EMPLOYMENT TRIBUNALS

Claimant:	**Dr E L Fitzpatrick**
Respondent:	**Sheffield Children's NHS Foundation Trust**
Heard at:	**Sheffield On: 22 July 2019 (reading day) 23,24,25 and 26 July 2019** **29 July 2019 (in chambers)**
Before:	**Employment Judge Little** **Mr M D Firkin** **Mr T Fox**

Representation

Claimant:	Mr B Henry of Counsel (instructed by Thompsons Solicitors)
Respondent:	Ms L Gould of Counsel (instructed by Capsticks Solicitors LLP)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:-

1. The Tribunal does have jurisdiction to consider the complaint under the Equality Act 2010 section 20(5) and/or section 20(3).
2. However that complaint is not made out and so is dismissed.
3. The complaint under the Equality Act 2010 section 15 also fails.
4. The claimant was fairly dismissed and accordingly the unfair dismissal complaint under the Employment Rights Act 1996 also fails.

REASONS

1. **The complaints**

   Dr Fitzpatrick presented her claim to the Tribunal on 1 June 2018. The complaints were as follows:-

   - Disability discrimination – failure to make reasonable adjustments.
   - Disability discrimination – discrimination arising from disability.
   - Unfair dismissal.

2. **The claimant's protected characteristic of disability**

   The respondent concedes that the claimant was a person with a disability within the meaning of the Equality Act. That was by reason of two impairments, dyspraxia and Irlen Syndrome. The respondent had become aware that the claimant may have had dyslexia as early as April 2015 but the correct diagnosis, as above, would have come to their attention in or about July 2015.

3. **The issues**

   It had not been possible to define and agree the issues at the preliminary hearing for case management conducted on 18 February 2019 because at that stage further information was required from the claimant. Although that further information was provided and the respondent given the opportunity, which it took, to amend its grounds of resistance, it became apparent at the beginning of our hearing that no definitive list of issues had been agreed. Once the Tribunal had had the benefit of reading into the case, we were able at the beginning of day two to agree the issues with the parties, as follows-

   <u>Reasonable adjustments</u>

   It became apparent that the claimant's primary case here was an allegation that the respondent had failed to provide auxiliary aids or services although the secondary case was that a provision criterion or practice required reasonable adjustments to be made, so the issues here were -

   3.1. Was the claimant put to a substantial disadvantage in comparison with persons who are not disabled by a failure of the respondent to provide auxiliary aids or auxiliary services?

   3.2. Would the auxiliary aid/service have removed the substantial disadvantage and was it reasonable for the respondent to have provided the auxiliary aid or auxiliary service?

   3.3. Specifically was there an unreasonable failure to provide the following training:-

   - Training in respect of Texthelp Read and Write Gold (software which provided the service of reformatting documents, reading out documents and spell checking).

- Training in respect of Dragon Medical Practice Edition 3 (voice recognition dictation).
- Coping strategy coaching.

The claimant's secondary case was on the basis that the respondent had a provision criterion or practice of implementing or continuing its capability procedure and that that put the claimant at a substantial disadvantage because she needed the training referred to above. The claimant was pursuing the alternative approach because at the beginning of the hearing it was envisaged that the respondent might dispute whether the training came within the extended definition of auxiliary aid. It is to be noted that the Equality Act section 20(11) explains that a reference in the Act to an auxiliary aid includes a reference to an auxiliary service. In the event, when Ms Gould made her closing submissions, it was conceded that the training/coaching was correctly to be viewed as an auxiliary service within the definition of an auxiliary aid. It follows that the Tribunal have only been required to determine the auxiliary aid/service aspect of the case.

3.4. Had the reasonable adjustments complaint been presented out of time and in particular:-

- When did time run from – when (if at all) had the respondent decided not to act, done an act inconsistent with doing the act or had there been a passage of time within which the respondent might reasonably have been expected to do it?
- Had there been conduct extending over a period to a point which was in time?
- If this complaint was out of time, would it be just and equitable to extend time?

<u>The discrimination arising from disability complaint</u>

3.5. Was the unfavourable treatment of dismissal by reason of the respondent taking the view that the claimant could not do her job to the required standard?

3.6. If so, did that inability arise in consequence of the claimant's disability?

3.7. If so, can the respondent justify dismissing the claimant in those circumstances and in particular did it have the legitimate aim of ensuring the efficiency of the psychology service and the health, welfare and safety of the claimant, the patients and the staff in the service? If so, was ultimately dismissing the claimant a proportionate means of achieving that aim?

<u>Unfair dismissal</u>

3.8. Can the respondent show the potentially fair reason for dismissal of capability?

3.9. If so was the decision to dismiss the claimant actually fair having regard to the provisions of the Employment Rights Act 1996 section 98(4) and in particular because:-

- The respondent failed to have adequate regard to the claimant's situation because the full benefit of the auxiliary aids was not received as training had not been completed and because coaching in coping strategies had not been completed?
- Because the final three month monitoring period was too short and in any event had been less than three months because it was paused?
- Insufficient time had been provided to the claimant to deal with her administrative tasks?

We should add that at the beginning of the hearing it was indicated that there was further alleged unfairness in that the respondent was said not to have properly considered alternatives to dismissal, such as redeployment, however in closing submissions Mr Henry confirmed that this was no longer being pursued.

3.10. If the claimant's dismissal was found to be discriminatory, should compensation for that dismissal reflect the possibility that the claimant may subsequently have been dismissed in a non-discriminatory way in any event? (**see Abbey National Plc v Chagger** [2009] IRLR 86.)

3.11. If the claimant's dismissal was found to be unfair should compensation for that dismissal reflect the possibility that the claimant might ultimately have been dismissed fairly in any event (Employment Rights Act 1996 section 123 and **Polkey** v **A E Dayton**).

We should add that the latter two issues were not alluded to in our initial discussion (although the Polkey point had certainly been raised in the grounds of resistance.) Nevertheless, it was clear from counsel's closing submissions that it was agreed that these issues were, if appropriate, to be determined by the Tribunal.

4. **Potential conflict issues**

4.1. When, immediately prior to the hearing beginning, the Tribunal saw the cast list which had been prepared by counsel for the respondent, it noted that one of the names was Pat Pepper, described as union representative at the appeal hearing. Ms Pepper is a non legal member of the Employment Tribunal in this region. The Tribunal had hitherto been unaware of Ms Pepper's involvement in the claimant's case. It did not appear that Ms Pepper was giving evidence in this case and that was confirmed to us by the respondent's counsel. We were told that Ms Pepper's involvement had been in relation to the appeal against dismissal (although in fact as we heard the case it was noted that she had had involvement in other meetings). Having explained the position to the parties, who it appears were unaware of Ms Pepper's connection to the Tribunal we allowed time for counsel to take instructions and consider the matter. On returning we were told that there was no objection to this Tribunal proceeding to hear the case. In the event, whilst Ms Pepper's involvement in the domestic case was perhaps more extensive than we originally envisaged, we

have not had to consider any controversial matters with regard to Ms Pepper's involvement in the claimant's case.

4.2. Mr Fox, a member of this Tribunal, indicated that he was a "friend" of the children's hospital. It appeared that this was an honorary title and indeed Mr Fox was not entirely sure what it involved himself. It clearly did not include any governance role nor did it involve any charitable donation. Having also disclosed this to the parties and having given them time to consider the matter there was no objection to Mr Fox continuing to be a part of this Tribunal.

5. **Evidence**

The claimant has given evidence but called no other witnesses.

The respondent's evidence has been given by Dr Lindsey Jacobs, acting director of psychological services; Dr Claire Pearson, consultant clinical psychologist; Mrs Liz Murch, associate director for community well-being and mental health division (and the dismissing officer) and Mrs Sally Shearer, director of nursing and quality (and one of the appeal panel).

6. **Documents**

The parties had agreed a two volume trial bundle running to 725 pages.

7. **Overview**

The claimant was at the material time employed as a consultant clinical psychologist (her substantive post). The claimant had been employed by the respondent since 1993 but the Tribunal have been required to consider matters occurring in the period from 2015 up to the claimant's dismissal on capability grounds in January 2018. There had been disciplinary proceedings against the claimant in 2015 with regard to alleged failure to make or retain clinical notes and the claimant had received a final written warning in March 2016 for similar matters. Also in 2016 a capability procedure was begun. That moved to stage 2 of the formal procedure in June 2016 and to stage 3 (a capability hearing) in April 2017, although in the event the decisive stage 3 capability hearing did not take place until 9 January 2018 following which the claimant was dismissed. In reaching its decision to dismiss and during the formal capability procedure the respondent had had the benefit of occupational health reports, input from the White Rose Dyslexia Centre and the claimant had availed herself of assistance under the Access to Work scheme.

8. **The Tribunal's findings of fact**

8.1. The claimant's employment with the respondent commenced in 1993 as a trainee. The claimant qualified as a clinical psychologist in 1996.

8.2. The claimant was appointed as a consultant clinical psychologist in or about January 1997. Throughout this period the claimant had worked in the paediatrics department of the children's hospital, working with children who had acute chronic life limiting or terminal medical conditions – and also working with their families. At least latterly during her time in the paediatric department, the claimant had been part of the cystic fibrosis team. The claimant's pay band was 8c.

8.3. From 9 April 2014 to 1 April 2015 the claimant had been absent from work on long-term sick leave. That absence may also have been in part precipitated by the difficult working relationship which the claimant had with a Dr Wynne and a Dr Dyson within the cystic fibrosis team.

8.4. Immediately prior to the claimant's return to work there had been an investigation into allegations that the claimant had not been keeping written notes for all the patients she saw and that it had not been clear where the claimant had been at all times within working hours. These matters had arisen as early as 2013, but the claimant's sickness absence had prevented the matter being concluded. The respondent viewed that as potential gross professional misconduct which could therefore have resulted in the claimant's dismissal. However, in April 2015 the claimant was informed that those matters would not be investigated any further. The claimant had suggested in the most recent investigation meeting that she now believed that she may have dyslexia which could account for her alleged shortcomings.

8.5. Following a meeting between the claimant and Dr Lindsey Jacobs, who was then the deputy director of psychological services, on 5 May 2015, Dr Jacobs wrote to the claimant (pages 190 to 192) it was noted that Alison Hollett, who had been conducting the investigation, had reached a different conclusion to the explanation which the claimant had previously given to Dr Jacobs. That was that rather than odd notes being missing, a significant number of clinical notes were found to be missing over a lengthy period of time. Dr Jacobs noted however that the claimant had been contrite and committed to rectifying the position going forward. However measures were being put in place. That included Dr Jacobs checking all the claimant's clinical notes for the next six month period. The meeting also discussed the issue of dyslexia which the claimant had raised and Dr Jacobs indicated that she would be referring the claimant to the White Rose Dyslexia Service.

8.6. When the claimant returned to work in April 2015 it was on a phased basis on an understanding that she would gradually return to a full 8c position. The awkward situation existed whereby colleagues who had apparently in the past reported their concerns about the claimant needed, Dr Jacobs believed, to be given some feedback. Dr Jacobs agreed with the claimant that they would be told that it had been found that the claimant had not been keeping notes on a significant number of occasions and that whilst there would be no disciplinary action, the claimant would be monitored. The awkwardness was exacerbated by reason of the claimant ostensibly being in charge of the cystic fibrosis team. It had therefore been those that she managed who had felt obliged to report their concerns.

8.7. The claimant was seen at the White Rose Dyslexia Centre in Sheffield. The report issued by that organisation as a result is at pages 650 to 658. The report gave a diagnosis of dyspraxia. Reference was also made to Irlen Syndrome. In her witness statement the claimant explains that symptoms of her dyspraxia include such matters as poor balance, a tendency to fall, lack of manual dexterity and difficulty organising the content and sequence of language, difficulties with

planning and organising thought; difficulties communicating coherently at times; very poor short-term memory and significant difficulties with attention and concentration. The claimant describes Irlen Syndrome as a perceptual processing disorder which in her case causes light sensitivity and reading and writing problems. The claimant prefers documents on purple paper and uses a purple overlay on her computer and a purple ruler to assist reading.

8.8. The White Rose report included various recommendations, one of which was that there should be a work based needs assessment.

8.9. The specialist workplace assessment was also undertaken by White Rose. The assessor was Vicky Shaw. The assessment report is at pages 668 to 677. Ms Shaw observed that her impression of the claimant was of an individual feeling extremely vulnerable and isolated and who was struggling to process an adult diagnosis of dyspraxia. Coping strategies which the claimant had put in place over a period of many years had become less effective as demands at work had increased and changed. Ms Shaw suggested various pieces of assistive technology such as speech to text software and also Dragon voice recognition software. It was noted that the claimant would require training in the use of that technology once it had been purchased. It was also observed that it could be appropriate to arrange workplace coaching for the claimant in respect of more effective reading and writing strategies and for effective memory technique.

8.10. On 10 July 2015 a facilitated mediation meeting took place, conducted by an independent mediator in conjunction with Dr Jacobs. Those attending were the claimant and the other members of the paediatric team. Unfortunately this process did not mend the working relationship and in Dr Jacobs' opinion had in fact made it worse. In part, in Dr Jacobs' view, that was because the claimant had reverted to her position that only a small number of clinical notes had been missing when the investigation had found that there were vast amounts of clinical entries missing.

8.11. Unfortunately further potentially disciplinary issues came to light shortly after this meeting. On 15 July 2015 Dr Jacobs wrote to the claimant in respect of a meeting which had taken place that morning (194(1) to 194(2)). The claimant had been informed that there would need to be a further formal investigation under the disciplinary procedure. The matters of concern were that the claimant had resumed clinical work with a family who she had not seen for some time due to her year off work, but had not requested to see the notes that had been taken in the meantime or spoken to the clinician who had been attending the family. It had also come to light that in respect of a particular patient there were two files, the claimant having had her own separate file for the patient. That was regarded as a serious governance issue. There was also concern that in response to an enquiry from a recently appointed clinical psychologist, the claimant as the lead in the cystic fibrosis team, had said that she should keep notes from clinic, whereas in the mediation meeting the claimant had suggested, it seems erroneously, that there were national guidelines in cystic fibrosis that warranted the claimant not keeping notes. There was also concern

about the claimant failing to keep an accurate prospective and retrospective electronic diary. In all these circumstances the claimant was instructed to immediately cease clinical work whilst an investigation was undertaken.

8.12. That investigation was undertaken by Dr Claire Pearson. Investigation meetings were conducted in September and October 2015.

8.13. On 22 September 2015 Dr A Rimmer, a consultant occupational physician with Sheffield Teaching Hospital NHS Foundation Trust, wrote to Dr Jacobs. Dr Rimmer had recently seen Dr Fitzpatrick and had seen a copy of the first White Rose report. Dr Rimmer thought that, in light of the dyspraxia diagnosis, it was clear that many of the concerns which Dr Jacobs had expressed with regard to the claimant's work were now explained.

8.14. On 17 November 2015 the claimant was formally suspended from work because in breach of the agreement that she would not carry out clinical work she had done so by telephoning a patient's family.

8.15. On 7 December 2015 Dr Pearson had a discussion over the telephone with Vicky Shaw of the White Rose Dyslexia Centre. In advance of that telephone conversation Dr Pearson had sent a list of questions to Ms Shaw. The note of that telephone conversation which sets out the written questions and Ms Shaw's response is at pages 253 to 255 in the bundle. Ms Shaw confirmed that the claimant did have a strong profile of dyspraxia. She noted that if the claimant's job role had changed or if she had returned after a period of sickness (the latter being the case) then her coping strategies/mechanisms would have been affected. It was also possible that the emotional stress and the fact that the claimant felt that her job was at risk had contributed to an unravelling of those strategies. Whilst it was believed that the claimant was struggling to re-establish those strategies at present, Ms Shaw was of the opinion that the claimant could regain those skills in the future. Ms Shaw believed that it would take the claimant between 25% and 50% longer to process written information than would be the case in a person who did not have dyspraxia. Ms Shaw went on to express her feeling that something had happened during the last year which had put the claimant into what she described as a freefall situation where the coping mechanisms that had previously worked so well started to unravel.

8.16. On 15 February 2016 Dr Pearson prepared the management report for the disciplinary hearing which the claimant would shortly be invited to attend. Initially there were six allegations regarded as disciplinary issues:-

- Failure to properly record clinical notes.
- Failure to comply with instructions to keep the electronic diary.
- Seven working days where there was no record of what work was being undertaken.
- Failure to complete appropriate clinical management of cases.
- Failure to take proactive steps in relation to governance issues.

- Being in breach of the conditions which were in place (no clinical work) so that the claimant could otherwise have remained at work during the disciplinary investigation.

Dr Pearson reported that it had been found that there was no case to answer in relation to the first three allegations. Whilst there were concerns in relation to the claimant's performance in those areas it was felt that those concerns could relate to the claimant's recent diagnosis of dyspraxia. Dr Pearson had prepared a separate report in relation to recommendations in respect of those first three matters. The remaining three matters (seeing a patient without reading the patient's file; having two files for one patient and conducting clinical work in contravention of the agreed position whilst the disciplinary matters were being investigated) were, in Dr Pearson's opinion, examples of gross misconduct.

8.17. On 17 February 2016 Dr Pearson wrote to the claimant inviting her to attend a disciplinary hearing on 1 March 2016. The claimant was warned that sanctions could include dismissal. (See pages 266 to 267).

8.18. The disciplinary hearing was conducted by Mrs L Murch. The outcome was confirmed to the claimant in Mrs Murch's letter of 8 March 2016 (296 to 300). The claimant was issued with a final written warning which would remain on her file until 28 February 2017. On return from suspension the claimant was to undertake a three month phased return and during that period she was to work at a different location and for a different team – the community Children and Adolescent Mental Health Services (CAHMS). This would be at the Becton Centre at Beighton, some eight miles from Sheffield city centre. Subsequently a return to work plan was prepared (321 to 323). The claimant was to be managed by Dr Pearson.

8.19. Dr Pearson's recommendation report, in respect of the first three matters which had hitherto been regarded as disciplinary concerns, is at pages 281 to 295. The report sets out a chronology of matters relevant to those three issues. That included the interview over the telephone with Ms Shaw of the White Rose Dyslexia Centre referred to above. Dr Pearson recommended that the issues with regard to electronic diary and the use of trust time were now considered in the light of a capability issue. Dr Pearson went on to recommend that consideration be given as to whether the claimant was capable of performing her role.

8.20. On 4 April 2016 a meeting took place between Dr Jacobs and the claimant. Subsequently a record of what had been discussed was set out in Dr Jacobs' letter of 6 April 2016 (pages 303 to 305). It was noted that the claimant's phased return plan would provide a supportive return to her role and for the assessment of reasonable adjustments. It was noted that the White Rose Workplace Assessment had provided a lengthy list of adjustments. Dr Jacobs noted that whilst some of those were straightforward to implement, that would not be the case with others and she needed to consider what was reasonable. It was

recorded that the claimant's view was that the list was a standard one and that not all of the proposed adjustments would apply to her role. It was noted that it had been agreed that there would be a further referral to occupational health to gain their view on what reasonable adjustments needed to be considered (page 304).

8.21. That resulted in a further report by Dr Rimmer dated 26 April 2016 (311). Unfortunately it would transpire that Dr Rimmer had not been provided with a copy of the White Rose Workplace Assessment. Dr Jacobs had understood that the claimant had provided Dr Rimmer with this. Dr Rimmer suggested that it would be helpful in due course for there to be a meeting between the claimant, Dr Jacobs, the White Rose assessor and Dr Rimmer herself.

8.22. On 11 May 2016 a meeting took place between Doctors Jacobs, Pearson and Varella, the latter being a consultant clinical psychologist who had also recently been line managing the claimant at Beighton. A note of this meeting is at page 315. There were various concerns about the claimant's performance. It was noted that the claimant had been told that she needed to leave a public library where she was completing work emails because of the risk of a confidentiality breach. There remained concerns about the claimant not completing her electronic diary and various problems with regard to the claimant's apparent lack of initiative. Dr Varella recorded that she was repeatedly asking the claimant to identify her learning needs and the support required to which the claimant would reply that she didn't know or "as needed".

8.23. On 9 June 2016 a meeting took place between Dr Jacobs and the claimant. Dr Jacobs' record of this meeting is set out in letters which she wrote to the claimant on 12 June (page 334) and 15 June (337). There are also some handwritten notes at pages 331 to 333. Dr Jacobs noted that in relocating the claimant to the Becton site the respondent had tried to reduce the stress of the claimant returning to the environment of paediatric psychology which the claimant had reported to be extremely hostile. It was also noted that the claimant had, whilst at Becton, not been given any clinical case responsibility and had not been expected to take any solo clinical sessions. Further no additional leadership, management or supervision responsibilities had been given and the claimant had been given a significant amount of extra time to complete tasks such as the completion of clinical reports. The claimant had also been given weekly line management support and mentoring which was substantially above that which would usually be provided for 8c staff. It was noted that the claimant had been late in providing proxy access to her diary in order that her line manager could review what work was being undertaken and reference was also made to the claimant working on confidential emails in a public library. The claimant had also failed to allow Dr Pearson to have access to her electronic diary. It was noted that concerns had been expressed about the claimant's ability to follow explicit verbal and written instructions, her lack of initiative in taking responsibility for her return to work and in what she may need to do to enable her to resume her full 8c responsibilities. There was also

concern about the length of time which it was taking the claimant to complete tasks despite the significant extra time which had been provided to her. Given all the information which had been provided to Dr Jacobs she had decided to move the claimant to level 2 of the capability process (see the respondent's capability policy and procedure at pages 70 to 88). The claimant would continue her phased return to work at Beighton and the claimant's duties would be increased in line with a band 7 clinical psychologist – it appears that essentially prior to this the claimant had been supernummary. It was not felt reasonable given the current shortfall in expectations at a foundation level to move the claimant straight back to 8c responsibilities. Dr Jacobs confirmed that in parallel with the capability process she hoped to receive recommendations from occupational health about any other reasonable adjustments which would be appropriate.

8.24. On 20 June 2016 a job plan for band 7 benchmarking was prepared by Dr Jacobs and Dr Pearson (355). That was to come into effect from 11 July 2016.

8.25. On 4 August 2016 Dr Pearson provided Dr Jacobs with an update on the claimant (365 to 366). There had been some progress with the keeping of the electronic diary but Dr Pearson had noticed that it took the claimant a long time to complete tasks.

8.26. On 15 August 2016 Dr Jacobs conducted a stage 2 review meeting with the claimant (370 to 371). Dr Jacobs had hoped that there would be a further occupational health report available for this meeting but that was not the case. Dr Jacobs noted that the work plan was benchmarking the claimant's performance at a band 7 and that her duties were reduced by 50% to take account of the claimant's disability. Dr Jacobs accepted the comment by the claimant's union representative (Dr Sam Watson) that the claimant's current work, assessments, was heavily loaded administratively in comparison with intervention work. Dr Jacobs acknowledged this but pointed out that there had been the 50% reduction in what was being expected of the claimant.

8.27. The anticipated occupational health report was in fact contained in Dr Rimmer's letter to Dr Jacobs of 24 August 2016 (372 to 373). Unfortunately this did not take matters very much further because Dr Rimmer expressed the view that she was unclear as to the nature of the concerns with regard to the claimant's capability at present and how those linked with her diagnosis.

8.28. When responding to this letter, Dr Jacobs observed that the White Rose report gave very generic advice and Dr Jacobs was keen to receive specific advice in relation to the claimant's role (page 378).

8.29. On 23 October 2016 Dr Pearson prepared a further update on the claimant's progress (380 to 381). Dr Pearson was concerned that the claimant was still not up to speed with ASD assessments (autistic spectrum disorder). Dr Pearson stated that she would have expected someone of the claimant's grade and experience to be able to gather additional skills in order to conduct those assessments at that point in

the work plan. Dr Pearson was of the view that the claimant was under confident about her skills. Dr Pearson concluded her report with the following comment:

"In summary, I do have concerns that Liz is still behind the trajectory that we had planned. This is despite the fact that reasonable adjustments have been made in terms of Liz's disability and the fact that she had moved to a new team in CAMHS . I had hoped that by now, all the aims would have been achieved and we would have been thinking about a new work plan including duties at an 8a level".

8.30. On 27 October 2016 Dr Rimmer again wrote to Dr Jacobs (382 to 384). Dr Rimmer noted that the White Rose Dyslexia Centre approached dyslexia and dyspraxia from an educational view point and that that might affect their ability to assess the needs of the claimant who worked in a complex and demanding healthcare environment. Dr Rimmer went on to recommend two organisations who she thought could provide the appropriate assessment. One was called Lexxic and the other, Genius Within. The former were understood to be subcontracted to undertake Access to Work assessments. Dr Rimmer pointed out that Access to Work could only be accessed by the individual employee concerned. Dr Rimmer was of the view that the needs of the claimant needed to be assessed by one of the specialist organisations rather than an occupational physician.

8.31. At a further stage 2 review meeting, conducted on 3 November 2016, there was a discussion as to what additional support the claimant felt she needed. Among other things reference was made to individual coaching and we understand this in fact to be a reference to training in respect of IT/electronic diary matters. It was agreed that the claimant would contact Access to Work so that an up to date assessment could be made.

8.32. On 22 November 2016 Dr Pearson provided a further update on the claimant's progress to Dr Jacobs (391 to 392). She had numerous concerns about the claimant. The claimant had told her that she did not understand the target that she had to reach under the job plan. The claimant's clinical activity had been below the target set. The claimant had reported that administration for initial assessments was a struggle for her but Dr Pearson's view was that other work demands such as extended follow up work had been taken away from the claimant so that she could focus on the initial assessments. Dr Pearson was also concerned about the claimant's apparent inability to retain information.

8.33. On 13 December 2016 Dr Pearson gave a further update (400). She reported that in the relevant four week period the claimant had seen 20 patients whereas it was expected that she should have seen 36. She had therefore only achieved 55% of her (reduced) workload.

8.34. On 10 February 2017 the Job Centre Plus (DWP) wrote to the claimant to inform her that her application for an Access to Work grant had been approved. The letter (pages 409 to 416) sets out the special aids and equipment that the grant would cover. That included the software for Dragon medical practice edition 3 (voice recognition) and the software Texthelp Read and Write Version 11 Gold. Also included was two half

days training on Dragon and two, two hour sessions training on the Texthelp Read and Write Gold. There was also provision for what is described as strategy coaching – in other words coaching in coping mechanisms or strategies for the claimant. That provision was for 20 two hour sessions. The handwritten annotations on the grant document are made by the claimant (see later).

8.35. There was some delay in Dr Jacobs having sight of this document. It appears that the document had been posted to both the claimant and the respondent twice by the DWP (see page 403) but it may be that Dr Jacobs did not see that document until 4 April 2017.

8.36. In addition to the Access to Work grant, a needs assessment report had been prepared by Capita on behalf of Access to Work/Job Centre Plus. This undated document is at pages 678 to 695. We find that Dr Jacobs received that report on 28 March 2017. That was also the date of the first of a two part stage 2 capability meeting (see below). The needs assessment report by Capita explained why the claimant would benefit from the various items set out within the grant document. Reference was made to the claimant benefiting from what is described as professional coaching with regard to skills to use such technology as Dragon. It was also recommended that the claimant was provided with coping strategy training. That would be bespoke training tailored to her needs in the workplace. Some of the areas which would need to be covered would be developing the claimant's skills and techniques for her short term memory, organisational skills and time management. It was recommended that the claimant should have 20 half day sessions with a specialist supplier of coping strategy training (page 682). Reference is made to training in the use of the medical version of voice recognition software on page 683 – two half day's training. There was also to be training in respect of the software described as spell checking which we understand to be the Texthelp Read and Write (see page 685).

8.37. Towards the end of March 2017 the claimant moved to a different community CAMHS site, nearer to her home. This was Centenary House at Upperthorpe, Sheffield.

8.38. A stage 2 capability meeting was conducted by Dr Jacobs with the claimant on 28 March 2017. The claimant was accompanied by her Unite representative Dr Watson. Matters discussed in this meeting are recorded in Dr Jacobs' letter of 10 April 2017 (438 to 439). The claimant was informed that following the meeting on 3 November 2016 she had not achieved the target set. There was discussion of the Access to Work needs assessment report (as noted, apparently received by Dr Jacobs that day). The letter goes on to record that it was agreed by all that the report included some elements that were expensive and not as it was put, fundamentally required, to enable the role to be carried out effectively. It was agreed that the claimant would review the report and provide a revised copy with the essential items identified. Hence the handwritten annotations on the Access to Work grant that we have referred to. The letter goes on to record that the next steps were considered in circumstances where the claimant had not achieved the target set at stage 2. The next stage of the process

could either be progression to a hearing (stage 3) or consideration of formal re-deployment. The claimant was informed that a potential band 7 vacancy in CAMHS had been identified for her consideration and the meeting was adjourned to the following Tuesday (4 April) so that the claimant could consider that option.

8.39. At the 4 April 2017 resumed meeting the claimant presented the annotated version of the Access to Work grant. The claimant also confirmed that she wished to be considered for the band 7 role and Dr Jacobs said that she would progress that so as to arrange an interview.

8.40. Dr Jacobs conducted a further meeting with the claimant on 28 April 2017. This meeting is referred to in paragraph 98 of Dr Jacobs' witness statement. It was agreed that all the adjustments recommended by the Access to Work report would be implemented save for what was described as co-coaching sessions. The claimant and Dr Jacobs had agreed that the latter would have taken a significant amount of management time and could not be reasonably accommodated. In her witness statement Dr Jacobs goes on to summarise the 14 adjustments that were to be put in place. These included assistive technology training which the claimant was to book; a half day Dragon medical training which again the claimant was to book and strategy coaching, also to be booked by the claimant. We should add that on numerous occasions during the course of Dr Jacobs' evidence she indicated that it was reasonable to expect the claimant to take the initiative for ordering or booking the requisite items of equipment and training. In part that was because the Access to Work grant was the claimant's own budget (rather than that of the respondent Trust) – although the Trust had agreed to meet the relatively small shortfall. Further we were told that at consultant level it would routinely have been part of the claimant's role in the past to order equipment for the department, having obtained approval for the spend.

8.41. On 2 May 2017 Dr Jacobs had learnt via Dr Pearson that the claimant had now decided not to apply for the band 7 position. A further meeting took place between Dr Jacobs and the claimant on 8 May 2017 when the claimant confirmed that that was now her position. That was despite Dr Jacobs offering the claimant a four week trial period. In these circumstances Dr Jacobs was now arranging a panel for a stage 3 capability hearing. This was notified to the claimant in Dr Jacobs' letter of 17 May 2017 (page 442).

8.42. On 12 May 2017 the claimant sent an email to Dr Jacobs (pages 440 to 441). The claimant felt that it had been extremely unfair that she had not been allowed to do her substantive job in paediatric cystic fibrosis for the last year. She felt that she was now being assessed unfairly and against totally the wrong criteria. The claimant alleged that the recommended reasonable adjustments had not been implemented – although this is rather difficult to reconcile with the matters referred to as being discussed in earlier meetings. The claimant wrote that she was happy to remain in the capability process but asked that her capability was fairly assessed in her substantive role and against her

job description (eg 8c) once the adjustments had been put in place and she had had the opportunity to settle back in.

8.43. On 20 June 2016 the claimant was invited to attend a stage 3 capability hearing fixed for 12 July 2017. In anticipation of this Dr Jacobs prepared a capability hearing report (see pages 452 to 455). In her conclusion to that report Dr Jacobs listed all the support mechanisms that had been put in place for the claimant including those which she had declined during the capability monitoring process. It was noted that to date the reasonable adjustments implemented were:

- Relocation to a new base.
- Initially benchmark performance against a band 7 grade.
- Initially no clinical case responsibility.
- Initially no solo clinical sessions.
- No additional leadership, management or supervision responsibilities.
- 50% reduction in expectation for clinical caseload.
- 50% additional time to complete administrative tasks.
- Weekly line management and mentoring – which Dr Jacobs commented was higher than would be provided to a newly qualified psychologist.

Dr Jacobs went on to write that the claimant had been on the formal process for managing capability since April 2016 and had not sustained an acceptable improvement in her capability or performance since that time. It was therefore with regret that Dr Jacobs had no alternative but to recommend that the claimant's contract was terminated both in line with service requirements and the application of the Trust's policy for managing capability.

8.44. The stage 3 capability hearing on 12 July 2017 was conducted by Mrs L Murch (461-468). The claimant was represented by Mrs P Pepper of Unite and also by Dr Sam Watson. During the meeting Dr Jacobs expressed the view that she was expecting the claimant to come back to her with the Access to Work adjustments which the claimant felt necessary but that she had not done so. Also during the meeting Dr Jacobs asked the claimant what other reasonable adjustments could be put in place. The claimant replied that she could have had coaching and training around using different systems. She also said that she needed to learn different ways to achieve things to improve her memory. The claimant explained that it took her a long time to write up reports and that speech to text software would have made that quicker. She also said that she was stressed because she was in a different setting CAMHS – rather than paediatric. She said that the focus of the work was very different. Mrs Murch suggested to the claimant that the types of work were almost the same but just with a different origin. The claimant said that she was taking medication and had counselling. She was also using her own self-help techniques and was getting support from family.

8.45. Mrs Murch asked the claimant what adjustments were outstanding and the claimant replied that it was all the items on pages 2 and 3 of the Access to Work report (presumably the grant document). The claimant

said that she had not understood that it was her job to order those items. When the two sides summed up their cases Dr Jacobs said that she had listed the adjustments which had been put in place which she believed to have been significant. She did not have any alternative but to recommend termination of the employment. As she put it "the gap to 8c was huge". Mrs Pepper summing up the claimant's case pointed out that the claimant had worked at the Trust for a long time. The Trust had not put all of the recommended reasonable adjustments in place. The Access to Work report had been agreed but not implemented. There had been no further chance or opportunity to improve. It was felt that with reasonable adjustments there was no reason why the claimant could not carry out the 8c role. It was confirmed the claimant was still not interested in redeployment to a band 7 post.

8.46. Mrs Murch did not make a decision on the day. There was a reconvened hearing on 19 July 2017 and in due course, on 27 July 2017. Mrs Murch wrote to the claimant to summarise the outcome and to refer to matters which had been discussed at both the 12 and 19 July meetings. That letter is at pages 471 to 473. It was noted that the claimant had said that she would have benefited from coaching and that Dr Jacobs had previously indicated to the claimant that it was agreed that the claimant could order all the items that were recommended. However it was acknowledged that that had not happened and that most of the items had not been ordered. During the gap between the two meetings Mrs Murch had obtained further information about what items from the Access to Work report had been ordered or received.

8.47. The decision communicated at the 19 July meeting was that a clear decision could not be made about the claimant's continuing employment at that stage. It was clear that there was a capability issue and Mrs Murch was satisfied that support had been given. It was however acknowledged that there were an outstanding set of adjustments that had not been put in place and accordingly the decision was to extend the stage 2 process to allow those adjustments to be put in place. It was envisaged that that would occur by mid-August 2017 and from that date the claimant would be monitored against her 8c consultant clinical psychologist role for a period of three months. At the end of that three month period the stage 3 hearing would be reconvened.

8.48. On 24 July 2017 Dr Jacobs and the claimant met to discuss how the recommendations made at the 19 July hearing would be "operationalised". It was noted that the Trust would need to make the payment up front but the bulk of that payment would then be reimbursed by Access to Work. Dr Jacobs confirmed that the Trust would fund the shortfall. The only item that was mutually agreed not to be reasonable was the management training (co-coaching). The meeting is recorded in an email of the same date (470(1)). It confirms the action plan for primarily the claimant to book or order the necessary items. In respect of assistive technology training and the half day Dragon medical training the claimant was to book that. With regard to strategy coaching the email records that the claimant was to ring two

providers who had been suggested to see who would be able to deliver the coaching within the time frame that the hearing panel had stipulated.

8.49. On 4 August 2017 Dr Pearson provided a further update to Dr Jacobs in respect of the claimant. A copy appears at pages 474 to 475. Against the heading "Clinical Practice" Dr Pearson reported that issues had been raised with her by other team members at Centenary House as regards the claimant's performance as a line manager. That included competency to run the complex case clinic, competency in relation to ASD assessments and for one patient assessed by the claimant no assessment letter was available. Dr Pearson reported that because of these concerns she would be monitoring the claimant's work at 8c in closer detail.

8.50. Dr Pearson also reported that the claimant was still bringing basic queries to supervision and line management which Dr Pearson would have expected from a band 7 who had been in the team for over a year to be able to action without checking.

8.51. On 12 August 2017 Dr Jacobs conducted a capability hearing outcome review meeting with the claimant and that is recorded in Dr Jacobs' letter of 5 September 2017 (503). A job plan that had been prepared by Doctors Pearson and Jacobs for the claimant in order that she could resume the 8c job was discussed. The claimant was concerned that insufficient time had been allocated to her for administration work. The time allocated was the standard 3.5 hours (albeit the claimant was undertaking a smaller caseload than normal). However the claimant considered that she would need 21.5 hours of administration time. The draft job plan is at page 476.

8.52. On 16 August 2017 there was a further meeting between the claimant and Dr Jacobs in order to review the current state of play on the ordering of the Access to Work equipment. An email of that date recording what was discussed is at page 496. It was noted that the assistive technology training had been ordered. The half day Dragon medical training had also been ordered but that was linked to the assistive technology invoice which had to be paid first. The claimant was to chase up finance about that. With regard to strategy coaching, it was noted that that had been ordered but the invoice had been returned as it needed to be signed by Mrs Murch, but it was understood that that had now been done.

8.53. At the resumed meeting on 5 September 2017 (see pages 504 to 505) it was noted that the strategic coaching was to be accessed by the claimant. The invoice had now been paid but the claimant had not yet had contact from the trainer. The claimant was requested to chase this up as soon as possible. The claimant was also informed that Dr Jacobs was not able to agree the request for 21.5 hours administrative time because that was not considered to be a reasonable adjustment. In Dr Jacobs' witness statement (paragraph 27) she points out that the claimant's working week was 37 hours and if she had been allowed 21.5 hours for administrative work that would have resulted in her spending the majority of her time doing admin and

so with insufficient time to complete her other 8c duties. However Dr Jacobs indicated at the 5 September meeting that, as what was described as a supportive gesture, the claimant would be allowed an additional three hours for administration which was described as an almost 100% increase on the time given in the standard 8c job plan.

8.54. A further capability hearing outcome review meeting was conducted on 21 September 2017 by Dr Jacobs with the claimant, who was again accompanied by her union representative Dr Watson. The record is in a letter of 21 September 2017 at pages 522 to 523. Dr Jacobs was of the view that the claimant now had 95% of the Access to Work report in place and the claimant agreed that that was so. In those circumstances it was proposed that the new job plan would begin on the following Monday, but the capability panel would take into account that the last piece of training for the software was not due to take place until 17 November 2017.

8.55. On 8 October 2017 Mrs Murch sent an email to the claimant (page 544). Mrs Murch noted that it had taken approximately seven weeks longer than had been anticipated to put the adjustments in place. As the majority of those items were now in place the three month monitoring period was to begin from 9 October 2017. The monitoring would be against the claimant's 8c consultant clinical psychologist role. The claimant was notified that the resumed stage 3 capability hearing would take place on 9 January 2018.

8.56. A capability hearing outcome review meeting was held on 17 October 2017 between Dr Jacobs and the claimant (547 to 549). The claimant was informed that as Dr Pearson was then currently away from work the claimant would be supervised by Dr Cathryn Lewis. It was confirmed that the claimant had had the first part of the Dragon software training and the second half day would be on 3 November. The claimant was asked whether that software was helping and the claimant replied that it would take some time to establish it because it was a voice recognition system that you needed to get used to. It was noted that the read and write training had been booked for 17 November. The claimant had also had her initial session for coping strategy coaching. The claimant said that that had been helpful but she would see how it progressed. It was confirmed that all other actions under the Access to Work document were now successfully in place.

8.57. On 17 November 2017 Dr Lewis provided an update on the claimant to Dr Jacobs (550 to 551). Dr Lewis reported that she had become extremely concerned about the claimant's lack of promptness in issuing initial assessment letters and that there seemed to be an absence of such letters in some cases. She had checked 39 of the cases seen by the claimant. Of those cases, in 10 the letters were done between 4 and 16 weeks after the initial assessment and in respect of 12 there were no letters at all.

8.58. On 9 November 2017 a Dr Helen Castle had sent an email to Dr Jacobs (555). Dr Castle explained that she had concerns about the amount of work of the claimants which was still in her tray at Beighton. Dr Castle

explained that she had spoken to the claimant at Centenary House that day and reported that she was very vague about having seen any emails from Dr Castle chasing her up on these matters.

8.59. On 14 November 2017 there was a further review meeting between Dr Jacobs, the claimant and Dr Watson the Unite representative. The record of that meeting is in a letter of the same date at pages 559 to 561. The claimant was concerned about the number of patients she had to see. She felt her caseload was very weighty. However she accepted on reflection that it was probably similar to other 8cs. The issue of the initial assessment (IA) letters was raised with the claimant. Dr Jacobs explained that that had been identified as an outstanding clinical risk and the claimant was asked to clarify her understanding of the situation. She said that she had not seen any emails from Dr Castle but agreed that Dr Castle had alerted her to look for emails because they were urgent, but the claimant had still not seen them. The claimant confirmed that she was aware of the outstanding letters. The claimant was also informed of Dr Lewis' concerns about delays in the same type of work at Centenary House. The claimant asked what Dr Jacobs would like her to do about this and Dr Jacobs explained that it needed resolving as a matter of urgency due to the clinical risk to patients surrounding it. The claimant could not explain how this state of affairs had arisen but she did say that she was struggling with admin. The claimant was reminded that at the stage 3 hearing she had indicated that she could undertake the full remit of the 8c role. It appeared in fact that the backlog had arisen prior to the monitoring period when the claimant was undertaking the band 7 role. The claimant explained that she understood that IA letters had to be completed within two weeks. The claimant said that she would do the outstanding letters when she could. There was then a discussion about the clinical risk of the missing information. It was agreed that there would be a pause in the capability process and the claimant will be allowed two weeks to clear the backlog of letters. The current situation was to be viewed as an alternative to a suspension. The claimant would be stood down from any non-urgent clinical work and no new cases were to be taken on during that period.

8.60. On 24 November 2017 Dr Jacobs wrote to Mrs Murch (564). She mentioned that she had found it necessary to ask the heads of department at Beighton and Centenary to provide her with a quality impact assessment in respect of the outstanding clinical reports that had been brought to her attention. She noted that she had not received an update from the claimant in relation to her progress on the backlog and she went on to say that sadly she understood from the heads of department that the claimant had not been in contact with them contrary to what had been agreed, so as to provide an update to them on progress.

8.61. On 8 December 2017 Dr Lewis provided what would be the last update during the monitoring period (576 to 577). The claimant had continued to fail to meet the target for seeing patients. Under the heading "Training" it was noted that the claimant had now received the Dragon software training and she had reported that that had been moderately

helpful, although there were some minor glitches such as the software not learning some acronyms. Her trainer was looking into that. It was also noted that her main problem was mental processing of what she was going to write and that slowed her down. She had not had training for the read and write software so had not used that in her work. She had only had a proportion of the coaching sessions (coping strategies) which had been recommended by Access to Work as two hour sessions every fortnight. It was noted that the claimant had recently requested that the sessions be reduced to one hour because she was finding it hard to fit them in.

8.62. In relation to the backlog of letters the claimant had completed 21 but as some of these now required the addition of an apology those letters had not actually gone out. There were a further 10 backlog letters outstanding and the claimant had said that she would send those out by 8 December. However they had not been sent out yet.

8.63. There was a further capability hearing outcome review meeting on 12 December 2017 and the record of that is in Dr Jacobs' letter of 20 December (581 to 582). The claimant was asked to confirm what progress had been made with the backlog of 36 letters and the claimant initially said that they had all been done. Dr Jacobs said that her understanding of 'done' would be that they had been checked, sent out and uploaded on to Carenotes (a database). The claimant then clarified that the letters had not actually been sent out or uploaded on to Carenotes but the claimant planned to send them into administration later that day. Dr Jacobs pointed out that that meant that they had not in fact been done. Dr Jacobs pointed out that although two weeks had been given for the backlog to be addressed, four weeks had now elapsed and so there was still a clinical risk. The claimant was informed that Dr Jacobs had been required to submit a quality impact assessment for both Centenary and Beighton due to the clinical risk that was involved.

8.64. Dr Jacobs went on to explain that there was an additional concern because Dr Lewis was reporting that there was a new backlog of 10 letters that had not been sent out from assessments which the claimant had done as part of her job plan. The claimant agreed that that was so. The letter which records this meeting includes the following:

"Given that there is a new backlog and that if I were to allow you to continue on the 8c job plan then this was likely to further escalate, I explained that as before I could look at this a potential disciplinary matter. However I would suggest that given where we are you will continue with the current arrangement as an alternative to suspension and work on the backlog letters. This means that you will not return to the full 8c job plan and that you will not take on non urgent clinical work as we cannot run the clinical risk."

8.65. On 22 December 2017 Mrs Murch wrote to the claimant (584 to 585) to confirm the invitation to a further stage 3 capability hearing on 9 January 2018. The claimant was informed that a possible outcome of the hearing might be that her contract with the Trust was terminated.

8.66. In anticipation of that hearing the claimant prepared a statement which is at pages 586 to 587. At some length the claimant explained what she believed were the great differences between the work undertaken at CAMHS and the paediatric specialities which the claimant had formerly undertaken. She referred to the amount of stress she had experienced during what she described as back to back formal processes of the last three years which she said had been immense and was clearly difficult for some people to imagine or acknowledge. The claimant complained about the amount of time she had been given for administration work and in respect of her caseload. She said that at one stage she had 124 cases open. We should add that the respondent has explained that when undertaking initial assessment work the caseload is likely to be high but that very often there is no work to be undertaken on the file after the initial assessment because it is a question of waiting for a referral on to somebody else.

The claimant said that she had found herself in the position of being stuck in a role that she never wanted to do or asked to do and she believed that there had never been any intention to return her to her substantive post. She concluded with these words:

"Overall, I feel that I have been treated unfairly and discriminated against. Working in a different speciality with the specific job plan and admin demands will be difficult for anyone let alone someone with my disabilities. I remain committed to my substantive post my contribution to which has been valued and led to my forging extremely positive relationships and outcomes for children, young people and their families as well as members of the MDT."

The claimant did not make any reference to the reasonable adjustments, that any adjustments were not in place or specifically in relation to the adjustments that involve training and coaching.

8.67. The capability hearing duly took place on 9 January 2018 chaired as before by Mrs Murch. On this occasion the claimant was represented by Dr Watson, a Unite representative. Minutes of this meeting are at pages 588 to 591. Dr Jacobs said that support had been put in place to implement and facilitate the recommendations from the Access to Work report and the 8c job plan. There was discussion of the claimant's request for extra administrative time when the job plan was being discussed previously. Dr Jacobs said that it was not until 8 October that they were able to assure that 95% of the Access to Work equipment was in place. Reference was made to the backlog of IA letters.

8.68. The claimant disputed that all of the Access to Work matters had been in place and she did not think it was 95%. She acknowledged that what was described as the tangible equipment was there, but the training was not complete. Dr Jacobs confirmed that her understanding had been that all the equipment had been ordered but it had not been necessary for all the training to be completed (during the monitoring period). Mrs Murch confirmed that that was her view as well. Mrs Murch asked what the longest delay had been for a family to receive an IA letter and the claimant said that she understood that the letters

dated back to July 2017. Mrs Murch asked the claimant what impact the Access to Work adjustments had made and about progress on the 8c job plan. The claimant said that one piece of software had made a difference with the fatigue and pain she experienced with typing (a reference to the Dragon software). She said that that had made the process slightly quicker but not improved it as much as she hoped. She thought that more experience was required. The claimant said that she had not been trained on the read/write software. The availability of the trainer had been an issue and she had had to cancel one of the sessions in order to get the backlog of letters done. The claimant read out the statement which she had prepared and which we have referred to above. Once this had been done Dr Jacobs confirmed that the claimant's job plan was the same as other clinicians but with additional administrative time. Mrs Murch said that they had decided to keep the claimant in CAMHS for the monitoring period because it was familiar at that time. They wanted to keep her in an environment that she was used to rather than move her again. The claimant is recorded as saying that she had not been happy about that at the time but agreed that there had been no other option. Mrs Murch asked the claimant whether she had flagged up the issue of the delay in sending out IA letters once she knew that she was falling behind with those letters. The claimant confirmed that she hadn't done so because she thought she could catch up. Mrs Murch said that at an 8c level the expectation was that she would know the clinical risk and would have been able to flag it up as an issue. At the conclusion of the meeting Mrs Murch said that she would invite the claimant back to a meeting within five days to confirm the outcome.

8.69. That meeting took place on 12 January 2018 when the claimant was informed that she was being dismissed with immediate effect. The dismissal and the reasons for it were confirmed in Mrs Murch's letter of 17 January 2018 (593 to 597). The letter sets out a review of what had occurred since the hearing on 12 July 2017. The claimant's and management cases were summarised. In her rationale Mrs Murch wrote:

"I can see that there are some reoccurring themes over the years which began prior to the disciplinary hearing in March 2016. I am concerned that despite support and reasonable adjustments, there are still issues relating to your ability to work to your consultant clinical psychologist job description and there are still specific issues relating to your ability to complete paperwork in a timely manner and escalate where you think you are behind with work. Not completing paperwork in a timely manner creates a clinical risk and negatively impacts the quality of care we deliver to our patients."

8.70. Mrs Murch went on to comment that she was not confident that if the claimant had been permitted to return to paediatric psychology that would have had a positive impact on her performance. She noted that the claimant had been transferred from paediatric psychology to the CAMHS team due to issues that the claimant had raised with regard to relationships in the former. She also pointed out that performance

issues had begun to arise even when the claimant was in paediatric psychology.

Mrs Murch went on to note that the claimant's diagnosis of dyspraxia had been considered throughout the capability process and that a large amount of support mechanisms and adjustments had been put in place. There had also been adjustments with regard to the claimant's administrative workload.

Mrs Murch concluded:

"The panel has considered all the evidence available and has come to the decision to dismiss you on the grounds of being incapable of performing the duties and responsibilities of your role as consultant clinical psychologist to the required standard".

8.71. On 24 January 2018 the claimant submitted an appeal that was set out in a letter from her union (598). One of the eight grounds was set out as follows:

"I was never allowed the proper time to receive the software training or the time to allow myself to become familiar with it. They seemed determined to proceed with my disciplinary on 9 January 2018 regardless."

No reference was made to the coaching for coping strategies.

8.72. The appeal hearing took place on 13 March 2018. There was a panel of three - Mr Steven Ned director of HR, Mrs Shearer, from whom we have heard and the chairperson was a Mrs S Jones. The minutes of this hearing are at pages 634 to 645. The claimant was represented by Mrs Pepper of Unite. With regard to the appeal ground that we have referred to above the claimant in the appeal hearing stated that she was not fully trained to use the new software meaning that she was not able to get up to full capacity. The claimant was asked by the panel why she had not raised the issue of the backlog of IA letters. The claimant's reply was that when changing bases she thought she would get them done. She was busy and stressed and felt afraid and didn't feel able to raise the issue.

The claimant contested that 95% of the adjustments were in place. She said that training was outstanding and she had no time to consolidate. Only four of the intended twenty coaching sessions had taken place and so 95% was wrong.

8.73. The panel did not give a decision on the day. They felt that they needed to have further information as to what the differences were between the work the claimant had been undertaking in the paediatric department and then the work undertaken in community CAMHS. They felt that Dr Jacobs would be the best person to give them that information but unfortunately there was a delay because Dr Jacobs was absent from work. Eventually the panel decided that they would approach Dr Pearson for this information.

8.74. The resumed appeal hearing was on 4 September 2018.The panel on this occasion was slightly different in that Mrs Jones was unable to attend and accordingly and with the consent of the claimant and her

representative the panel proceeded as a duo and Mr Ned was the chairperson.

8.75. The notes of that hearing are at pages 642 to 645. Dr Pearson attended as a witness. The question that was put to Dr Pearson by the panel was whether it would have been reasonable for the claimant to be re-deployed from a band 8c position in paediatrics to a band 7 position in CAMHS and would the generic training that the claimant had received be sufficient to help her perform the latter role. Dr Pearson's evidence was that the training which the claimant would have received gave her experience of lots of different settings so that core skills were gained. That was so that when a person qualified they could work anywhere. She also noted that during the career of a clinical psychologist it was possible to transfer between specialities and between children and adults due to those core skills. It was not unusual therefore to move around during your career. That being said it would not just be a question of walking into a new role as there would need to be an induction period to familiarise the person with local processes and systems.

8.76. The claimant agreed that there were transferable skills but went on to say that the things she was doing in her former role were very different to what was expected of her in CAMHS. The workload there was heavy on assessments. Also in that role she was dealing with what she described as more severe cases. The claimant went on to set out various other differences she believed existed between the two locations.

8.77. In what appears to be an undated letter, Mr Ned wrote to the claimant setting out the appeal decision (646 to 647). Mr Ned noted that Dr Pearson's evidence had been that she felt it was reasonable to expect a person to be able to transfer between different specialities. It was noted that the claimant agreed that there were transferable skills.

The panel recognised that the claimant had health issues that were impacting on her work. They believed that management had sought to understand and mitigate the impact of those health concerns by making a number of adjustments to the claimant's role and the expectations of her over a period of time. The panel were also persuaded that management had significant concerns about the claimant's capability, particularly with regard to the timely completion of letters following assessments where failure to do so would present a clinical risk. Despite management having worked with the claimant over an extended period of time to address those issues and concerns it was evident that the claimant was not able to function appropriately as a band 8c clinical psychologist and the offer of re-deployment had been turned down. The appeal panel did not find any evidence to overturn the dismissal and so the appeal was not upheld.

9. **The parties' submissions**

9.1. <u>The claimant's submissions</u>

Mr Henry had prepared a skeleton argument in which he confirmed that the claimant's primary case was that the respondent had failed to

provide the three items of training as auxiliary aids. If a piece of software was provided as a reasonable adjustment then that must include training on how to use it and that the software be fully functional. There had to be implementation of the learning. He referred to a passage in the first White Rose report which had stated that any software provided to the claimant should also include appropriate training to ensure that the claimant was able to access all of the features properly. That support should be provided on a one to one basis and should include opportunities for overlearning and provision of skills.

With regard to the discrimination arising from disability complaint, the skeleton argument noted that the reason for dismissal had been capability. The claimant's capability had been impaired because of her disabilities and so the impaired capability arose in consequence of those disabilities. The claimant accepted that the respondent had the legitimate aims of service efficiency and the health and safety of the employee, co-workers and patients. However the claimant did not accept that dismissal was a proportionate means of achieving that aim. That was because all the reasonable adjustments recommended and agreed had not been provided. We were referred to the decision of the Court of Appeal in **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160. In that case it was pointed out that if a potentially reasonable adjustment which might have allowed the employee to remain in employment had not been made the dismissal would not be justified.

With regard to the unfair dismissal complaint the claimant's dismissal had been unfair for three reasons. First, the Trust had failed to take sufficient steps to implement reasonable adjustments before the monitoring period was started. The claimant had not come to terms with the diagnosis of her condition. She had previously had coping mechanisms albeit that she did not realise they were coping mechanisms because she was unaware of her disability. Those coping mechanisms had broken down. Secondly, the Trust could have extended the stages of the capability procedure until all adjustments were in place. Finally, in any event the three month monitoring period had been cut short with a result that the claimant had only had a four week period undertaking her substantive role.

On the question of whether the claimant would have been dismissed in any event even if the reasonable adjustments had been put in place and sufficient time allowed, the skeleton argument had suggested that the last review report by Dr Lewis in December 2017 had been more favourable.

In Mr Henry's oral submissions he said that an employer could not rely on an employee to tell them of coping strategies if the employee did not know that she had coping strategies. In respect of the time issue regarding the reasonable adjustments complaint Mr Henry's primary case was that there was an ongoing duty to make reasonable adjustments and the breach crystallised when the claimant was dismissed so there was no out of time point. In the alternative if time

was running there was a continuing breach. Failing that we were urged to grant a just and equitable extension.

In relation to the discrimination arising from disability complaint the "something" referred to in the skeleton argument was clearly shown to be correct by reference to the dismissal letter.

We were referred to the Court of Appeal's Judgment in the case of **City of York Council v Grosset** [2018] IRLR 746 for the correct approach when considering a section 15 complaint.

With regard to the unfair dismissal complaint, Mr Henry confirmed that the claimant was no longer pursuing an argument that there was unfairness because the respondent failed to properly consider re-deployment. However there had been unfairness because there had not been time for the reasonable adjustments to become embedded. The three month monitoring period had been truncated because the claimant had been taken off clinical work.

9.2. Respondent's submissions

Ms Gould said that this was a sad case. However it was not a case where the respondent had been biased or where the claimant had been railroaded out. Instead there had been a very lengthy capability procedure. The respondent had made a great deal of effort in trying to keep the claimant in employment.

There were themes in the case. One was the claimant's speed of work. It was accepted that that was affected by the claimant's disability but it was debatable whether the claimant's failure to take initiative and failure to inform her managers of delays and backlogs was so related.

When considering the decision to dismiss, Mrs Murch had to take into account the bigger picture and not just the final three month monitoring period. The capability process had been lengthy with numerous stage 2 meetings.

We were reminded that the claimant in cross-examination had conceded many of the points put to her in respect of the respondent's case and its concerns about her performance. The claimant had accepted that various steps taken by the respondent had been reasonable. The focus of the claimant's case had been on auxiliary aids.

Ms Gould pointed out that there had not been a rush to judgment because Mrs Murch had not considered it appropriate to dismiss in July 2017 but had instead allowed the claimant more time with the bulk of the adjustments in place.

On the time limit issue, Ms Gould pointed out that the claimant had been in the workplace all the time – that is she had not been absent through sickness. In addition, she had had union advice throughout. The respondent's position was that time began to run in February 2017 because that was when the respondent approved the adjustments recommended by Access to Work. It was not appropriate to extend time on the basis of the claimant's health.

The respondent conceded that the training/coaching came within the definition of auxiliary services and so within the broader definition of auxiliary aids. In those circumstances there was no need for the claimant to pursue the reasonable adjustment complaint on the basis of a PCP.

Dragon was in place and was embedded. In relation to the Texthelp Read and Write training the respondent had done all it could.

The claimant had been dismissed because of the clinical risk and her failure to take the initiative. Ms Gould reminded us that in paragraph 39 of the claimant's witness statement she had sought to deflect responsibility for the backlog of initial assessment letters. In effect the claimant was saying that it was the respondent's fault for not picking that up. However in cross-examination the claimant had accepted that preparing and promptly issuing initial assessment letters was part of the brass tacks of the job. Whilst the claimant needed the adjustment of Dragon voice recognition, it should be borne in mind that for a substantial period of time the claimant had been on a band 7 role undertaking 50% of the normal appointments. The issue with the backlog of letters was not simply the backlog but also not flagging up the problem and then giving different accounts as to how the backlog was being addressed. Referring to letters as having been done obviously suggested that that included them having been sent out. Ultimately the respondent did not have trust in the claimant.

It had been the claimant who had in the latter period asked to be benchmarked against a band 8c role.

If the dismissal was found to be discriminatory and/or unfair the respondent's case was that the claimant would ultimately have been dismissed on capability grounds. The claimant was nowhere near band 8c. A reasonable adjustment or auxiliary aid must have a chance of making a difference. In the claimant's case it was necessary for the respondent to carry out a balancing exercise, taking into account clinical safety and whether it had trust in the claimant in a safety critical role.

The claimant's dismissal was both fair and justified.

However, if the dismissal should be found to be unfair or discriminatory the Tribunal should apply the principles of **Polkey** in relation to the former and Chagger **(Abbey National Plc v Chagger** [2009] IRLR 86) to the latter.

10. **The Tribunal's conclusions**

10.1. Reasonable adjustments by provision of an auxiliary aid (service)

10.1.1 *Does the Tribunal have jurisdiction to consider this complaint?*

This turns on the question of whether this complaint was presented outside the time permitted by the Equality Act, section 123. The primary limitation period is three months starting with the date of the act to which the complaint relates. However conduct extending over a period is to be treated as done at the end of the period. Dr Fitzpatrick's case focuses on the auxiliary services of two types of training and one

type of coaching. We conclude that it is not correct to regard time as having begun to run from the date when approval of the Access to Work adjustments was given. Ultimately the complaint is about how the agreed auxiliary services were put into effect. During the final three months of the claimant's employment the auxiliary service of training for the read/write software had not been provided, although it had been authorised. The claimant contends that that was a breach of the section 20(5) duty. Whilst the respondent in effect says that that was the claimant's fault not the Trust's, that is not relevant to the time issue. The claimant is therefore contending that this failure was a continuing act and that remained the case until the claimant's dismissal. We accept that contention

In relation to training on the Dragon software the claimant accepts that this auxiliary service had been provided within the final three months of her employment. Whilst it is debatable (see below) whether allowing time to put the training into practice can properly be regarded as an auxiliary service, nevertheless the claimant contends that that state of affairs also applied during the last three months of her employment and at the date of dismissal. In those circumstances we find that this was properly to be considered as within our jurisdiction as an allegedly discriminatory act continuing over a period.

It is common ground that the coaching for coping strategies had begun during the final three months of employment but that 15 sessions (or possibly more as the claimant had asked that the fortnightly sessions be reduced to one hour rather than two hours) this was a work in progress as of the date the claimant was dismissed. In these circumstances we find that as the claimant is in effect contending that the failure to provide the auxiliary service of coaching must sensibly mean the whole of the coaching package which had been purchased, this aspect of the claimant's case is also properly to be considered as within the continuing act concept.

For these reasons we conclude that the reasonable adjustments complaint was presented in time and so we have jurisdiction to determine it on its merits.

10.1.2 *At the date of dismissal, had the respondent taken such steps as it was reasonable for it to have to take to provide the auxiliary services?*

At the risk of repeating our analysis above, we find that the Dragon training had been provided, the Texthelp Read and Write training had not been provided and only a quarter of the coaching for coping strategies had been provided.

The question becomes was it reasonable to expect the respondent to continue the claimant's employment whilst she was monitored and working to the 8c job plan for such period as would be necessary for all the training to be completed, embedded and all the coaching sessions completed?

It seems that the Texthelp Read and Write training could have been completed fairly quickly as it comprised just two, two hour sessions.

There was no need for any further time to be allowed for the Dragon training because that had been completed at the material time. We conclude that the complaint that insufficient time had been allowed to implement the benefit of the Dragon software or to put the training into practice puts this part of the claim into section 20(3) (a PCP case) but the issue remains the same – should the claimant reasonably have been allowed more time for this? We observe that the claimant has not indicated how much time she thought would be required.

In relation to the coaching for coping strategies we calculate that the outstanding 15 sessions which would have taken place at fortnightly intervals would have continued for a further seven months, or if the fortnightly sessions were reduced to one hour but with the overall provision being for 40 hours, considerably longer.

We instruct ourselves that the appropriate test for reasonableness in this context is objective. It is therefore for us the Tribunal to determine the question rather than solely consider the approach which would have been taken by a reasonable employer. Naturally however we have to take into account the evidence of and views expressed by the Trust. That means giving due regard to its concerns about clinical safety and its obligations in terms of the efficient provision of its psychological services.

We have considered the relevant sections of the EHRC Code of Practice on Employment and in particular the guidance at paragraph 6.27 which is in the following terms:

"If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment."

We are satisfied that there would have been a significant clinical risk if the claimant had been permitted to continue in her 8c role. Genuine concerns about the claimant's record keeping, timely provision of responses to referrals and other shortcomings in terms of the claimant's practice, including failing to inform managers when backlogs were occurring had been present in one form or another since at least 2014.

Whilst the claimant's focus in this case, in the context of auxiliary aids, has been on the final three month monitoring period, we take the view that, as Ms Gould suggests, it is necessary to look at the bigger picture when assessing the reasonableness question. The picture which emerges is that despite an incredible amount of input from Dr Jacobs and others; despite the formal capability process having lasted for over a year together with a lengthy stage 3 process and despite the provision of a significant number of reasonable adjustments – both on the initiative of the Trust and in response to input from White Rose and Access to Work - there had been no discernible improvement in the claimant's performance.

In all these circumstances we conclude that in so far as the claimant's dismissal occurred at a time when not all the auxiliary services had

been wholly provided it was nevertheless reasonable that there had not been that complete provision. Accordingly, we find that the reasonable adjustments complaint under section 20(5) and for that matter under section 20(3) of the Equality Act fails.

10.2. The section 15 complaint

Clearly being dismissed is unfavourable treatment. We accept that the claimant was dismissed because she was incapable of performing her duties and responsibilities and further that that incapability arose in consequence of the claimant's disabilities.

The claimant accepts that the respondent had a legitimate aim.

The Tribunal must determine whether dismissing the claimant was a proportionate means of achieving that aim. Whilst we appreciate that proportionality is not the same as reasonableness, we believe that we are entitled to take into account the same evidence, material and findings which have assisted us in reaching our decision on the auxiliary aid/services aspect of this case.

This is because the issue of proportionality here boils down to whether the claimant should have been given more time. That is the only aspect of this part of the claimant's case as she is no longer contending that there should have been re-deployment instead of dismissal.

We do not consider that it would have been proportionate to allow further time and instead we find that it was proportionate to dismiss when the respondent did.

10.3. Unfair dismissal

10.3.1 *Has the respondent shown a potentially fair reason to dismiss?*

There is no dispute that the reason shown by the respondent – capability – is a potentially fair reason under the Employment Rights Act 1996.

10.3.2 *Was that reason actually fair by reference to Employment Rights Act 1996 section 98(4)?*

Our first observation – alluded to when summarising the respondent's closing submissions – is that during the course of cross-examination the claimant accepted virtually every proposition put to her by Ms Gould. Such was the acceptance by the claimant of the respondent's case that the Employment Judge felt the need to intervene and point out to the claimant that she did not have to agree with the points that were being put to her unless that was really her position. Nevertheless, the concessions continued.

When asked about the issue of two files being kept in respect of the same patient, an issue that was raised with the claimant in October 2015 the claimant's evidence was that in hindsight she accepted that Dr Jacobs would have been concerned that she had not raised that with her. She also went on to accept that this would lead Dr Jacobs to being concerned about the claimant's ability to do the job.

When asked whether it had been reasonable for Dr Jacobs to state in her report for the capability hearing that the claimant was not capable

of a band 7 role and certainly not of an 8c role, the claimant accepted that it was reasonable for Dr Jacobs to reach that conclusion.

Later in the cross-examination the claimant was asked whether it had been reasonable for Dr Jacobs to be concerned that the backlog at Beighton had only come to light via Dr Castle rather than being reported by the claimant herself. Was that, the claimant was asked, something which could undermine the respondent's trust in her. The claimant replied that it could have that effect.

10.3.3 *Was it unfair if the respondent failed to have due regard to the claimant's "situation" and in particular if not all reasonable adjustments/auxiliary aids/services were in place?*

We have given this topic detailed consideration when considering the section 20(5) complaint and when considering the section 15 complaint. We appreciate that in the context of an unfair dismissal complaint we need to consider whether the actions of this respondent were those of a reasonable employer. We find that they were. We consider that a reasonable NHS Trust would not in the circumstances applying in this case have felt it necessary to make any further adjustments or allowances for the claimant.

10.3.4 *Was a three month monitoring period too short, particularly if in the circumstances the appropriate 8c assessment could only be conducted for part of that period?*

We find that a reasonable employer when considering this issue would have had regard to the extensive history in the claimant's case and that any reasonable employer in these circumstances would have concluded that no point would have been served by any extension to the monitoring period.

10.3.5 *Was the dismissal unfair because the respondent gave insufficient time to the claimant to deal with administrative tasks?*

We have found that the claimant had been given additional time, albeit not the 21.5 hours per week that she had sought. Further assistance was provided to the claimant because she was not required to see the usual amount of patients and so that had the effect of reducing the amount of administrative work (which the claimant had additional time to do.) We do not find that a reasonable employer would have considered it necessary to make any other arrangements than those which were in place.

An employer who is dealing with an incapability case is required to obtain sufficient medical information to inform its decision where the capability is health related; to consult with the employee and make such adjustments as are reasonably necessary. A reasonable employer is required to allow time for improvement and time for the adjustments to take effect. However the employer is also entitled to

take account of the service which it provides and the need to make that provision in a safe, prompt and efficient manner. We find that this employer was within the reasonable band of decisions open to a fair employer when in January 2018 it decided that it must dismiss the claimant. We therefore find that the unfair dismissal complaint fails.

Employment Judge Little

Date 23rd August 2019