The respondents have a defence if they can show such treatment was a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

149. The duty to make reasonable adjustments is set out in sections 20 – 21 of the Equality Act 2010 and in Schedule 8. Where a provision, criterion or practice applied by the employer or a physical feature of the premises or a lack of an auxiliary aid puts a disabled person at a substantial disadvantage in comparison with people who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage or provide the auxiliary aid. Substantial' means more than minor or trivial (EqA s212(1)).

150. The House of Lords in Archibald v Fife Council [2004] IRLR 652 said this about the duty to make reasonable adjustments:

> 'The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination.'

151. At para 6.28, the EHRC Employment Code says the following factors may be relevant to whether an adjustment would have been reasonable: whether taking any particular steps would be effective in preventing the substantial disadvantage; the

practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer's financial and other resources; the availability to the employer of financial or other assistance to make adjustments eg advice through Access to Work; and the type and size of the employer.

152. The employer is not subject to a duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

Burden of proof under Equality Act 2010

153. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision..

154. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

Conclusions

155. We now apply the law to the facts to decide the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length. The numbering of the issues is taken from the paragraphs at the start of these Reasons. It starts at issue 3.

Issue 3

156. This issue concerns whether the respondents failed to make reasonable adjustments to enable the claimant to do her job successfully from 2014 to her dismissal by:
    156.1. Providing working software for visual impairment compatible with the hardware needed by the claimant.
    156.2. Providing the hardware ie a large monitor.
    156.3. Providing a permanent desk as opposed to requiring the claimant to hot desk.
    156.4. Providing glasses for visual impairment to use with the software.

Providing working and compatible software

157. This issue relates to the period of the claimant's first return to work.

158. As a result of her eye impairment, the claimant needed compatible working software to enable her to use the computer. This need was identified by Access to Work and it was not disputed in the tribunal hearing. Without such software, the claimant would be at a substantial disadvantage compared with people who did not have her disability. In legal terms, the software was an 'auxiliary aid'.

159. The question is whether the respondents took such steps as were reasonable to provide compatible working software. We find that they did. This is why.

160. The respondents consulted Access to Work as to what was needed. That was an appropriate step to take. Access to Work asked Action for Blind People to carry out a specialist assessment. The respondents cooperated with that assessment and bought all the software which was suggested by Access to Work. They also arranged the training to use the software.

161. The claimant is upset that the respondents obtained ZoomText rather than Supernova. But Access to Work said the two products were essentially the same. Access to Work recommended on ZoomText because the respondents already had another employee using it, which meant it would require less extensive testing.

162. It was reasonable for the respondents to get the most up-to-date version of ZoomText. Nobody knew that it had problems and that the previous version, used by another employee, would be better.

163. There were unfortunately heavy teething problems with ZoomText. It crashed at some point nearly every day. That must have been infuriating and stressful for the claimant. But it was not the respondents' fault. The respondents tried to work out what the problem was. They had various theories. They got the claimant to stop using her small laptop, which helped to some extent. Ms Jan offered to help the claimant clear out her Outlook Inbox in case that was a factor. The claimant did not take up that offer. They enlisted the help of the IT department and told the claimant she should speak to them.

164. Eventually on 16 June 2015, Jamie in IT got ZoomText to admit that version 10 did cause crashes. By the end of the day, version 9 was installed. This solved the problem.

165. Other software such as Readit Air was also installed. The claimant does not appear to have any problems with this.

166. It was not the claimant's fault that the ZoomText version 10 did not work. As we have said, it was understandably very stressful for her. But that is not the legal question. The legal question is whether the respondents did everything they reasonably could. We find that they did.

167. The claimant's other objection, which she did not argue very forcefully at the hearing, was that the software should have been installed earlier and that it delayed her return to work. That is not in fact the case. The claimant delayed returning because she did not feel well enough. The software was ready and waiting for her on the date she felt well enough to return.

168. This claim is therefore not upheld.

Providing a permanent desk as opposed to requiring the claimant to hot desk.

169. This issue also refers to the period of the claimant's first return to work. It is logical to deal with the issue of the desk before dealing with the issue of the monitor.

170. The claimant would have been put at a disadvantage by any requirement to hot desk because she needed to have a desk which had optimal lighting and ambient conditions, and was well-placed in terms of access to other areas of the building which she would need to visit regularly during the day.

171. We find that the respondents did make reasonable adjustments in providing a permanent desk for the claimant. This claim is not upheld. This is why.

172. As soon as she came back, the respondents invited the claimant to choose a desk. Meanwhile they reserved a temporary fixed desk for her pending that choice. This was the same desk every day. Ms Jan had very carefully chosen what she thought was a good location for this temporary desk. Only once had the chair been removed. But even if the system broke down on a couple of more occasions, it was instantly soluble. The claimant just had to choose a permanent desk. She was unable to do so. She was unable to explain to the tribunal why not. She said she did not have time, but there is no evidence that that is correct. We noticed that the claimant found it increasingly difficult to make decisions and get back to her employer on a number of matters. We suspect this was a feature of her psychological distress.

173. There was nothing further the respondents could do. They felt that if they had imposed a permanent desk on her, the claimant would have objected. We agree that is highly likely given the claimant's general approach. The respondents have therefore not failed to make a reasonable adjustment on this point.

Providing the hardware ie a large monitor.

174. This issue also refers to the period of the first return to work. By the time of the second return to work, everyone had even larger monitors.

175. Access to Work suggested the respondents replace the claimant's 17 inch monitor with 19 inch monitors. It was easier to see all the information on screen at once with a larger monitor. By

the time of the claimant's return to work, employees all had 20.1 inch monitors anyway. Nevertheless, Ms Jan was prepared to provide the claimant with even larger monitors once a permanent desk had been identified so they could be fixed.

176. The claimant has not proved to us that a 20.1 monitor did not show all the text. Access to Work had only recommended 19 inches. But even if a larger monitor was required, the only reason it was not acquired was because the claimant continually failed to select a permanent desk. As we have already stated, that was down to the claimant. It was not the respondents' fault. The respondents did not fail to make a reasonable adjustment in this respect.

177. By the time of her second return to work, all staff had a 34 inch screen, which the claimant was also given, and she had also been allocated a fixed desk.

Providing glasses for visual impairment to use with the software.

178. This issue refers to the second return to work period.

179. It was never clearly indicated to the tribunal what kind of glasses the claimant needed and specifically what disadvantage they were needed for. The only mention of glasses at all at the time seems to have been during the claimant's second return to work, when she was talking to Ms Harrison about waiting for her eyesight to settle before getting glasses and on occasion, apparently contradictorily, saying she had forgotten them. The claimant did not concretely ask the respondents to pay for glasses until her appeal. We cannot find there is a failure to make reasonable adjustments in this respect because we do not have sufficient clear information.

<u>Issues 4 - 5</u>

180. These issues concern whether the respondents treated the claimant unfavourably because of something arising in consequence of her disability by dismissing her because of her level of sick leave. The claimant says her level of sick leave was because of her disability or because of related-stress as a result of (i) the disciplinary action taken against her, ie the final written warning in April 2014. The two allegations which were upheld

against the claimant were selectively processing non-serious cases and manipulating workflow. The claimant says these actions were because she was unable to meet her targets because of her visual impairment and because of the failure to make the reasonable adjustments we have discussed above.

181. The first question is why the claimant was dismissed. We find that she was not dismissed because of the level of her sickness absence in itself. She was dismissed because the respondents believed she would never be able to return to work in that workplace.

182. The next question is whether this was because of something arising in consequence of her disability. We find that it was, in two ways. Firstly because her visual impairment meant she would never be able satisfactorily to return to that kind of job. And second, because she would psychologically unable to do so as a result of anxiety and depression caused by the effect of her visual impairment on her self-confidence. Dr Sterland explicitly makes these connections in his report. The claimant was therefore dismissed because of something arising in consequence of her disability.

183. However, this is not unlawful if the respondents can prove that dismissing the claimant was a proportionate means of achieving a legitimate aim. We find that the respondents did prove this. These are our reasons.

184. The respondents' aim was to have someone in the claimant's role who could do the job. This was a legitimate aim. The respondents have a function to perform and the work has to be done.

185. The final question is whether dismissing the claimant was a proportionate means of achieving that aim. Sadly, we think that it was. We appreciate that the impact on the claimant of losing her job was serious. At a time when her self-confidence was low, and she was struggling to adjust to her worsening eye-sight, losing her job would have a severe impact. It may also have been difficult for her immediately to find a new job.

186. On the other hand, it was clear that the claimant was unable to do the job and the position would not improve. She had been off

sick for over three years, with only two very short and unsuccessful return to work periods. The respondents had made reasonable adjustments. The reasonable adjustments had not helped. There was nothing else that could be done. The claimant was getting worse. On the second return to work, she was completely unable to cope. Meanwhile the respondents had important public work to carry out, recording and assessing adverse reactions to drugs.

187. The claimant refers to the final written warning she was given in April 2014, essentially for taking short-cuts as a result of her increasing difficulties meeting targets because of her visual problems. We would not say that the warning was a direct result of her disability. The claimant made choices. She could have told her line managers of her difficulties rather than manipulate the workflow to hide that she could not meet targets. We feel that a final written warning was harsh in the circumstances, but given the importance of the work as well as the impact on work colleagues, we could certainly understand some level of warning being given. We also feel the length of time that the claimant was suspended was poor practice for which the respondents had no excuse. However, having said all that, by summer / autumn 2017 matters had moved on substantially. The claimant was unable to go back to work, and the reason for that was because of her deteriorating eyesight and its impact on her self-confidence.

188. For all these reasons, this claim is not upheld.

Issues 6 - 7

189. These issues concern whether the respondents treated the claimant unfavourably because of something arising in consequence of her disability by failing to obtain up-to-date medical and disability-related advice on her condition so as to make an informed decision regarding her continued employment.

190. We do not uphold this claim. The respondents did made an informed decision based on up-to-date medical advice. The dismissal hearing was on 5 September 2017, which was postponed at the claimant's request from 22 August 2017. The respondents had Dr Sterland's report on 18 August 2017 which reviewed the OH notes over several years, plus reports from Dr Giagounidis whom the claimant had seen on 25 May 2017 and on

3 July 2017. Dr Giagounidis' reports immediately followed 23 May 2017, the last day the claimant worked when she had behaved in a way indicating mental ill health.

191. Dr Sterland did not express any reservations about his ability to give a form view based only on the papers without having met the claimant. His view was that the situation was not going to improve, so getting a further report would make no difference.

192. The reason the respondents did not get yet another more up-to-date report was not because of something arising from the claimant's disability but because they already had sufficient medical information. Indeed they had reports from OH going back several years.

193. Moreover, the respondents' actions were justified. Dr Giagounidis wrote reports in May and July 2017. The reason those reports were not more informative was because the claimant did not engage. She said she had not seen the referral form and attached documents, but she had been sent these. She just had not looked at them, even on the second occasion. The respondents had offered to get a Psychiatrist assessment, but the claimant had not wanted to do that. At the appeal stage, Dr Raine had postponed the appeal hearing date so that the claimant could get an absolutely up-to-date note from her GP about her fitness for work, but the claimant had not done that.

194. This claim is therefore not upheld.

Issue 8

195. Whether the respondents failed to make a reasonable adjustment in the period November 2017 – January 2018 including the December 2017 dismissal letter by communicating with the claimant in a suitable way, eg by using a font size which she could read. The claimant says she was put at a disadvantage by having constantly to read communications from the respondents.

196. The respondents' communications with the claimant in the period November 2017 – January 2018 were always by email and hard copy. None of these were in enlarged font. The claimant did not always have access to her email, which would enable her to electronically enlarge documents. She needed the help of her

mother or aunt or advice agencies to read the documents. This put her at a disadvantage compared with someone who does not have her visual impairment.

197. It is true that the claimant never explicitly asked for documents to be sent in larger font during this period. But the respondents knew or should have known that she needed it. As early as 30 October 2014, the Access to Work report said that due to her blurred and tunnel vision, the claimant preferred to read 14 – 16 point, and even then her reading time was reduced. Moreover, although a computer is not the same as paper, it is notable that that also required magnification. The claimant sent Dr Raine her appeal letter in very large font and her more detailed appeal reasons in smaller but still enlarged font.

198. It would not have been difficult for the respondents from November 2017 – January 2018, when writing such important letters about the termination of her employment, to ensure that emails and hard copies were typed in at least font 16, or larger.

199. In practice, the claimant was able to process the information and respond to the letters and fully participate in the appeal. However, it would have been harder work for her to do so.

200. We therefore find there was a failure to make this reasonable adjustment.

Issues 9 - 10

201. These issues concern whether, from 2014 to her dismissal, the respondents treated the claimant unfavourably because of something arising in consequence of her disability by not following and implementing an internal Managing Absence Policy and Sickness Policy prior to her dismissal. The claimant told us that by this, she meant the respondents had not made Early Interventions as set out in the Absence Management Policy, in particular before embarking on any formal meetings.

202. The management guidance in the Policy says that line managers should proactively manage poor attendance, initially on an informal basis, by considering early interventions. There is then a non-exhaustive list of interventions including reasonable adjustments for disabled staff; use of OH; referral to the Employee

Health portal; and flexible working – consider whether a temporary or permanent adjustment to the working pattern is practicable. By 20 November 2014, the date of the First Job at Risk warning, the respondents had made a number of early interventions. To some extent, they had been hampered by claimant's reluctance to engage fully.

203. Even before the claimant went off sick and the Absence Policy was invoked, the respondents had made early interventions. They obtained an OH report in April 2013 which had recommended the claimant contact Access to Work and that targets be reduced. The claimant did not give the necessary confirmation that her report could be released to her line managers until 24 July 2013. As a result of the OH recommendations, Ms Vaughan did not press the claimant to reach targets.

204. The claimant was off sick from 1 May 2014 until 27 April 2015. An informal case conference under Stage 1 of the procedure was held by Ms Vaughan on 9 July 2014. It was used to discuss the claimant's health, the importance of keeping in touch because the claimant did not always do this, and the need for the claimant to contact Access to Work for an assessment, which she still had not done. The claimant was also told that if she wanted any additional support, she should contact her managers or HR and there was also a confidential staff assistance programme.

205. The next case conference was 24 September 2014. A further OH referral was made. The Access to Work Assessment was finally arranged and took place on 30 October 2014 after some logistical difficulties. OH reported on 10 November 2014. OH recommended a phased return to work once the claimant was fit to return and that she then carry out a stress risk assessment. The claimant was made aware of support through the Employee Assistance Programme.

206. On 13 November 2014, a further formal case conference was held. The Remploy assessment had not yet been received. Ms Jan offered to meet the claimant off site and complete the stress risk assessment together. Only at this point, 20 November 2014, was the First Job at Risk warning issued. By this time, the claimant had been off sick for over 6 months and a number of early interventions had been taken, ie two OH reports (albeit one before she went off sick), non-enforcement of targets, an Access to Work

assessment, a pending Remploy assessment, an offer to do a stress risk assessment, an agreement to a phased return to work in due course, and making the claimant aware of various Employee Assistance Programmes.

207. The tribunal is not convinced that the concept of 'early interventions' extends beyond the first formal warning under the Policy. However, the respondents did continue to make adjustments and try to resolve difficulties, not always with the claimant's full engagement. They allowed extended time gaps between some of the Policy stages. On 1 December 2014, Ms Jan tried without success to get the claimant to agree to a time to meet and discuss the stress risk assessment. She also had to chase the claimant to pass on the Access to Work report so she could work on the recommendations. The claimant had the Report but had failed to send a copy to the respondents.

208. On 17 March 2015, there was a further OH report which said the claimant was fit to return to work. On 16 March 2015, Ms Jan met the claimant outside work to complete the stress questionnaire but the claimant was still not ready to complete it. A case conference took place on 25 March 2015. A representative from Remploy was present in an adjoining room and the claimant was allowed to talk to him. Ms Jan said she was waiting for the claimant and Remploy to produce a return to work plan, which she would then implement. The claimant had a list of support measures but would not have Ms Jan have a copy then or when asked afterwards. Following the case conference, the claimant was given a Final Job at Risk warning under Stage 3 of the procedure.

209. The claimant returned to work on 27 April 2015. She went off sick again on 22 June 2015. Further OH reports were obtained on 3 November 2015 and 7 April 2016. Shortly after, the claimant was invited to a Stage 4 hearing following on from her Final Job at Risk Warning of 25 March 2015. She had now been off sick for a further 9 months. Despite this, a decision was taken not to take action while the claimant was asked if she would like to apply for ill-health retirement. After further OH reports and meetings, the claimant was issued with another Final Job at Risk warning in April 2017. Shortly after, she returned to work for the second time but, as we have discussed elsewhere, she was not really well enough. Her last day at work was 23 May 2017. After two further inconclusive

OH reports and an independent OH report by Dr Sterland based on the paperwork, the claimant was dismissed on 2 October 2017 with notice.

210. We therefore find that the respondents did follow and implement an internal Managing Absence Policy and Sickness Policy prior to the claimant's dismissal. In particular, they did make early interventions.

211. We have rejected this allegation on the facts. We do not think the respondents failed to make early intervention. However, even if they had failed, we would find it difficult to see how failing to make early interventions would be unfavourable treatment *because of* something arising in consequence of the claimant's disability.

Issue 11 - 12

212. These issues concern whether in December 2017 the respondents treated the claimant unfavourably because of something arising in consequence of her disability by offering the claimant a choice between dismissal or ill-health retirement and by placing a time-limit on making her choice in a letter in small font.

213. Offering the option of ill-health retirement was not unfavourable treatment. It was favourable treatment. The option was offered at a point when it was clear that the claimant was not going to be able to continue in employment. She did not have to take it up.

214. The reason for imposing time-limits was because the respondents believed the claimant's best chance of getting ill-health retirement was if she applied while still employed. They explained that. They extended the claimant's time to decide repeatedly, and it was an option right up to the termination of her employment after the dismissal decision had been made. The possibility of applying for ill-health retirement was first suggested to the claimant in June 2016. She was first sent the application form on 3 August 2017. By the time the claimant was offered the option again on 2 October 2017, she already knew about the option. She was given a further two weeks. Ultimately she was given to 13 January 2018 to apply.

215. The fact that the offer was made in letters of unenlarged font was not unfavourable treatment because of something arising out of the claimant's disability. That is not why the letter was written in ordinary font. It was just thoughtless. The related issue of making reasonable adjustments by enlarging font is dealt with separately above.

216. This claim is therefore not upheld.

Issues 13 – 14

217. These issues concern whether the respondents treated the claimant unfavourably because of something arising in consequence of her disability by failing to consider her for flexible working by which she means reduced hours.

218. The reason the respondents did not offer reduced hours is because it did not arise. The claimant never indicated that she wanted to work reduced hours. She put forward, with her advisers, a phased return to work.

219. They did not fail to consider reduced hours because of something arising from the claimant's disability.

220. We add that the claimant did not run her case in the tribunal on the basis that she wanted or should have been offered reduced hours.

221. This claim is not upheld.

Issue 15

222. This issue concerns whether from 2014 to date the claimant was victimised as a result of having alleged in her grievance that the respondents contravened the Equality Act. The respondents accept this was a protected act. The alleged acts of victimisation are (1) being subjected to attendance levels and (2) being dismissed.

223. The claimant submitted her grievance on 6 July 2015. She had recently gone off sick again after her first return to work period. The grievance was decided on 23 October 2015. At the claimant's request, the outcome letter was not sent to her until 9 June 2016, rejecting the grievance. The claimant appealed. Her appeal was rejected on 3 August 2016.

224. There was no overt indication of hostility towards the claimant following the lodging of her grievance. Nor do we see any notable change in the respondents' treatment of her. The attendance management procedure was already being followed before she lodged her grievance. She had already received a Stage 3 Final Job at Risk warning on 25 March 2015.

225. Indeed, even though she lodged a grievance, she was not invited to a Stage 4 Absence meeting until April 2016, more than a year after the Final Job at Risk warning. Even then, Mr Foy avoided dismissing the claimant and the claimant was permitted to try again to return to work on 20 April 2017.

226. There is no evidence that she received a hostile reception from her line managers. As before, a phased return to work had been agreed. The software was now working. A large monitor was available. The claimant had been allocated a fixed desk.

227. The reasons for the dismissal were clear. They were based on the managers' experience of the claimant's inability to cope with work on her second return and the advice of an independent OH consultant. The respondents had tried to make things work over a long period of time. They had not succeeded because there was a fundamental incompatibility between the claimant's health and the job. The dismissal did not strike us as in any way premature and there is no evidence at all that it was prompted in any way by the grievance.

Issue 16

228. This issue concerns time-limits. The only claim which we have upheld is the failure to make reasonable adjustments by enlarging the font in emails and hard copy correspondence from November 2017 – January 2018. This discrimination continued over a period and into the primary time-limit. On its face, it is therefore in time.

Issues 17 – 18: Unfair dismissal

229. These issues concern whether the claimant was unfairly dismissed. The legal test for this is different to the test for a discriminatory dismissal.

230. The first question is whether the respondents have proved the reason for the dismissal. We find that the respondents have proved this. The reason the claimant was dismissed because the respondents believed she would never be able to return to work in that workplace. This was the effect of Dr Sterland's advice which confirmed their own fears from what happened during the second return to work.

231. The next question is whether the dismissal was fair or unfair, applying the band of reasonable responses. The question is not whether this tribunal would have dismissed the claimant. The question is whether an employer could reasonably have dismissed the claimant, even if others employers might have done something different.

232. We find that it was reasonable for the respondents to dismiss the claimant. By the time of dismissal, they had a report from an independent OH consultant saying that the claimant would never be able to return to that workplace. A reasonable employer could rely on that report, even though Dr Sterland had not seen the claimant. Dr Sterland expressed his opinion in a confident way. He did not say that he could not decide on paper. He had looked at all relevant documentation including years of OH reports.

233. The respondents had tried and failed to get clear advice from Dr Giagounidis in May and July 2017, mainly because the claimant had not read the OH referral form and attachments on both visits and did not engage. The claimant had also not wanted to get an assessment from a Psychiatrist and even at the appeal stage, when given time to get a completely up-to-date note from her GP about her fitness to work, had failed to do so.

234. What Dr Sterland said in his report would not have appeared surprising to the respondents because the claimant had been off work for a very long time, and they had seen for themselves what had happened when she tried to return.

235. The respondents had not rushed to dismiss the claimant. The claimant was absent from work through sickness for roughly three and a half years with only two short periods of work in between for 2 months and 1 month respectively.

236. The respondents had followed the stages of their absence Policy, sometimes with extended gaps in between Stages. They had acquired numerous OH reports. They had tried without success to get the claimant to do a Stress questionnaire. They had agreed two phased returns to work with reduced targets. They had ordered all the software and training on it which was recommended by Access to Work. They had followed the phased return to work plan suggested by Remploy.

237. The respondent organisation had an important public duty to collate information on adverse drug reactions. The claimant, through no fault of her own, could no longer do the job. According to their medical advice, further time, OH reports and assessments were not going to make any difference.

238. The respondents handled the procedure in a fair way in terms of basic dismissal procedures such as inviting the claimant to the Stage 4 meeting, rescheduling the meeting when she said she could not attend, warning her the hearing would go ahead in her absence, giving her a fully reasoned dismissal letter and dealing properly with her appeal including holding an appeal meeting which the claimant did attend.

239. For all these reasons, we do not find the dismissal was unfair.

Issue 19: Holiday pay

240. The respondents paid the claimant's holiday pay on the last day of the hearing. The claimant was happy that it satisfied her holiday pay claim.

Issue 20: Notice pay

241. The respondents did not pay notice because the claimant was off sick through the notice period and her sick pay had run out. The tribunal drew their attention to s87(1) and s88(1)(b) of the Employment Rights Act 1996.

242. The claimant's continuous employment started on 18 May 2009. The termination date was 3 January 2018. Under her contract of employment her entitlement was statutory notice, ie 8 weeks' net pay.

243. The tribunal has a note that the respondents stated they would pay the notice if it was owed. However, they did not come back on this point.

244. On the face of it, unless there is an exemption of which we are not aware, the claimant is owed this notice by reason of s s87(1) and s88(1)(b). of the Employment Rights Act 1996. This can be resolved at the remedies hearing on 3 December 2019.

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Employment Judge Lewis

Dated: 8 July 2019

Judgment and Reasons sent to the parties on:

10 July 2019

For the Tribunal Office