VCD

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs Nissan Lahi	**AND**	University Hospitals Coventry & Warwickshire NHS Trust

HELD AT Birmingham **ON 10,13, 14, & 16 August 2018**
9,10,11 & 14, 15 & 16 January 2019

EMPLOYMENT JUDGE **VC Dean**
MEMBERS Mr M Bell
Mr G Murray

Representation
For the Claimant: Dr R Ibakakombo, representative

For the Respondent: Mr T. Sheppard, of counsel

JUDGMENT

The judgment of the Tribunal is that

1. The claimant was not unfairly dismissed by the Respondent in breach of s98(4) of the Employment Rights Act 1996.
2. The respondent did not unlawfully discriminate against the claimant by reason of the protected characteristic of her disabling condition of back

pain in breach of s15, 20 & 21 of the Equality Act 2010.

3. The respondent did not unlawfully discriminate against the claimant by reason of the protected characteristic of her race in breach of s 13 of the Equality Act 2010.
4. The respondent did not unlawfully victimise the claimant in breach of s27 of the Equality Act 2010.
5. The claimant's complaints are dismissed.

REASONS

Background

1. By way of background in this case the claimant was employed by the respondent in the role of healthcare cleaner between 19 April 2008 and 28 July 2018 when she was dismissed from her post by reason of her capability in particular the failure to attend work regularly in accordance with the managing attendance policies.

2. On 19 November 2018 the claimant presented a complaint that she had been unfairly dismissed by the respondents. The claimant asserts also to have been unlawfully discriminated against because of her race, she describes herself as Black of African-Ivory Coast origin. The complaint is of unlawful direct discrimination because of race. In addition, the claimant complains that she has been subject to unlawful discrimination because of her disability by reason of a back-pain condition. The claimant asserts that respondent unlawfully discriminated against her and the decision to dismiss was because of sickness insofar as it related to the disability of back pain and that she was discriminated against as a consequence of matters arising from her disability. The claimant asserts also that the respondents failed to make reasonable adjustments. Finally, the claimant asserts that she has been victimised in the respondent's decision to refuse to uphold the appeal because she had done a protected act, namely alleging that she had been subject to unlawful discrimination and issuing tribunal proceedings.

3. The respondent denies that the claimant was unfairly dismissed and asserts that the decision to terminate her employment was because of her failure to maintain acceptable levels of attendance at work. The respondent accepts, with the benefit of subsequently disclosed medical evidence, that the claimant is disabled by back pain but assert that they did not have knowledge of the claimant's disability nor were they on reasonable notice of the condition being a disability at the relevant time. The respondent denies the claimant was subject to unlawful discrimination at all and denies that she was victimised having done a protected act.

Issues

4. The parties agreed on 10th August 2018 that the list of issues to be determined by the Tribunal are:

Unfair dismissal

(i) What was the reason or if more than one the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's capability - attendance at work being unsustainable.

(ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

(iii) If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did

the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

(iv) If the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];
b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Race

EQA, section 13: direct discrimination because of race – the claimant describes herself as Black of African – Ivory Coast origin.

(v) It is not in dispute that the respondent subjected the claimant to the following treatment:

a. Dismissing the claimant on 26 July 2016
b. Failed to uphold the claimant's appeal against her dismissal.

(vi) Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators known as 'Nicky', 'Chris' and 'April' and/ or an hypothetical comparator [*see para 6 and 7 p27*]

(vii) If so, was this because of the claimant's *protected characteristic* of her race?

Disability

(viii) Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition: back pain? It is conceded by the respondent in retrospect. The respondent denied knowledge of the disability at the relevant time.

EQA, section 15: discrimination arising from disability

(ix) Did the following thing(s) arise in consequence of the claimant's disability being back pain:

a. The decision at the appeal hearing to uphold the original decision that had been taken to dismiss the claimant [*who had incurred 428 days' sickness absence over the prior 5 years*] and materially was dismissed following the reactivation of the Managing Attendance Policy in and around 21 September 2015 when the respondent restarted the process at Stage I

following the period of 74 days absence in the previous six months and continuing the Managing Attendance policy between 21 September 2015 to the effective date of termination on 25 July 2016 ?

(x) Did the respondent treat the claimant unfavourably as follows:

a. Deciding that the claimant's appeal was not successful. In particular the claimant asserts that the decision to dismiss was because of **that** sickness absence in so far as it related to the disability of back pain?

(xi) If so, has the respondent shown that failing to uphold the claimants appeal was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):

a. The Service Provision requirement and the impact on the service provision,
b. The ability to programme the timetabling of the cleaners on wards, common areas and theatres,
c. Cost avoidance – to avoid the need to pay inflated rates to engage agency workers and /or bank staff,
d. All of which (a-c) feeds in to patient safety.

(xii) Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability at the relevant time?

Reasonable adjustments: EQA, sections 20 & 21

(xiii) Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

(xiv) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

a. Decision to set out employees stage I a target of 100% attendance for a period of 6 months, starting from the date that target was set (21/09/2015). [para 1 p22]
b. Decision to set out employees at stage II a target of 100% attendance for a period of 6 months, starting from the date that target was set (23/03/2016). [para 2 p22]
c. During the phased return, employees had to perform full duties of a cleaner. [para 3 p22]

(xv) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:

a. Because of her disability stages I-III of managing attendance policy were applied leading to the claimant's dismissal and rejection of the appeal.

(xvi) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

(xvii) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the

claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

a. Identifying and providing a suitable alternative position (administration position and clerical jobs) in a different department. [para 12 p22]
b. Looking at any changes the respondent could make to the claimants working arrangements such as the need for regular breaks due to her back pains. [para 13 p22]
c. Organised phased return to work. [para 14 p22]

(xviii) If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Equality Act, section 27: victimisation

(xix) Did the claimant do a protected act. The claimant relies upon the following:

a. Claimant document 29 September 2016 at p297 in the grounds of the appeal.

(xx) Did the respondent subject the claimant to any detriments as follows:

a. Upholding the decision to dismiss the claimant
b. If so, was this because the claimant did a protected act?

Law

5. The legal framework is addressed by the parties in their written submissions. In summary the legal frame work to which we have regard is that which we set out below.

6. This section contains our summary of the applicable legal principles. We did not think it necessary, or helpful, to refer in detail to every authority provided by the parties.
7. In our consideration of the complaint of unfair dismissal we have regard to Section 98 Employment Rights Act 1996 which provides:-

(1) "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

a) the reason (or if more than one, the principal reason) for the dismissal; and

b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to

do"

(4) "Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

b) shall be determined in accordance with equity and the substantial merits of the case."

8. It is for the employer to show the reason for dismissal and that it was a potentially fair one. The burden is on the employer to show that it had a genuine belief in the reason alleged. British Home Stores v Burchell 1978 IRLR 379. The tribunal must consider whether that belief is based on reasonable grounds after having carried out a reasonable investigation but in answering these two questions the burden of proof is neutral.

9. The tribunal is assisted by the guidance offered in Iceland Frozen Foods v Jones 1982 IRLR 439 namely:-

a) The starting point should always be the words of section 98(4) themselves.

b) In applying the section the tribunal must consider the reasonableness of the employers conduct, not simply whether they consider the dismissal to be fair.

c) In judging the reasonableness of the dismissal the tribunal must not substitute its decision as to what is the right course to adopt for that of the employer.

d) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, another quite reasonably take another.

e) The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

f) The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.

10. The relevant legislation in respect of the discrimination complaints was dependent upon whether there was a continuing course of conduct or not. If not, the complaints which pre-dated the coming in to force of the Equality Act 2010 ("the EA10") on 1 October 2010 were covered by the previous legislation – the Race Relations Act 1976 ("the RRA") and the Disability Discrimination Act 1995 ("the DDA").

11. For these purposes, we have set out the law contained in the EA10 but, where it differs from the law under the RRA or SDA, we have explained how. It should be borne in mind that the legislative intention behind the EA10 was to harmonise the previous legislation and to modernise the language used. Therefore, in general terms, the intention was not to change how the law operated unless the harmonisation involved codifying case law or providing additional protection in respect of a particular protected characteristic, in line with that which had previously

been afforded to persons with other protected characteristics. As a result much of the case law applicable under the DDA or RRA is relevant to how the provisions of the EA10 are to be interpreted and applied.

12. Disability and race are protected characteristics as defined by section 4 of the EA10.

13. Sections 39 and 40 of the EA10 prohibit unlawful discrimination against employees in the field of work.

Section 39(2) provides that:

"An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment."

Section 39(4) provides the same protection in respect of victimisation.

Section 39(5) imposes a duty to make reasonable adjustments.

Section 120 EA10 confers jurisdiction on an Employment Tribunal to determine complaints relating to the field of work.

14. Burden of proof

Section 136 of the EA10 provides that:

> "if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred [but] if A is able to show that it did not contravene the provision then this would not apply".

This provision reverses the burden of proof if there is a prima facie case of discrimination, harassment or victimisation. The courts have provided detailed guidance on the circumstances in which the burden reverses Barton v Investec [2003] IRlR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred.

15. Case law has established that a mere assertion of discrimination without reference to a protected characteristic will not, without more, (for example relevant background information known to an employer) constitute a protected act Durrani v London Borough of Ealing UKEAT/0454/2012.

16. If there has been a protected act, the Employment Tribunal must then consider whether the claimant was subjected to detriment because of it. The provisions of the EA10 essentially operate in the same way as the public interest disclosure detriment provisions in the ERA.

17. If the applicable legislation is the RRA and SDA rather than the EA10, the Tribunal must determine whether the claimant was less favourably treated than a real or hypothetical comparator by reason of carrying out the protected act. The comparison is a simple comparison between the treatment afforded to the person who has carried out a protected act, and others who have not Nagarajan.

18. The EA10 provides that a person with a protected characteristic is protected at work from prohibited conduct as defined by Chapter 2 of it. The types of prohibited conduct complained of in this case are considered below.

19. In addition to the statutory provisions, Employment Tribunals are obliged to take in to account the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights. Although we were not referred to any specific provisions by the parties. We had it's content in mind when we considered the complaints made under the EA10 and/or the RRA.

20. Direct discrimination

By s.13 EqA, an employer directly discriminates against a person if :

1.1.1.1. it treats that person less favourably than it treats or would treat others, and

1.1.1.2. the difference in treatment is because of a protected characteristic.

By s.136 EqA,

"if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred [but] if A is able to show that it did not contravene the provision then this would not apply".

21. Guidance on the tribunal's decision making process is authoritatively dealt with in Igen v Wong [2005] IRLR 258 and confirmed in subsequent cases such as Madarassay v Nomura [2007] IRLR 246 and in Laing v Manchester City Council [2006] ICR 1519, the EAT spelt out how the burden of proof provisions worked in practice:

"First, the onus is on the complainant to prove facts from which from which a finding of discrimination, absent an explanation, can be found. Second, by contrast, once the complainant lays that factual foundation, the burden shifts to the employer to give an explanation. The latter suggests that the employer must seek to rebut the inference of discrimination by showing why he has acted as he has. That explanation muct be adequate which as the courts have

frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with race".

From this a number of principles have emerged:

A difference in treatment and a difference in race is not sufficient, and "something more" is needed: (Madarassay, para 56):

"56 The court in Igen Ltd v Wong [2005] ICR 931 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which ****879*** *a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*

22. Whilst tribunals often deal with the two stages in turn, in reality the single "reason why" issue can be the most appropriate way to approach the facts. See Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL (a sex discrimination case): in some cases the *'less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined*.' Thus, the decision in *Shamoon* allows tribunals in appropriate cases to approach a direct discrimination claim not by approaching each element of the statutory definition sequentially but by asking a single question: was the claimant, because of a prohibited characteristic, treated less favourably?

23. Direct discrimination is rarely overt. But where the employer behaves unreasonably, that does not mean that there has been discrimination though it may be evidence supporting that inference if there is nothing else to explain the behaviour. See Anya v University of Oxford and anor

[2001] ICR 847, CA. Some tribunals have referred to this as the "Zafar trap" referring to Glasgow City Council v Zafar [1998] ICR 120:

"I cannot improve on the reasoning of Lord Morison, delivering the opinion of the court, who expressed the position as follows, 1997 S.L.T. 281 , 284:

"The requirement necessary to establish less favourable treatment which is laid down by section 1(1) of the Act of 1976 is not one of less favourable treatment than that which would have been accorded by a reasonable employer in the same circumstances, but of less favourable treatment than that which had been or would have been accorded by the same employer in the same circumstances. It cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances."

24. Thus an employer might escape a finding of direct discrimination by establishing either equally unfair treatment or by leading evidence of a genuine reason which is not discriminatory and which was the reason for the conduct .See Bahl v Law Society [2004] IRLR 799, "*Employers will often have unjustified albeit genuine reasons for acting as they have*". Such evidence can of course be taken as part of the single "reason why" question or if necessary taken into account at the second stage under the two-stage burden of proof test.

Following from Bahl it is clear a respondent does not need to justify the treatment of the complainant or establish that he acted reasonably or fairly because all he needs to do is to show that the true reason for the less favourable treatment was not discriminatory.

25. Having said all that, Hewage v Grampian Health Board [2012] ICR 1054 said (para 32):

"…..it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they

have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

26. Victimisation

1. The statutory provisions state:

"27Victimisation

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or

(b)A believes that B has done, or may do, a protected act.

(2)Each of the following is a protected act—

(a)bringing proceedings under this Act;

(b)giving evidence or information in connection with proceedings under this Act;

(c)doing any other thing for the purposes of or in connection with this Act;

(d)making an allegation (whether or not express) that A or another person has contravened this Act.

(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4)This section applies only where the person subjected to a detriment is an individual.

(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

27. As to the necessary elements of victimisation under s.27 EqA, the three stage approach is familiar to the tribunal:

- What is the Protected Act?
- Was C subjected to a detriment?
- What was the reason?

28. It is necessary that Knowledge of the protected act must be considered here. As to knowledge, see Scott v London Borough of Hillingdon [2001] EWCA Civ 2005, para 19:

> *"19……..knowledge on the part of the alleged discriminator of the protected act is a pre-condition to a finding of victimisation. That is inherent in the statutory wording and it was spelt out by Lord Steyn in Nagarajan v London Regional Transport [2000] 1AC 501 at 519H, in a passage subsequently endorsed in Chief Constable of West Yorkshire v Khan [2001] UKHL 48 , at para.56. Lord Steyn said of section 2(1) that it:*
> *"contemplates that the discriminator had knowledge of the protected act and that such knowledge caused or influenced the discriminator to treat the victimised person less favourably then he would treat other persons."*

29. The situation which arises under section 2(1) is therefore not identical to that with which a tribunal or court is dealing when faced with discrimination claims under section 1(1) of the Race Relations Act 1976. In the latter type of case, knowledge by the alleged discriminator of the race of the complainant will rarely be in issue. Normally the issue will centre around the effect of that knowledge: did it have a significant influence on the decision to treat the complainant less favourably? As has been emphasised many times, that influence may be one of which the discriminator may not be aware. It may be an unconscious influence: see Lord Nicholls of Birkenhead in Nagarajan , pages 511H–512D; also Glasgow City Council v Zafar at page 1664D. It was for that reason that it has been recognised that there may be special problems of proof for complainants bringing discrimination claims under section 1. Prejudice is rarely openly displayed, whether the discriminator is aware of his prejudice or not. That is what lies behind the guidance given by this court in King v Great Britain China Centre, that case was dealing with the specific difficulty facing complainants in discrimination cases of establishing that racial factors affected the decision.

30. But when one turns to whether or not a discriminator knew of a protected act, one is dealing with a different type of issue. Establishing a person's knowledge of a fact is a process required in many branches of law and not in any sense one peculiar to discrimination cases. There is in general usually less difficulty in establishing knowledge of a fact by means of extrinsic evidence, such as a document mentioning the fact or evidence of oral transmission of knowledge of the fact."

31. Drawing Inferences

Inferences must be drawn from actual findings of fact. The tribunal might be assisted by a recent guidance from EAT on drawing inferences: In Talbot v Costain Oil, Gas and Process Ltd and ors [2017] ICR D11, EAT, His Honour Judge Shanks summarised the following principles for employment tribunals to consider when deciding what inferences of discrimination may be drawn:

> *"…..on the vexed question of how a tribunal should approach the issue of whether there had been unlawful discrimination under the Equality Act 2010 and its statutory predecessors, most importantly, Qureshi v Victoria University of Manchester (Note) [2001] ICR 863 and Anya v University of Oxford [2001] ICR 847 . The following principles were to be derived from the authorities. (1) It was very unusual to find direct evidence of discrimination. (2) Normally the tribunal's decision would depend on what inference it was proper to draw from all the relevant surrounding circumstances, which would often include conduct by the alleged discriminator before and after the unfavourable treatment in question. (3) It was essential that the tribunal made findings about any "primary facts" which were in issue so that it could take them into account as part of the relevant circumstances. (4) The tribunal's assessment of the parties and their witnesses formed an important part of the process of inference. (5) Assessing the evidence of the alleged discriminator, when giving an explanation of any treatment, involved an*

assessment not only of credibility but also reliability and involved testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities; and, where there were a number of allegations of discrimination involving one person, conclusions about that person were obviously going to be relevant in relation to all the allegations. (6) The tribunal had to have regard to the totality of the relevant circumstances and give proper consideration to factors which pointed to discrimination in deciding what inference to draw in relation to any particular unfavourable treatment. (7) If it was necessary to resort to the burden of proof, section 136 of the Equality Act 2010 provided that, where it would be proper to draw an inference of discrimination in the absence of "any other explanation", the burden lay on the alleged discriminator to prove there was no discrimination.

32. Disability Discrimination

Knowledge of Disability

1. Sch 8, Pt 3, Para 20 of the Equality Act 2010 provides as follows:

"Lack of knowledge of disability, etc

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(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

Underhill P in Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10/DM provided guidance on the predecessor provisions (albeit no material difference arises):

"to spell it out, an employer is under no duty under section 4A unless he knows (actually or constructively) both (1) that the employee is disabled and (2) that he or she is disadvantaged by the disability in the way set out at in section 4A(1). As Lady Smith points out [in Alam], element (2) will not come into play if the employer does not know element (1)." Para 37

33. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the tribunal (*Jennings v Barts and The London NHS Trust UKEAT/0056/12*).

34. An individual is disabled for the purposes of the Equality Act if:

"6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

35. Reasonable adjustments

PCP's

The application of a flawed disciplinary procedure on a one-off basis will not amount to a 'PCP' - see Nottingham City Transport Ltd v Harvey *UKEAT/0032/12 EAT* Langstaff (P) Held:

"SUMMARY

DISABILITY DISCRIMINATION – Reasonable Adjustments

Employee unfairly dismissed, because the employer did not conduct a reasonable investigation nor consider mitigating circumstances when disciplining a disabled employee. It also considered a claim for failure to make reasonable adjustments where the employee had a disability. It thought the PCP was the application of the employer's disciplinary procedures, which would reasonably have been adjusted by investigating reasonably and considering personal mitigation arising out of disability, and not dismissing him. It was conceded on his behalf that there was no evidence before the ET that the employer's practice was to ignore mitigation or to fail to carry out a reasonable investigation. The ET erred in

identifying as a "practice" that which was not, and in failing to address the questions in Rowan…

[17] *In applying the words of the DDA, and we have little doubt in cases in future dealing with the successor provisions under the Equality Act 2010, it is essential for the tribunal to have at the front of its mind the terms of the statute. Although a provision, criterion or practice may as a matter of factual analysis and approach be identified by considering the disadvantage from which an employee claims to suffer and tracing it back to its cause, as Mr Soor submitted was indicated by Maurice Kay LJ in Smith v Churchill's Stairlifts plc [2005] EWCA Civ 1220, [2006] IRLR 41, [2006] ICR 524, it is essential, at the end of the day, that a tribunal analyses the material in the light of that which the statute requires; Rowan says as much, and Ashton reinforces it. The starting point is that there must be a provision, criterion or practice; if there were not, then adjusting that provision, criterion or practice would make no sense, as is pointed out in Rowan. It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(1) provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP.*

[18] *In this case it is common ground that there was no provision that the employer made nor criterion which the employer applied that could be called into question; the issue was the practice of the employer. Although the Act does not define "provision, criterion or practice" and the Disability Rights Commission's Code of Practice: Employment and Occupation 2004 deals with the meaning of provisions, criteria and practices by saying not what they consist of but what they include (see para 5.8), and although those words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, absent provision or criterion there still has to be something that*

can qualify as a practice. "Practice" has something of the element of repetition about it…"

36. See also Carphone Warehouse v Martin UKEAT/0371/12 [2013] EqLR 481 in which Shanks J held that:

***"[19]** What the Employment Tribunal found, in effect, was that the lack of competence or understanding by The Carphone Warehouse in preparing the Claimant's wage slip for July 2010 was capable of being a "practice" within the terms of s 4A and that the reasonable step that they should have taken was the step of not delaying payment of the correct amount of pay. Mr Hutchin says, in effect, that this approach is misconceived. We are afraid we agree with him in this contention, for two related reasons. First, a lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer. Secondly, the obligation created by s 4A is to take steps, or such steps as are reasonable. However it is phrased, what the Employment Tribunal were saying, in effect, was that The Carphone Warehouse had failed to take proper care in preparing Mr Martin's pay packet in July 2010. Taking care cannot be properly described, in our view, as taking a step or steps for the purposes of s 4A(1) of the DDA. What the Employment Tribunal is seeking to do, perhaps understandably, is to give the Claimant a remedy for what they regard as rather egregious incompetence by The Carphone Warehouse, but we do not think the facts can be shoehorned into the relevant provisions of the DDA. Therefore, that finding of discrimination, in our view, cannot stand."*

37. Code of Practice

The Equality and Human Rights Commission: Code of Practice on Employment (2011) at paragraph 6.19 provides [Sch 8, para 20(1)(b)] if the employer does not know the worker is disabled that:

"For disabled workers already in employment, the employer only has a duty to make an adjustment if they know, or could reasonably be

expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they reasonably can be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

Paragraph 6.23 the Code identifies what is meant by 'reasonable steps':

"the duty to make reasonable adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case."

Evidence

36. In hearing this complaint we have been referred to an agreed bundle of documents extended over some 394 pages. We have heard evidence from seven witnesses who have given sworn testimony and have referred to their written witness statements which are all contained within a witness statement bundle that has been indexed. The Claimant gave evidence on her own behalf. On Monday, 7 January 2019 made a written request to be provided with a French interpreter who attended when the hearing reconvened on Wednesday at 9 January 2019 and subsequently when the claimant was in attendance.

37. For the respondent we heard evidence from David Powell the dismissing manager, Lorraine Nye workforce business partner for the respondents, Claire Wilde ISS Head of Cleaning, Seamus Thomas-Flood who represented the claimant as a local trade union representative at University Hospitals Coventry and Warwickshire NHS Trust for Unison, Anthony Jones, an employee of ISS Mediclean who worked in the role of night shift supervisor who conducted the stage 2

managing attendance policy ‘MAPs’ meeting, and Anthony Hobbs Director of Operational Finances sustainability for the respondent who chaired the claimant’s appeal hearing.

38. In addition to the live witnesses we also been referred to the written witness statements of Alison Martin who was an employee of ISS Medicare Limited in the position of Attendance Manager and to the witness statement of Mark Shepstone who was employed by ISS Medicare in the role of HR and Finance Manager. The parties were informed by the tribunal that a witness statement that was not supported by a present witness who was able under oath or affirmation to be subject to cross-examination and clarification was accorded relatively light weight. Dr Ibakakombo, the claimant’s representative has submitted that the tribunal pay no regard whatsoever to the witness statements that have not been supported by witnesses attending the tribunal, the Tribunal has reminded Dr Ibakakombo that light weight would be given to the written witness statements relative to the objective evidence to which they referred in introducing documents within the agreed bundle.

39. The course of these proceedings has not trod the path originally envisaged by EJ Wynn-Evans in his case management preliminary hearing held on13&14 November 2017 who had no reason to doubt the parties time estimate of 6 days; which anticipated one half day reading time, one half days of cross examination and re-examination and tribunal questions of the claimant, one half days the response witnesses and the remaining time for submissions, deliberation, judgement and, if appropriate remedy.

40. In the event the time estimate had not allowed for reasonable adjustments to be made that had not previously been anticipated and for the events which followed. At the start of the hearing a number of interlocutory issues were raised. Dr Ibakakombo sought to add

additional documents to the bundle that included the claimant's handwritten notes written in French [363-371]. Dr Ibakakombo agreed that the tribunal's direction, that if the claimant wished to rely upon the documents an independent translation should be provided, was a reasonable one. EJ Dean made the observation that no doubt if the content of the claimant's diary entry was relevant, reference to it would be made by the claimant in her witness statement which was written in English and submitted to the tribunal and the respondent. In the event the claimant's witness statement and her evidence did not refer to those documents nor was an independent translation provided.

41. Dr Ibakakombo bought a further application that only the statements served by the respondents in June 2018 ought to be allowed to be presented to the tribunal. On 27 July 2018 witness statements for Alison Martin, Claire Wilde, Anthony Jones and Anthony Hobbs had been served which Dr Ibakakombo asserted ought not to be admitted nor ought the witness statement provided by Mr Seamus Thomas-Flood who was the claimant's trade union representative at the stage III meeting. Mr Seamus Thomas-Flood's witness statement had been served on the claimant on 7 July, following the service of a witness order to require Mr Thomas-Flood to attend the tribunal hearing. The claimant had filed a supplemental witness statement served on the respondent on 7 August. Dr Ibakakombo was reminded that EJ Dimbylow had already directed that the additional witness statements should be allowed and that the claimant be permitted to call any other witness and serve supplementary witness statements to deal with the matters arising from the additional witness statements that had been served upon her. Having considered all relevant matters this tribunal determined that the claimant had had sufficient time to answer the additional statements in a supplemental witness statement and in respect of the witness statement of Mr Thomas-Flood whose statement been served on 7 August, the claimant had the afternoon of 10th August on the first day of the hearing while the tribunal undertook reading and

the weekend that followed to give instructions to Dr Ibakakombo and for him to prepare his questions. It was not necessary for the claimant to submit a further written statement, rather Dr Ibakakombo was able to ask further questions in chief of Mrs Lahi to enable the claimant to give evidence to address matters raised by Mr Thomas-Flood's statement.

42. The parties agreed a list of issues on the afternoon of 10 August to enable the tribunal to deal in timely fashion in hearing the evidence over 3 days and for submissions to be made to enable the tribunal to deliberate and deliver a judgement that was proposed on 17 August.

43. Hearing of evidence took place on the 13th and 14th and 16th of August August when evidence was heard from Mr Powell, Mr Thomas-Flood, Lorraine Nye, Claire Wilde and Anthony Hobbs. The tribunal did not sit on 15 August for unavoidable and unexpected reasons. To ensure the efficient hearing of evidence on occasions it was necessary to remind Dr Ibakakombo in his cross-examination to focus on the issues that were to be determined in the hearing. Although Dr Ibakakombo on behalf of the claimant had not asked for any adjustments to be made to accommodate her back pain, it became evident to EJ Dean, who observed that the claimant was sat in some discomfort that adjustments may be necessary and, in answer to the tribunals enquiries, adjustments were made to provide the claimant with a high backed chair on which to sit. The claimant was invited to ask for further adjournments, if necessary to ask for breaks in addition to those which were routinely scheduled and she was encouraged to make herself comfortable whether by sitting or standing or walking in the hearing room when and however necessary for her comfort. Frequent breaks were directed during the course of the hearing.

44. The claimant's lay representative, frequently represents claimants in the employment tribunal. In order to efficiently manage the hearing it was necessary to direct the representatives to focus the cross

examination on the issues that had been agreed to ensure that the case could be completed within the time estimate originally provided to avoid the hearing going part heard.

45. Guidance was given to the claimant's representative in respect the nature of legal privilege and direction was given to ensure that questions in respect of issues once answered were not unnecessarily revisited and, when inappropriate questions seeking opinions as to causation of medical conditions were made of unqualified witnesses, they were not pursued.

46. At the start of the hearing of the case the parties and witnesses were reminded of the need for courtesy to be extended to all in the tribunal and in particular that the questions and examination were to be focused on the issues in the case and that questions were to be answered unless they are identified as inappropriate and that if they were not understood clarification should be sought. Witnesses where necessary were reminded to answer the questions that had been asked.

47. We record that on the first morning of hearing evidence, Dr Ibakakombo posed a hypothetical question of the respondent's witness Lorraine Nye requiring her to 'suppose the occupational health report was wrong' in suggesting that the claimant was not disabled and asking *'why didn't you offer the claimant any adjustments?'* When the question was finished Mr Shepherd counsel for the respondent interjected in response to which Dr Ibakakombo exclaimed loudly '*oh my God'*. When reprimanded for his unacceptable outburst Dr Ibakakombo apologised and excused his behaviour asserting that he had been stopped by EJ Dean when asking his questions and that Mr Shepherd had been permitted to interrupt. When reminded that Dr Ibakakombo had already completed his question when Mr Shepherd had objected Dr Ibakakombo challenged the note made of his question by the tribunal

but denied he was calling the judge a liar saying rather it was what his client said.

48. We record also that Dr Ibakakombo was informed that as part of the judicial role it is the responsibility of the employment judge to take such note of the evidence, as is necessary to enable the tribunal to consider the evidence that has been heard when conducting their deliberations and reaching their conclusions. As a reasonable adjustment to accommodate her own disability EJ Dean takes a typed note of the evidence which, though not verbatim, is relatively full. Dr Ibakakombo was reminded that many judges making in note of the evidence have cause, as did EJ Dean in this case, to ask witnesses and those asking questions of them, to pause asking their next question in order that a note of the evidence given in answer to the last can be captured; that request, when necessary, is made to all and without favour to any party; indeed in this case judge Dean has had cause to require both representatives and indeed one of her members Mr Bell to pause asking their next question until the note of a lengthy account of evidence has been made.
49. We record also that it was necessary to remind the claimant's representative of the need to be respectful of the need to pay attention to the swearing of their oath by witnesses in order to respect the process of the court proceedings.

50. It is unfortunate that on the scheduled 3rd day of hearing evidence, 15 August 2018, EJ Dean was unexpectedly unable to attend the tribunal. It has become apparent that on the 15th the party's representatives who attended the Tribunal office until it became apparent that the Tribunal would not be able to sit, spoke to each other about the merits of the case of which they had widely differing views.

51. On 16 August 2018 the parties were required to attend the hearing scheduled to commence at 11a.m. Neither the claimant nor her

representative attended the tribunal offices at the appointed time and EJ Dean caused the tribunal clerk to contact the claimant's representative to enquire as to their whereabouts, a number of calls were made, the representatives telephone was answered and disconnected, a message was left and two further calls were left unanswered. The claimant and her representative subsequently attended the tribunal at 11:30 and provided no explanation or apology to the court for their late arrival.

52. It is unfortunate that early during the cross-examination of Mr Hobbs by the claimant's representative on 16 August Dr Ibakakombo began asking question before EJ Dean had completed noting the answer that was given by Mr Hobbs to a question. As a result Dr Ibakakombo express the view that he wished to make a comment. Dr Ibakakombo expressed the view that he had been humiliated by the tribunal and by the judge since the start of the hearing and, in light of comments made to him by the respondent's representative the previous day, that they were confident that the tribunal would decide in their favour on the basis that the tribunal would accept their evidence and reject the claimant's evidence, Dr Ibakakombo expressed the view to the Tribunal that:

> "*I am not here to waste my time knowing this hearing is a formality on the basis of what the representatives say, the employment tribunal find whatever the claimant says is untrue and I reserve my right not to carry on my hearing before Employment Judge Dean"*

53. Having addressed Dr Ibakakombo concerns the hearing adjourned for an early lunch break to enable the claimant and her representative to consider the situation and the future conduct of the hearing. Following the lunch adjournment the claimant attended in person unaccompanied by her representative. The claimant expressed her concerns that Dr Ibakakombo was not attending the tribunal and made heartfelt representations echoing a number of Dr Ibakakombo's assertions and her feelings that she felt unable to remain in the tribunal without the support of Dr Ibakakombo who was her pastor and help.

54. The hearing was adjourned to enable the claimant to decide, in the absence of her representative, whether she wished to represent herself, to instruct another representative, or to indicate whether she wished to have the assistance of a French interpreter if the hearing was adjourned to another date. Dr Ibakakombo subsequently confirmed to the tribunal that he intended to continue to act for the claimant and the hearing was rescheduled to be heard for an additional 4 days.

55. When the hearing reconvened on 9th January the tribunal hearing room had accommodated recording equipment which was used. EJ Dean continued to take a typed note of the evidence. At the reconvened hearing in January the proceedings were conducted in the same manner as they had been in August, the tribunal have not been made aware of any concerns about the conduct of the hearing in January having been made by Dr Ibakakombo.

56. On 9 January 2019 Dr Ibakakombo attended without his client who he reported had acute back pain, was unable to move and had been unable to obtain medical evidence from her GP as to her fitness on that day. The hearing was adjourned for the day to enable the claimant to obtain evidence of her fitness or otherwise to attend the tribunal hearing and listen to and subsequently give evidence. On 10 January the claimant and her representative attended and confirmed that she was fit to be in attendance. No evidence of the claimants lack of fitness on 9 January was provided, Dr Ibakakombo informed the tribunal that the GP had indicated that they were directed not to provide any documentation for the tribunal.

57. The claimant having confirmed that she was fit to attend the hearing on 10 January adjustments were made, as they had been in August 2018 to accommodate the claimant in respect of her back pain. To accommodate the claimant and also the French interpreter, breaks of at

least 10 minutes every hour were taken on the remaining days of the hearing. On 10 January to accommodate the claimant's request the lunchtime adjournment was extended by a further 30 minutes.

Credibility

58. We make an observation at this stage about witness credibility. When considering credibility we have regard to the whole of a witness's evidence as well as to individual parts. Whilst we may find a witness less than credible in respect of one aspect of their evidence we do not necessarily drawn adverse inference in respect of the remainder of their evidence. However, where the credibility of the witness is called into doubt on a number of occasions and where a witness prevaricates and avoids answering direct questions an adverse picture of that witness's credibility begins to be drawn.

59. We have heard much from the claimant which causes us concern about the credibility of her evidence. We have been referred on a number of occasions to the claimant's suggestion that her doctors ,in writing her sick notes and in the observations that they made in their GP records of her attendances, did not write what she tells them. Whilst a GP record may be brief in their description we do not expect a professional to misstate the truth of the history given by their patients nor to misstate the reason for a patient's fitness or otherwise for work. We have accepted the GP's records as an objective and honest contemporary account when they are presented as such.

60. The claimant has variously suggested that she had been trained to operate the 'swing go' machine [2nd w/s para 11], compared to the claim [w/s66] that she had not been properly trained to use the Swingo machine by 'Mendy'. In her evidence to the tribunal, in contrast with the comments made to her GP on 12 May 2016[360] when referring to bending down to empty a machine, she commented she had:

'not received any training how to handle machine, now employer has arranged for training so planning to see solicitor'

We find that the claimant had not ever received authorised training to be permitted to use the Swingo machine but she used the machine knowing that it was without training and she was not authorised to use the machine.

61. While the first occurrence of the claimant suffering back pain whilst at work was in 2014, some 18 months later she gives an account to a well-being meeting held on 8 June 2016 [223] in respect of an absence because of back pain that she had not had back pain before an accident that occurred 'last year'. Aside from misstating when the so-called accident occurred the note under any comments was that:

"Nissan said accident at work whilst using equipment she was not trained to use' was told not to use but she went ahead and used"

in light of the fact that only on 12 May the claimant had informed her GP she had not been trained to use the machine we conclude that the record made by Alison Martin at the meeting was correct and the minutes of the meeting was signed by the claimant.

62. The claimant has asserted that the notes were forged. Aside from the objective contemporary evidence we have from the GP's notes, the claimant has signed the notes with the signature which is consistent with the various forms of the claimant's signature as evidenced on the documents [eg 146,137,148,149m]. We find on any objective view the claimant's assertion that notes were forged is not credible. We find that the claimant had never been given authorised training by the ISS for the respondents and that despite being unauthorised to do so the claimant chose to use a machine which enabled her to do the mopping job that was her task more quickly.

63. There have been a number of occasions where the claimant has not attended meetings that the respondent scheduled, the claimant's

account is that she informed the respondent that she was not going to attend those meetings, however we have been provided with absolutely no evidence to support her assertion which is not accepted. We find that the claimant on more than one occasion without cause or explanation failed to attend meetings that the respondents had scheduled.

64. Of considerable concern to the tribunal is that the claimant asserts that she informed Mr Powell at the stage III attendance management meeting, that led to the termination of her employment, that her back was better. However, the claimant now asserts that she only told Mr Powell that her back was better despite the fact she was suffering from acute back pain, she says because occupational health had told her not to say anything about her back pain to keep a job. We note that the claimant has made the assertion that she had dishonestly said that her back was better at the urging of occupational health for the first time ever only at this tribunal hearing. The claimant gave this account when cross-examined about the level of absence in duration and occasions triggered the stage III meeting that led to the termination of her employment. The claimant confirmed that the outcome letter of 26 July 2016 [253] accurately reflected the medical note for her absence having changed from being back pain to stress at work from 6 July 2016 and that her back was better.

65. We find the claimant's suggestion that she had been told by occupational health not to say anything about her back pain to keep a job is entirely disingenuous, self-serving, and undermines the credibility of her evidence.

66. When cross-examined about the fact that she had been told at induction that all staff were informed not to use equipment unless they had received authorised training in that equipment, the claimant stated that she had not been told that at induction in 2008. When asked if she might have simply not remembered she asserted that she *'remembers*

everything'. We have been referred to the claimant's training records [138-149] and despite the claimant being given the opportunity to produce any records of training in the use of other equipment including the Swingo, she has produced no such documentation. We find that the claimant's assertion that she had been trained by an authorised trainer on the Swingo machine is not credible. We find that the respondent's case that the claimant as part of a general induction was told that she should not use equipment that she was not trained by an authorised trainer to use within the environment in which she worked is more likely than not to have been a true account.

67. The claimant has claimed that the notes of an investigation meeting [270-272] held on 27 March 2014 that was a fact-finding meeting to establish the circumstances of the use by the claimant of a swinging machine, is a falsified document. The record [272] suggests that the claimant was reminded that nobody was to use equipment if they had not been trained by a recognised trainer and the meeting note confirms Sue Cook then saying '*but you are not supposed to use equipment if you have not been trained and signed off*'. We have no reason to believe that the respondents notes are not genuine, we find that it is a record of a meeting in March 2014 which confirms to the claimant that she was not to use equipment if she had not been trained and signed off.

68. Although there are no notes of the stage III meeting we have heard evidence of the matters discussed at the meeting not only from the claimant but also from David Powell, Seamus Thomas-Flood of Unison the claimants then trade union representative, Alison Martin, ISS attendance manager [w/s only] and Claire Wilde ISS healthcare cleaning manager and Lorraine Nye who attended to provide David Powell the manager who chaired the meeting, with HR support. The claimant gives an account that she showed to David Powell at the stage III meeting a letter from her GP [203A]. Whilst we do not doubt the fact

that the GP wrote a letter, '*to whom it may concern'* it is dated 1 December 2015 and refers to the claimant's chronic musculoskeletal pain. We note that the letter was not addressed to the claimant's employer. We accept the accounts given by the respondent's witnesses that such a letter was not produced to the stage III meeting. We have found in particular the evidence given by the claimant's then trade union representative Mr Thomas-Flood to be cogent and credible in the account which, in the number of respects flatly contradicts the claimant's evidence and account of the meeting.

69. In addition to the credibility findings we have made we have observed that the claimant on a number of occasions has prevaricated and, being asked questions in plain language, has sought to avoid answering them and on a number of occasions failed to answer questions that were put at all, as observed by Mr Sheppard who in face of her failure noted it and moved on. It has been necessary to remind the claimant that her reluctance to answer direct questions repeatedly may, together with our other findings of fact cause the Tribunal to draw inferences in respect of her case.

70. In terms of assessing the evidence generally we have found that respondent's witnesses have been consistent in the content of their witness statements and the answers that they have given to questions put them to the cross examination by Dr Ibakakombo and in clarification by the tribunal.

71. We have found the evidence of Mr Thomas -Flood to be particularly persuasive in relation to the evidence that he gives of the disciplinary hearing described as the stage III managing absence procedure meeting held on 25 July 2016 which fundamentally undermines the claimant's version of that meeting. The claimant was represented by Mr Thomas-Flood as her union representative at the time and we find he

has no reason to provide an account contrary to the claimant's recollection.

Findings of Fact

72. The claimant was employed by the respondents in the role of Healthcare Cleaner between 19 April 2008 and 28 July 2016 when she was dismissed from her post.

73. Since 1 April 2004 the respondent and has contracted out the management of its facility management services including cleaning services to ISS Mediclean Ltd. Although employed by the respondent the claimant worked under the day-to-day supervision and control of ISS Mediclean Ltd. ISS was responsible for managing the claimant including her attendance, save where dismissal was contemplated in which circumstances only the respondent had authority to act. ISS were obliged under the terms of their facilities management contract to follow the first respondent's policies and procedures including their Managing Attendance Policy ("MAP"). During all material times the respondent's Managing Attendance Policy were those issued in 2012[74-97] and on 16 May 2016 [98-124].

74. In her role as healthcare cleaner the claimant was employed by the respondent working under the day-to-day supervision and control of ISS. ISS employ a number of managers and HR specialists for the purposes of their operation and they are responsible for managing the claimant's attendance in line with the respondents MAP.

75. In strict terms the MAP applicable in respect of management of the claimant at stage I and stage II was that operating version 8 and stage III was version 9. It is not disputed in this case that ISS operated at very high levels of absence of staff particularly in cleaning and that there was an historical failure by ISS to effectively manage sickness levels. ISS has no authority to dismiss an employee of University Hospitals

Coventry and Warwickshire NHS Trust and therefore it is one of the respondent's managers with the authority to dismiss who is required to hear any stage III hearing under the MAP.

76. Within the MAP, absences described as 'long-term' and 'short-term' are identified at the claimant's induction and, amongst other things, there is an introduction on the rules of conduct including sickness and absence and grievance and disciplinary procedures [138].

77. The definitions provision of the MAP distinguishes long-term sickness absence from short term sickness absence, the former being defined as any absence of more than 4 weeks with **no planned return** date, short being absence that does not meet the definition of long-term.[78 para.4.0]. the 2016 policy [102] distinguishes long-term sickness absence has been defined by any absence of more than 4 weeks **with no expected return date.**

78. The respondent considered the claimant's absences to be more appropriately dealt with under the short term sickness absence policy which sets out trigger points which are detailed at 6.8 [86-87 and 112-113]:

> "*5 days cumulative absence (pro rata the part-time staff) or 3 episodes of absence in any rolling six-month period*
> *7 days cumulative absence (pro rata the part-time staff episodes of absence in any rolling 12 month period*
> *if the stage II target is breached a stage III hearing will be held to be chaired by one of the respondents employees with the authority to dismiss."*

79. The claimant in this case asserts that all of her absences were long-term sickness absence. We do not agree with the claimant's assessment; the summary of the claimant sickness absence was provided to the claimant in advance of the stage III meeting [227] which

sets out a table detailing all of the claimant sickness absence in the previous 5 years. The respondent maintains that although the claimant's sickness absences over a period of 5 years represented 17 absences, 8 of which were long-term in nature though not all were in relation to a back injury absence from February to July 2014 joint problems and knee pain accounts for six episodes and stress and depression for two. In 2015 the respondent required ISS to significantly improve attendance management and we find that it was in response to this initiative that the claimant's absences were scrutinised as were others.

80. The relevant history of events to which we turn our attention in this case date from 2015 and in particular September 2015 when the respondent started the process of stage I under the managing attendance policy in respect of the claimant. In May 2015 the claimant began a period of absence on 27 May for 14 days because of joint problems. The claimant in the previous period had had 4 episodes of absence, one of which had been through 4 months from 15 December 2014 to 17 April 2014, 74 days for '*joint problems'* followed by 2 days absence '*feeling unwell'* on the 11th and 12th of May 2015, one day '*feeling unwell'* on 19 May 2014 and 14 days for '*joint problems'* 27th May to 12 June 2015. On her return to work an absence reporting record form was completed on 22 June 2015 which confirmed the claimant was placed on a stage I and the MAP procedure target was that, during the next 6 months if she had any more days of absence she would be put to stage II of the sickness procedure. We find that the respondent fairly issued the stage I target.

81. In her witness statement[para 40] the claimant suggests that the joint problems that had been the cause of her May/June absence *'surely related to the back pain'.* No medical evidence has been provided to confirm that assertion or indeed any of the claimant's subsequent absences related to the back injury as described occurred in February 2014. Having been issued with the stage I warning on 22 June 2015 the

claimant wrote to Julie Fares[193a] a formal grievance letter in which she claimed to be unfairly treated at work, in particular she complained that when she returned to work on 22 June 2015 she had had to move to another work area and she felt that that was unfair and she was being picked on as she had been moved from working in the theatre area. The claimant acknowledged that her contract did not allocate her to a particular area however she did not consider the changing of her work area to be fair. In a typed letter dated 26th of June 2015 [195] the claimant wrote explaining that she felt she has been discriminated towards due to being off ill and asked to be allowed to continue in the old department that she was working in before her illness occurred.

82. A grievance meeting was scheduled to be heard and, in the meantime, the claimant had indicated to Mark Shepston [197] that she might want to look at working different hours possibly working weekends only. A grievance meeting was held on 24 July at which the claimant was represented by Unison. The claimant's grievance was resolved by the respondents agreement that on her return to work, proposed to be Saturday, 12 September 2015, that her work pattern would be 10 a.m. to 6 p.m. on Saturday and 5 p.m. to 8 p.m. on a Sunday [198].

83. We find that the respondent's decision to issue a stage I target on 22 June 2015 was a reasonable one and was a decision reasonably taken in accordance with the short term absence policy operated by the respondent. We find that the reason for the issue of the target was because of the respondents focus on the business need to correctly operate their managing absence procedure.

84. On 22 September 2015 on her return to work following the 60 day period of absence from 26 June 2015, after the stage I warning had been issued on the 22nd until 18 September 2015, a further stage I informal review meeting was held on 21 September. A letter confirming that the 21st September meeting was treated as a stage I informal

review meeting echoed the earlier discussions and seemingly consolidated the stage I target of 100% attendance at work for 6 months and stated that if further ill-health absences occurred through the duration of stage I target it would be necessary to proceed to stage II formal review. [202]. The return to work interview agreed a phased return to work over a two-week period [200] and to accommodate the claimant's childcare needs, a new working rota was set [201].

85. On 17 November 2015 the claimant wrote to ISS [203] asking for a further change in her shifts to work the night shift from 9 PM to 6 AM Thursdays and Fridays only. The claimant and stated: *'I am struggling to get childcare from my daughter at the moment, and due to my health condition, plus being a full-time student, it is really hard'.* In her witness statement [para 51] the claimant has elaborated the words of her letter to suggest that the health condition was '*(back pain)*' and *'to work in the mop room if possible the reason of my back pain'*. We find that whilst the claimant in her witness statement refers to the reason for these requests being related to back pain that was not a reason articulated by her in the request letter. We observed that on this as indeed in her evidence to us, the claimant seeks to assert that all of her sickness absence was because of her back pain even though not articulated by her GP to be for that reason.

86. In her evidence to the tribunal [w/s para 53] the claimant says that she sent a copy of the letter addressed '*to whom it may concern'* from her GP dated December 2015[203A]. The respondent's evidence is that they have no record of that letter having been sent to them. The claimant does not detail when she sent it to Ms Devens nor does she evidence any covering letter of explanation sent with that letter. In answer to the respondent's assertion that the letter was never sent to them in December 2015 and was never presented to Mr Powell at the stage III meeting, the claimant says that the respondent simply asserts that they have not received documents that do not favour them. The

claimant says that she showed the letter to Mr Powell at the stage III meeting, neither Mr Powell nor the claimant's trade union representative Mr Thomas Flood accepted that the document was produced at the meeting. That there should be a conspiracy, that extends across the claimant's ISS managers, her trade union representative and the otherwise independent respondent's manager at stage III, we find so implausible in the context of all of our findings of credibility that we find it more likely than not that the doctor's letter was not sent or given to the respondent as the claimant asserts.

87. On 14 December 2015 the claimant began a period of absence recorded as work-related stress [204]. The respondent wrote to the claimant asking that she would attend a well-being meeting on 23 December 2015 to discuss her health situation, claimant was informed that she could be accompanied by a trade union representative. We find that the claimant did not make contact with the respondent and, despite her assertion to the contrary, we have found no evidence to that effect. The appellant did not attend the well-being meeting and on 5 January 2016 a further letter was written arranging a well-being meeting on 23 December 2015 for 19 January 2016 [206]. At the meeting on 19 January [207-207a] the claimant asked to return to work in theatres and Ms Martin's handwritten note of the meeting concludes:

> '*I think HR manager and cleaning manager need to meet Miss Lahi re shift and what available, to make it a formal meeting so Nissen can understand what she is doing and hopefully get back to work.'*

88. Ms Martin had agreed at the meeting to make a referral to occupational health [208-209].

89. A document 319B has been produced in the bundle, it is a letter dated 11 January 2016 to Alison Martin which the claimant says was sent to her in advance of the meeting of 19 January which purports to be a copy of a letter sent to ISS Medical in early December 2015[203A]. No

mention of that letter is referred to in the notes of the well-being meeting held on 19 January 2016 nor in the reference to occupational health. The document [319B] which is produced by the claimant is a document signed by the claimant with an annotation *'I enclose my school evidence (2 pages)*'. Taking all our concerns about the credibility of elements of the claimant's evidence we have read Ms Martin statement [para11] she says that she had never seen the document prior to being shown a copy of it as part of the proceedings and, although we attach relatively lightweight to her witness statement which in large part recites the sequence of correspondence and its contents we find it more likely than not that the letter was not sent respondent.

90. The claimant was assessed by occupational health at a clinic on 8 February 2016 to address the issues outlined in the referral letter of 21 January. The report dated 8 February 2016 [215-216] identified that then the claimant was off for a period of depression, had hopes to return to work at the end of the current fit note on 1 March and that there was no reason why she would not be able to provide reliable and consistent service. In answer to question whether or not the Equality Act 2010 was likely to apply, the occupational health specialist advise that the Equality Act was not likely to apply at that time and that the claimant should be fit to return to do all elements of her current job. As the claimant was identified as fit for her current role, there was no requirement to seek an alternative post, there were no specific recommendations made and no grounds for redeployment on medical grounds.

91. On 16 March 2016 the claimant was invited to a stage II formal review meeting to be held on 24 March [214]. The meeting took place on 24 March attended by the claimant, with Anthony Jones the night shift supervisor who managed and supervised the team of cleaners at ISS and he was night shift supervisor who was supervising the claimant's attendance for the first time at a formal meeting. The note taker at the meeting was Nicola Price an ISS supervisor and the claimant chose not

to be represented by a trade union representative. Miss Price's handwritten notes [291] recall the content of the meeting however mark the date as being 23 March. A letter dated 29 March 2016 [217] was sent to the claimant confirming the outcome of the stage II sickness absence review meeting and referring to the meeting as having taken place on 23 March. Mr Jones in his evidence has confirmed that his recollection was that the meeting took place on 24 March as had been scheduled and that the outcome letter had been typed in his absence by Alison Martin and had been signed in his absence on his behalf. The contents of the outcome letter reflected the discussions save only that the date of 23 March was referred to in error.

62. The claimant's evidence is that a meeting never took place on 24 March and that stage II sickness absence review meeting was conducted on 23 March 2016 in her absence. In answer to questions in cross examination the claimant asserted that there was no meeting in the stage II sickness absence review on or around 23 or 24 March 2016 and the claimant's evidence was that there was never a meeting around that date between her and Mr Jones. The claimant rightly identified that the notes of the meeting were not signed by her however she did not categorically state that the notes were made up rather asked the tribunal to assess the value of the documentation.

63. In evaluating the honesty of the record of the meeting whether held on the 23 or 24 March we find, having considered all of the other subsequent correspondence and meetings, that the first time that the claimant suggests that there was no meeting that constituted stage II sickness absence review meeting held with her was in her second witness statement [para10] which was written by the claimant on 7 August 2018. That witness statement refers to the claimant's own record of what happened at work on 24 March 2016 [367 -368] which we observe appear to be an undated note written in French that was not translated independently into English. We have reminded ourselves of

the observations made at the start of the hearing in August when it was made clear to Dr Ibakakombo that if the claimant wished to introduce documents that were written in French they had to be translated independently into English or the claimant's account of them described in English in her witness statement ,no such description or translation has been provided. We note that the account given in the second witness statement seeks to assert that the claimant did not attend a stage II review meeting on 24 March 2016 as she had described in her first witness statement [para 64]. We find it inconceivable that, had a stage II meeting not taken place that neither the claimant nor her trade union representative at the stage III meeting, nor at the appeal meeting, had suggested that a stage II meeting with the claimant had not taken place or sought to object to the outcome letter [217] and its contents which founded the stage III meeting. We find the claimant's late denial that a Stage II meeting had ever taken place not to be a credible account,

64. It is the claimant's assertion that her absences for depression 26 June to 21 September 2015 for 60 days and the stress 15 December 2015 to 29 February 2016 for 55 days were long-term absences and ought to have been considered by the respondents under the long-term absence procedures. The evidence we have heard from the respondents is that these absences, although each longer than 4 weeks, were absences in respect of which well-being meetings were held intermittently and that at no time during this absence period was the claimant certified as having no planned return date or no expected return date. Having considered all of the evidence we find that when there were absences for a variety of reasons that showed frequent unconnected and sometimes lengthy absence which was not open-ended the appropriate policy operated by the respondents was to consider the case under a managing attendance policy as short-term absence.

65. Drawing upon the industrial experience of the Employment Tribunal panel we find the respondent exercising their discretion contained within the policy was an exercise of discretion that was well within the range of the operational responses of a reasonable employer in circumstances where the respondent had no grounds to consider that there would be no likely return to work foreseeable in an employee's case. We find persuasion in the respondent's introduction to their policy [77] in which the respondents seek to establish mechanisms for the foreshortened attendance standards falling within 2 categories:

> "*The procedure to be used to manage matters of absenteeism in situations where an individual's attendance is adversely affected by an underlying health condition or disability*"

and the second category

> *"Where the procedure deals with matters of absenteeism where the individual is unable to meet the standards required when no underlying health condition has been identified".*

The respondents we find have categorised the nature of the claimant's absences as being where the claimant is unable to meet the standards required and when no underlying health condition has been identified.

66. Having set the parameters requiring the claimant having breached the stage I target, the stage II target was set to hundred percent attendance at work for the 6 months was due to expire on 22 September 2016 and an incident occurred on the night shift of 9 May 2016 when the claimant approached her supervisor Mark Hopkins to inform him that she had a pain in her back. An investigation had been commenced of the incident [220a-b] as a result of the claimant having reported to Mr Hopkins that the pain had begun when she is emptying the Swingo machine and demonstrated how she had unscrewed the end to the hose and put the hose in the sink to drain the machine. The claimant had informed the duty manager that she had not completed an accident form as it was not an accident it was just painful after using the machine and that her GP had informed her that she had pulled a muscle. The claimant had

submitted a Med 3 statement that she was unfit to work due to lower back pain.

67. The respondent gathered statements from one of the claimant's colleagues Mrs Sukhwinder Kaur [218] and her supervisor Mark Hopkins [220]. The witness statements from Mrs Kaur stated that the claimant had asked Mrs Kaur for the key for the Swingo and she had informed her that she had not been trained and Mrs Kaur told the claimant that she should not be using machine with no training; subsequently the claimant had returned to the area with the Swingo machine having borrowed a key from another domestic. Mr Hopkins witness statement gives an account of his discussion with the claimant who had informed him of her pain, had explained that she had been using the Swingo in the evening and that that may have been the cause of the back pain. When asked if she had been using the Swingo in the correct manner, the claimant had informed Mr Hopkins that she had never been trained on the Swingo, had asked the evening supervisors to train her on many occasions but had been refused. Mr Hopkins statement says that he informed the claimant she should not have been using the Swingo without training. However, Mr Hopkins commented that when the claimant demonstrated what she had been doing whilst emptying the Swingo when she had experienced the pain, the claimant had demonstrated that the method the claimant had used for emptying the Swingo, had been the correct method.

68. The incident review[220a] summarises the previous incident when the claimant had claimed to have had an accident while cleaning down the Swingo on 21 February 2014 and that her sick absence record from November 2014 did not record any absences due to back pain since that time when she returned to work.

69. Having been absent from work from 10 May 2016 with back pain the claimant was invited to a well-being meeting on 27 May [221] which at

the claimant's request was postponed to 8 June [222]. A well-being meeting was held with the claimant on 8 June with Claire Wilde. The notes of the well-being meeting [223] though signed by the claimant are described by her as fabricated. We have made observations about the claimant's credibility in respect of her account of that 'well-being meeting' that are set out above. As a result of the well-being meeting the claimant was referred to occupational health and the claimant was referred to the fact that having breached the stage II target that was set on 23 March 2016, that she would be referred for a further review at stage III of the policy. The letter sent by Claire Wilde on 9th June [224] made it plain to the claimant that the circumstances meant that the matter of her continued employment would be considered formally by a panel of Trust managers and that the Chair would determine whether or not her contract of employment would be terminated by reason of medical capability.

70. An Occupational Health Report was provided on 16 June following an assessment of the claimant at the occupational health clinic [233-234]. The Occupational Health Report reported that the appellant had reported she had developed acute back pain whilst emptying a Swingo machine on 9 May, that although the appellant had described she had a previous episode of absence with back pain she had no ongoing issues that affected her attendance prior to the 9 May episode. The report concluded there is every reason to believe the claimant would make a good recovery from her recent injury. The report advised that the claimant was excluded from using the Swingo initially on any return to work and that she would be properly trained in its use before being introduced to it in her tasks. The report concluded there were no grounds to advise redeployment on medical grounds at that time and that, whilst covered by a valid sick note from her GP and unfit to return to work, her back symptoms were improving.

71. A stage III review under the MAP was scheduled to take place on 27 June 2016 as scheduled in the invitation to the meeting sent on 9 June 2016 [225]. The invitation letter attached to it a statement of case prepared by the respondents [227 - 234] and the claimant presented a statement addressed to Mr Powell dated 22 June [235-238]. That meeting was cancelled at the claimant's request as a trade union representative was not available and was rescheduled to take place on 25 July 2016 [242].

72. We observe that it is most unfortunate that the meeting held on 25 July was not formally minuted. We have heard evidence from Mr Powell who chaired the meeting who gives an account that he and others had made their own notes and that the notes had not been retained. Mr Powell indicates that his letter 26 July confirming the outcome of the meeting [243-245] and accurately represents the matters discussed at the hearing.

73. We have had the benefit of hearing from the claimant's trade union representative Mr Thomas Flood who has been an entirely credible witness, who has attended under witness order, and has given an even-handed and objective account of the meeting. Mr Thomas -Flood has also provided an insight into the change in the manner in which the Managing Attendance Policy was implemented by ISS on behalf of the respondent from 2015.

74. The claimant in cross examination said that her account is supported by her diary entries, those diary entries and notes we observe are written in French and no translation is provided nor account of them given in the claimant's witness statements.

75. Furthermore, the evidence from Mr Thomas-Flood the claimant's representative at the stage III meeting accords with the account given by Mr Powell of the meeting and in the outcome letter.

76. We find that Mr Powell considered the claimant's further period of absence following the setting of the stage II target. When the stage III review was triggered, the claimant had the well-being meeting on 8 June by which time the claimant had had a period of 22 days absence having first been invited to a 'well-being meeting' on 20 May having then been certified unfit from 10 May.

77. Mr Powell had had sight of the Occupational Health Report which confirmed that although unfit for work her back problem had continued to be certified as the reason for absence until 6 July and thereafter the reason for lack of fitness for work was changed to stress at work which was certified until 15 August. At the stage III hearing the claimant had explained that the stress at work was because she was subject to formal sickness absence review. When questioned about her mental health, claimant had indicated that if the decision were not to dismiss her and terminate her employment ,her doctor would immediately provide her with the fit note stating that she was no longer unwell. Mr Powell expressed concern that the claimant's mental health could be cured overnight were she to be allowed to continue to work for the respondents.

78. We have heard evidence from Mr Powell that, on the basis of the facts presented to him, he did not believe that all of the claimant's absences were because of back pain. On the contrary Mr Powell identified that the occupational health reports did not suggest that there was an underlying long-term condition in relation to back pain or at all which suggested that the claimant would be considered to be a disabled person under the Equality Act 2010.

79. Although not presented to Mr Powell by the claimant as such, the claimant has suggested at the Tribunal hearing that all of her sickness absences were linked to and because of her back pain. Having had the

benefit of sight of the claimant's GP records and her sick notes we find that there is no evidence to link the claimants back pain to being caused by an accident at work. We find that the evidence before them was not sufficient to put the respondent on notice that an accident at work might have been the cause of all the claimant's absences nor that back pain was a long term or recurring and linked condition. The claimant's medical records referred to her having had back pain prior to her employment by the respondents and indeed back pain is referred to as being a reason for 8 days absence by reason of back pain in the last full year of her employment by her previous employers reference [149b]. Although the claimant at this tribunal hearing has suggested that she had informed Mr Powell that her back was better and she was fit to return to work she had only said that because she had been told to say so by occupational health, the evidence considered by Mr Powell all indicated that the claimant was not suffering with back pain, it was not a recurring problem and that other medical problems appeared objectively to be unconnected with the claimant's back pain. The claimant in her written statement to the stage III meeting concludes her statement saying:

> *"this is a brief statement of all the unfair, stressful and painful situations I have been with been through with ISS for 8 years service, and even at that stage whatever the result I will stay with the damaged back forever because of neglect from ISS services."*

80. Notwithstanding the claimant's statement that her back was damaged because of the neglect from ISS services the claimant had offered no evidence to support her allegation and we find her claim runs contrary to the evidence provided by occupational health, the claimant's GP fit notes and the account given at the meeting by the claimant and her trade union representative. We conclude that there was nothing before Mr Powell to lead him to believe that the claimant's back pain was a long-term impairment having a substantial adverse effect on her ability

to undertake normal day-to-day activities such that she was a disabled person.

81. We find that the reason for Mr Powell deciding to terminate the claimant's employment was because of her capability or not to provide regular attendance in her employment. The dismissal process was managed in accordance with the respondents Managing Attendance Procedure and was consistent with the ACAS Code of Practice on Disciplinary Procedures.

82. Having found that a step II MAP meeting had taken place as evidenced by Mr Jones in the minutes of the meeting and the letter confirming the outcome on 29 March 2016 [217] we find that the step 3 review was held in accordance with the respondents policy. It is evident from the oral evidence that has been before us and the written witness statements that the claimant was given every opportunity to make such representation she wished at the stage III hearing and was given an opportunity to put forward any documentation that she wished to do. We find that the claimant and her trade union representative participated fully in the stage III meeting and that the conclusion reached by Mr Powell at the end of that meeting was one reached having considered all of the relevant information. We find that the decision made by Mr Powell was one well within the range of reasonable decisions that an reasonable employer may take.

83. We find that the decision taken by Mr Powell to terminate the claimant's employment because of her capability or not to do the job and attend regularly in accordance with the respondent's attendance procedures was procedurally and substantially fair.

84. In his submissions to the tribunal, Dr Ibakakombo has suggested that the respondent in failing to investigate the first incident with the Swingo machine that had happened on the 20 or 21 February 2014 had not

conducted a proper investigation and that the investigation documents into that incident were disclosed to the claimant for the first time in 2018 and no CCTV footage had been produced. Whilst we note that evidence has been given that there is no CCTV footage of the area in respect of which the 2014 incident had taken place, we remind ourselves that the claimant was dismissed because of her capability to undertake a job as a result of her unacceptable attendance record, the issues about which the claimant complained in her statement to the stage III meeting[235-238] we find were not pertinent to question of whether or not the claimant's level of attendance was in breach of the respondent standards.

85. It is notable that at no stage during the management of absence did the claimant assert that the respondent's treatment of her was less favourable or unlawful discrimination because of her race or because of a condition that she stated was a disability. The suggestion was not put to Mr Powell who determined that the claimant's employment should be terminated because of her failure to meet attendance standards nor is it put to the claimant's trade union representative Mr Thomas Flood that she complained that the respondent's treatment of her was unlawful discrimination whether because of her race or because of a disability.

86. In the outcome letter sent to the claimant she was informed that employment was terminated on grounds of ill-health (capability) with immediate effect and the claimant was paid in lieu of 8 weeks notice. She was informed of her right to appeal to be made within 10 days of the outcome letter that was dated 26 July 2016. The claimant appealed the decision to terminate her employment by her letter of 2 August 2016[246]. In short the claimant considered the decision to terminate her employment was unfair and that she claimed she had not been told to not use the Swingo cleaning machine which caused a back problem. The claimant asserted that the use of the Swingo machine was part of her job and that the majority of her sickness absence was due to the

accident at work and not related to her not being happy in the area in which she was working or being depressed.

87. During the course of the tribunal hearing the claimant has asserted that historically over a period of five years she had incurred 132 days sickness absence because of back injury in 2014 and a further 22 days for the same reason in 2016; the claimant apparently ignores the fact that within that same period she had incurred 274 days for reasons not identified as relating to back pain injury and that she had not met the various stage attendance targets. We find that the claimant's assertion that other absences related to back pain and injury have not been supported by any medical evidence.

88. We observe that the respondent's failure to produce a final set of notes of the Stage 3 MAP meeting review is one that has resulted in the claimant making assertions and assumptions about the conduct of the meeting. We, and to an extent, Mr Hobbs have had the benefit of considering all of the evidence relating to that meeting and understanding the context of it in making our findings of fact. The claimant has not had the benefit of sight of the respondent's notes or the statements until the exchange of witness statements. In their absence it is not entirely surprising that those advising the claimant may have considered, based upon the claimant's account alone, that her case was one that should proceed to a tribunal to consider. We would recommend that the respondent take steps to train all of their mangers as well as HR professionals of the need to produce minutes of formal meetings on every occasion. We accept the evidence from the witnesses that the taking of notes is usual but not universally adopted practice – ideally it should be. The absence of the written notes taken at the Stage II meeting does not make the meeting and decision taken at it procedurally or substantively unfair in light of the findings of fact that we have made.

89. An appeal hearing was convened to be chaired by the appeal manager Anthony Hobbs it was originally scheduled to take place on 12 September and, at the claimant's request, re-scheduled to be heard on 20 September 2016. The respondent's management had prepared a Management Report [250-252] together with the documents that had been submitted at the stage III meeting [253 -294]. The claimant submitted a statement [245] at the meeting on 20 September in which the claimant identified she wished Mr Hobbs to reconsider in her appeal the decision to dismiss her with which she disagreed based on a number of highlighted points (a)-(d). The claimant did not agree that she had been instructed not to use the Swingo machine, she asserted that the document dated 12 March 2014 'statement of Nissan Lahi ' was a forged document , she asserted that she had followed the absence policy of the company and that she had been misinterpreted due to English not being her first language.

90. In light of the new issues the claimant raised at the start of the meeting with him Mr Hobbs determined that it would be appropriate to adjourn the meeting and the appeal meeting was reconvened to be heard on 14 November 2016. On 29 September the claimant submitted the document 'submissions, arguments and grounds of my appeal' [297-301]. The claimant confirmed that the document was prepared with legal advice. The respondents management prepared a supplementary management report [302-304] and notes were taken at the meeting [305-316].

91. At the November meeting the claimant was accompanied by a friend Charles Tchapdeu. We have considered the record of the appeal meeting. Mr Hobbs has confirmed that the purpose of the appeal was not to rehear the stage III meeting but rather to consider whether the decision taken by Mr Powell was one that was reasonable in the circumstances and to consider also the new complaints that the

claimant raised for the first time that she was discriminated because of her race and what she considered to be a disability.

92. We note that the claimant had asked on 22 September 2016 that she should be given more time to obtain legal advice in respect of appeal [296] and that a substantial part was the reason why the appeal meeting was adjourned and rescheduled for 14 November 2016.

93. We have considered the contemporary notes taken at the appeal meeting on 14 November 2016 and the evidence given by the various witnesses to that meeting who have been before us. Having considered all of the evidence before us we find that Mr Hobbs reconsidered the decision that had been taken to terminate the claimant's employment and he reached a reasonable conclusion that there was no basis to not uphold the original decision. Mr Hobbs identified that the claimant had not previously suggested that she had been subject to unlawful discrimination because of race or disability.

94. At the appeal meeting the claimant suggest for the first time [314] that she had been told that she was not to say she had a bad back or she would lose her job, the claimant asserted that occupational health would deny that fact as they do not wish to lose their job. Ian Mantle, the workforce adviser in attendance who heard that statement for the first time at the Appeal hearing asked the claimant who had made that statement to her. Much as she has demonstrated in answering questions in cross examination in the tribunal, the claimant deflected the question at the appeal hearing and made a series of other statements but did not answer who had made the direction that she should not say she had a bad back. As we have identified in our findings on credibility we find the claimant suggestion incredible as indeed did Mr Hobbs.

95. Mr Hobbs examined the claimant's assertion that all of her absences related to her back and that the statements made by her GP changing

her diagnosis from back pain to depression were incorrect. Mr Hobbs is of the view that if the claimants fit notes were incorrect it was her responsibility to challenge the record that her GP made if she did not agree with his diagnosis. Mr Hobbs concluded that the claimant's continued absences in breach of the MAP policy were not related to back pain and that, even if the respondent were to disregard the absences identified as back pain, the claimant's absences were still sufficient to cause the respondent to terminate her employment.

96. Turning to the claimant's allegation that she was discriminated against because of her race the claimant's allegation was explored at the appeal meeting [314]. When asked to explain what she referred to in her race complaint Mr Mantle the workforce adviser informed the claimant that the majority of dismissals that had taken place at ISS in the previous 12 months had been of people who were white. The claimant was, when asked to explain her race complaint as she had not provided any evidence to support the feeling that she had been discriminated on grounds of race said: *"do not ask me, I do not want to add anything to that"*

97. We find that in respect of the claimant's allegations of race discrimination she did not articulate at the appeal meeting, nor had she before that time, why she considered she had been discriminated against because of her race. We find that at the appeal hearing the claimant's allegation of race discrimination was based upon the bare fact of her describing her race as black African-Ivory Coast origin and nothing more than that.

98. Following the appeal meeting Mr Hobbs wrote to the claimant. The letter sent on 15 November [317-319] is detailed and provides a full explanation for the decision reached by Mr Hobbs. We do not repeat the detail of the outcome letter in this judgement however we are satisfied that it evidences Mr Hobbs having considered all of the claimant's

representations, concluding that the decision taken by Mr Powell was one that had given proper consideration to the reasons behind the claimant's episodes of absence and concluded that there was insufficient evidence to demonstrate the claimant's assertion that the documents that she had signed were forgeries or falsified. Mr Hobbs concluded that Mr Powell reasonably decided that the claimant had provided insufficient evidence to demonstrate that she had suffered an injury to her back due to an accident at work and that her absences all related to her having suffered an injury to her back due to an accident whilst using the Swingo machine and that the Trust was at fault in relation to that accident.

99. We find Mr Hobbs was reasonable in reaching a conclusions that he did. We find that no evidence was presented to Mr Powell nor at the appeal meeting to Mr Hobbs to support the claimant's assertion that all of her absences related to her back pain nor that she was disabled by her back pain. We find that like Mr Powell, Mr Hobbs was of the view that in light of the occupational health reports and the evidence that surrounded it there were no reasonable adjustments that might have facilitated the claimant's return to work prior to the stage II target having been failed.

100. It is clear to the tribunal that, based upon the occupational health reports, the evidence provided to the dismissal hearing and the lack of further evidence provided to the appeal hearing, the respondent was reasonable in reaching a conclusion both at the stage III meeting and appeal that the claimant was not a disabled person at the relevant time and the claimant was not discriminated against due to her disability.

101. To the extent the claimant complained that she had hurt her back using the Swingo machine, which she acknowledged she had not been trained by the respondents to use, the respondents had made it plain to her that she was not to use that machine unless and until she had received appropriate training. We find, were she to have returned to

employment, that the respondent would have acted upon the occupational health recommendation that the claimant should not use the Swingo machine.

102. At the tribunal hearing the claimant has suggested that the respondent ought to have considered offering her redeployment within the organisation in an administrative role. No such a suggestion was made by the claimant during meetings whilst she was in their employment and moreover the hours that the claimant had sought to work, namely nights, were not hours that would be accommodated by administrative roles within the respondent organisation where administration work was undertaken during normal office hours.

103. Mr Hobbs in finalising his conclusions at the appeal confirmed that he was satisfied that any employee exhibiting the levels of absence demonstrated by the claimant should have been dismissed from their post because of the lack of capability to deliver regular attendance. In the period prior to 2015, ISS managers had exercised very substantial discretion in not issuing performance targets to the claimant sooner than they had as the respondent's MAP standards required they should have done.

104. We find the decision taken by Mr Hobbs not to overturn the original panel's decision was one that was within the reasonable parameters. Furthermore, we find that the decision taken to confirm Mr Power's original decision was one which Mr Hobbs considered was correct based upon the claimant's capability as reflected by her attendance pattern.

105. We find that Mr Hobb's decision made in November 2016, though made in the knowledge that the claimant in her appeal asserted a right under the Equality Act (a protected act), was not a decision taken because the claimant had done a protected act.

Argument and conclusions

106. We turn to consider the arguments made both orally and in their written submissions and having full regard to them and our findings of fact on the evidence the conclusions that we have reached.

Unfair dismissal

107. We are asked to determine what was the reason or, if more than one, the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's capability - attendance at work being unsustainable. The tribunal in light of the findings of fact we have reached hold that the reason for the decision to terminate the claimant's employment was one relating to the claimant's capability at work and was for a potentially fair reason.

108. Having determined that the dismissal was for a potentially fair reason we consider if the respondent in all respects acted within the so-called 'band of reasonable responses'? The findings of fact lead us to conclude that the respondent exercising their discretion did so in a reasonable manner having followed the appropriate path under the managing absence procedure in the correct manner. Although the claimant has suggested that she did not understand the respondents procedures neither she nor her trade union representative at the stage III termination meeting asserted that the respondents had failed to apply the correct procedure in this case nor was it suggested in the appeal hearing. We have found that the respondents properly followed their own procedures and that the decision taken by the respondent to terminate the claimant's employment was within the so-called band of reasonable responses. Whilst a different employer may have taken different decisions, the decision taken by Mr Powell upheld by Mr Hobbs at appeal was one that was reasonable and fair in the circumstances

having had regard to the size and nature of the respondent's undertaking.

109. We turn to consider whether the dismissal was fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

110. We criticise Mr Powell for not having ensured that a formal note of the stage III meeting was made and retained however we were satisfied that the evidence has led us to conclude that the stage III meeting was one in which the claimant and her trade union representative were able to fully participate and make whatever representations they wished to make. To the extent that the claimant asserts that she was not permitted to state her case or that she made assertions that has been disputed by Mr Powell as corroborated by Mr Thomas-Flood for the reasons we have set out in the findings of fact above we prefer the account given by Mr Powell and Mr Thomas-Flood and the contemporary evidence to which we have been referred.

111. We reach our conclusions having had full regard to the written submissions of both parties in respect of the allegations of unfair dismissal. We observe at this stage that in his written submissions made to the tribunal Dr Ibakakombo has suggested that the dismissal is unfair because the respondent failed to investigate properly or question employees and carry out a reasonable investigation. We have found that the investigation carried out by Mr Powell was one which complied with the statutory provisions and case law having had regard to British Home Stores v Birchell, Iceland Frozen Foods Ltd v Jones and Sainsbury Supermarkets v Hitt

112. In light of our findings that the claimant was fairly dismissed this case does not proceed to remedy in respect of the unfair dismissal claim.

Race Discrimination

113. We consider whether the claimant has been subject to unlawful discrimination contrary to section 13: direct discrimination because of race, the claimant describes herself as Black of African – Ivory Coast origin. It is not in dispute that the respondent dismissed the claimant on 26 July 2016 and failed to uphold the claimant's appeal against her dismissal. The tribunal is required to consider whether that treatment was "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators known as 'Nicky', 'Chris' and 'April' and/ or an hypothetical comparator. Other than referring to a number of named comparators in the tribunal claim the claimant has done nothing more to identify how the named comparators were treated differently to her. Before the tribunal Claire Wilde identified that neither April Anglis nor Nicky Thorpe who were believed to be the individuals referred to had progresses beyond stage 1 of the attendance procedure and that Christine Ferrero had been a long term absentee in 2014 following knee replacement surgery and had not since been in breach of the attendance standard. The tribunal has been satisfied by the respondent's evidence that the reason for the respondent's treatment of her was because of the implementation and management of management of her absences in a manner that following 2015, ISS was required by the respondent to operate the MAP proactively consistent with the practice of the respondent's direct managers in a manner that they had not before. The claimant was made clearly aware of the operation of the policy and the suggestion that she did not understand the policy is disingenuous.

114. We consider whether or not the respondent's enforcement of their MAP policy was because of the claimant's protected characteristic of her race?

115. We have found that the reason why the claimant was treated as she was, was because of her wholly unacceptable attendance at work and that a hypothetical comparator would have been treated in exactly the same way in the same circumstances.

116. We have reached our conclusion having had regard to the statutory and appeal court guidance having regard to the burden of proof and consideration of the reason why the claimant was met with the treatment that she was.

Disability Discrimination

117. Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition: back pain? It is conceded by the respondent in retrospect that the claimant is disabled. The respondent denied knowledge of the disability at the relevant time. The respondent has conceded that the claimant is disabled by back pain and moreover that that disability may have existed at all material times. However the respondent asserts that they had no knowledge of the claimant's disability nor did they have reasonable grounds for believing that the claimant was disabled when the decision to terminate employment was taken nor at the Appeal hearing. At the tribunal hearing the claimant asserted that her various absences, including depression, stress and joint problems are all as a result of her back injury. The medical evidence denies that assertion.

118. The claimant's absences were identified as being for a number of reasons [227]. We have made findings that there is no link to the Back Injury and Back Pain the claimant suffered in 2014 to the back pain that she suffered with effect from 10 May 2016 to 8 June 2016. The

claimant's back pain is described as being acute and reactive as described by occupational health [233]. The assessment of occupational health was that the claimant was not at the relevant time a disabled person covered by the Equality Act 2010. We remind ourselves that an employer cannot rely upon an occupational health guidance alone .We have referred to the appeal guidance in Gallup v Newport City Council and Danelien v Liberata UK Ltd and conclude that the surrounding evidence both from the GP's evidence provided to the respondent and the claimant's own statements about her ability to return to work would lead any reasonable employer considering the situation to conclude that there was not evidence to suggest that the claimant was a disabled person is provided by the Equality Act.

119. We have considered the claimant's complaints both in relation to her section 15 complaint that she has been discriminated against for the reasons arising from her disability and that the respondent had failed to make reasonable adjustments in respect of a disabling condition contrary to section 20 and 21 of the Equality Act. The tribunal has found that the respondent did not have knowledge of the fact that the claimant's back pain was a disabling condition at the relevant time. More than the fact that they did not have actual knowledge of the back pain being a disabling condition the Respondent did not have facts before them that gave rise to circumstances by which the respondent could reasonably have been expected to know that the claimant had the disability at that time.

120. In light of the respondent's lack of knowledge of the claimant's disability at the relevant time section 15 of the Equality Act by virtue of section 15(2) does not apply.

121. The respondents lack of knowledge of the claimant having a disability causes the requirements of s20 &21 of the Equality Act 2010 not to apply by virtue of the provisions of Schedule 8 para 20(1) of the Act.

122. Finally, we turn to the complaint that the claimant was subject to unlawful victimisation contrary to s27 of the Equality Act. It is accepted by the respondent that the claimant in her document dated 29 September 2016 [p297], her grounds of appeal, did a protected act. The claimant has claimed that the respondent in failing to uphold her appeal and not overturning the decision to terminate her employment had caused her to suffer a detriment because she had done a protected act.

123. In light of the careful reasoning in his outcome letter and the account that he has given to the tribunal we have found that Mr Hobbs took a decision not in any way because of the protected act. He made a reasoned and reasonable decision to uphold the dismissal decision on appeal. Mr Hobbs, whilst acknowledging that the decision taken by Mr Powell was one that might have been taken differently by another person, concluded none the less that the decision taken by Mr Powell was a decision permissible under the respondent's policy was consistent with ACAS guidance and was within a reasonable range of responses. We conclude that the claimants protected act was not the reason why the decision was taken to uphold the original disciplinary decision and to not to uphold her appeal.

124. The judgment of the Tribunal is that:

124.1. The claimant was not unfairly dismissed by the Respondent in breach of s98(4) of the Employment Rights Act 1996.

124.2. The respondent did not unlawfully discriminate against the claimant by reason of the protected characteristic of her disabling condition of back pain in breach of s15, 20 & 21 of the Equality Act 2010.

124.3. The respondent did not unlawfully discriminate against the claimant by reason of the protected characteristic of her race in breach of s 13 of the Equality Act 2010.

124.4. The respondent did not unlawfully victimise the claimant in breach of s27 of the Equality Act 2010.

124.5. The claimant's complaints are dismissed.

Employment Judge Dean
9 October 2019