THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs Maria Yorke**

Respondent: **GlaxoSmithKline Services Unlimited**

Heard at: **North Shields Hearing Centre** **On: 29, 30 and 31 May 2019 with deliberations on 5 July 2019**

Before: **Employment Judge Morris**

Members: **Ms BG Kirby**
Mr L Brown

Representation:

Claimant: **Mr D Robinson-Young of Counsel**
Respondent: **Mr D Mitchell of Counsel**

RESERVED JUDGMENT

The majority judgment of the Employment Tribunal is as follows:

1. The claimant's complaint that the respondent unlawfully discriminated against her by treating her unfavourably because of something arising in consequence of her disability contrary to sections 15 and 39 of the Equality Act 2010 is not well-founded and is dismissed.

2. The claimant's complaint that, contrary to section 21 of the Equality Act 2010, the respondent failed to comply with its duty under section 20 of that Act to make adjustments is not well-founded and is dismissed.

3. The claimant's complaint that her dismissal by the respondent was unfair, being contrary to sections 94 and 98 of the Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

Representation and evidence

1. The claimant was represented by Mr D Robinson-Young of Counsel who called the claimant to give evidence.

2. The respondent was represented by Mr D Mitchell of Counsel who called three employees of the respondent to give evidence on its behalf as follows: Mr G Raine, First Line Leader; Mr S Hodgson, Site Engineering Operations Manager; Ms S Angus, Strategy and Change Business Director.

3. The Tribunal also had before it an agreed bundle of documents, which was added to at the commencement of the hearing, comprising some 365 pages.

The claimant's complaints

4. The claimant's complaints are as follows:

   4.1 The respondent had treated her unfavourably because of something arising in consequence of her disability as described in section 15 of the Equality Act 2010 ("the 2010 Act"), that unfavourable treatment being dismissing her and subjecting her to other detriments contrary to sections 39(2)(c) and (d) of that Act respectively.

   4.2 A failure on the part of the respondent, contrary to section 21 of the 2010 Act, to comply with the duty to make adjustments imposed upon it by section 20 of that Act.

   4.3 Her dismissal by the respondent was unfair contrary to sections 94 and 98 of the Employment Rights Act 1996 ("the 1996 Act").

The issues

5. Pursuant to the orders of the Employment Tribunal arising from a telephone private preliminary hearing conducted on 11 December 2018 the parties had agreed a list of issues that are included at the front of the bundle of documents referred to above. Those being agreed issues and that list being a matter of record, it is not necessary to set them out fully in these Reasons; they will be addressed in our consideration below. Suffice is to say they address the three complaints of the claimant (summarised as discrimination arising from disability, failure to make reasonable adjustments and unfair dismissal) and add an additional element of jurisdiction as to whether (in accordance with section 123 of the 2010 Act) the claimant's discrimination claims have been brought within three months starting with the date of the act to which the complaint relates, whether the alleged conduct extended over a period so as to be treated as having being done at the end of the period and, if not, whether it was just and equitable to extend time and if so for what period.

6. Finally, there is the issue of remedy. Early on the morning of the first day of the hearing, however, when in the context of timetabling the Employment Judge referred to the issue of remedy, the representatives remarked that there had been discussions between their respective instructing solicitors and that, given that the claimant had yet to finalise details of pension loss, the hearing should be limited to liability only. That was not the Employment Judge's interpretation of the Summary and Orders arising from the preliminary hearing referred to above that refer to the hearing in this claim being "completed within three days" and requires a detailed statement of remedy from the claimant to be submitted on or before 18 January 2019. Nevertheless, given that it did appear unrealistic to expect the Tribunal to determine liability, announce its judgment and then move on (if necessary) to consider remedy within the three days allocated, it was agreed that this hearing should be restricted to determining liability only with remedy being addressed, if necessary, at a later date.

Consideration and findings of fact

7 Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law, some of which was referred to by the representatives (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

7.1 The respondent is a well-known company in the pharmaceutical sector of some considerable size and significant resources including a dedicated human resources department ("HR"). One of its sites, which is said to be one of its largest in the world, is at Barnard Castle at which some twelve-hundred people are employed. That site focuses on four business areas: Sterile; Derms; Liquid and Cephalosporins. The claimant worked in Derms.

7.2 The claimant was employed at that site from 20 November 1989 until her employment was terminated on 12 October 2018 in accordance with to the respondent's Disability and/or Long-Term Ill Health in the Workplace Policy ("the Disability Policy") (72). She was employed as a Mover. Her duties included such matters as printing/collating batch documentation, printing labels, attending meetings, ordering materials from the warehouse, moving pallets, reconciling orders, checking documentation and liaison with other employees. It was, however, quite a physical role and included opening heavy doors, handling heavy materials, pallets and the compulsory wearing of safety shoes; although there were alternative safety shoes that were lighter on the feet that were offered to employees with diabetes but which the claimant had never requested. Mr Hodgson's estimate (which was not challenged) was that the Mover role was approximately 70% physical with the remaining 30% relating to administrative tasks such as document checking, reporting on quality issues and checking samples. The general job description is at page 66.

7.3 The claimant suffers from rheumatoid arthritis. She was first experienced symptoms which in March 2016 and then given a formal diagnosis in June

2016. From that date at least, therefore, she was a disabled person as that term is defined in section 6 of the 2010 Act. The physical effects of her condition include immense pain, swelling and stiffness in her joints particularly her hands, wrists, hips, feet, ankles, knees and elbows. She has no strength or grip in her hands or wrists, stiffens and aches if in one position for too long and cannot do any repetitive tasks. If she walks or stands in a position for too long her hips become painful and begin to stiffen. She has been prescribed various medications in the past but suffered adverse reactions to all of them and now has a weekly injection that she has taken since January 2018 with no side effects.

7.4 There is no dispute that the respondent's premises within which the claimant worked were not "disability friendly" (to adopt a phrase from one of the witnesses). It is constructed on four levels with only stairs between the levels. There is no lift other than a lift the primary purpose of which is to transport goods and materials. The disabled lavatories are located on the ground floor and level one. The claimant worked in the basement.

7.5 Even before the claimant's diagnosis in June 2016, her absence record was not good. The parties are agreed that in 2013 and 2014 the claimant was absent for 13 and 30 days respectively. The parties do not agree about the level of absences in 2015, 2016 or 2017. In those years the claimant states that she was absent on 85 days, 119 days and 96.5 days respectively whereas the respondent asserts 185 days, 158 days and 102 days respectively. It appears to the Tribunal that the differences in the number of days arise from whether the Saturday and Sunday in each week (when the claimant would not normally have worked in any event) should count in calculating total absence; but that probably depends upon whether one is looking at a number of days' absence or a period of absence. Whatever the approach to calculating absence, however, the Tribunal is satisfied that the claimants' absences from work were significant.

7.6 The claimant was referred on a number of occasions to the respondent's 'in-house' occupational health department ("OH"). The first letter of advice is dated 12 July 2016 (133). Given the circumstances it is a fairly positive letter and expresses the hope that the claimant will be well enough to commence a phased return to work at the expiry of her current fit note on 27 July.

7.7 The claimant then returned to work on a phased basis working alternate days without any issues. She was seen again by OH in August 2016. The OH letter of 8 August (134) records that she returned to work as planned on week commencing 25 July on alternate days performing her usual role which she had managed without issue. Further, that she had agreed with OH to extend her shifts as follows: two days at six hours w/c 8.8.16, three days at six hours the week after, four days at six hours then five days at six hours before full-time work w/c 12 September.

7.8 The respondent's Attendance Management Policy ("AMP") (77) includes at section n that a return to work ("RTW") interview should be held with any

employee returning to work after any sickness absence; even one-day's absence. At this time Mr Raine was the claimant's line manager. The claimant's evidence was that Mr Raine did not always conduct the RTW interviews and he confirmed that to be the case, commenting, "some were missed". The claimant was clear, however, that Mr Raine had not conducted such RTW interviews with her in relation to her absences from the beginning of 2013 before she had received a diagnosis of rheumatoid arthritis. Further, that she had never complained about his failures in this respect whether before or after her diagnosis. She added that Mr Raine failed to conduct RTW was with many employees and no one complained; "it was commonplace".

7.9 More particularly, Mr Raine did not conduct a RTW interview with the claimant immediately upon her return on 27 July but delayed until 1 September 2016 his explanation being that a clear steer had been given by OH regarding the claimant's limitations and restrictions (145). The Tribunal considered that to be an understandable explanation but, as Mr Raine accepted in evidence, it was contrary to the AMP that a RTW interview should be held whenever an employee returned to work after sickness absence. That said, Mr Raine did have available to him the OH reports of 12 July 2016 (133) and 8 August 2016 (134) the latter of which records that the claimant had returned to work as planned on a phased basis in week commencing 25 July, performing her usual role and that she had managed without issues. Considering this point alongside the above point that the claimant had never complained about this matter at the time, the majority of the Tribunal is satisfied that her complaint in these respects is more technical in nature that the AMP was not followed rather than, as was submitted on her behalf, that not following the AMP in these respects was a point of substance.

7.10 The note of the RTW interview on 1 September 2016 continues that since the claimant's return to work she had been working reduced hours but had struggled due to lack of medication. She was aiming to return to full hours by 12 September and it was agreed that during the week commencing 5 September she would work Monday to Thursday for seven hours a day. If, however, she was unable to work those hours she should discuss that with Mr Raine who would document it appropriately. At this time she was 'self-restricting' depending on her daily condition (ie. only undertaking tasks that she felt capable of doing): there were Supporter roles and other Movers on other lines who, at least in the short term, were available to assist the claimant in respect of aspects of her role that she felt unable to undertake. Mr Raine advised her that he would be seeking advice from HR as to the next course of action under the AMP process.

7.11 The further advice from OH that it was agreed would be sought at the RTW meeting on 1 September resulted in a letter from OH dated 14 September 2016 (137). Elements of that letter include the following:

7.9.1 "I advised her that she was unfit for work in any capacity and should go home to rest"

7.9.2 "If she is able to attend work, in my opinion, she will struggle to remain for the full shift – as her condition meets the Equality Act criteria requiring reasonable adjustments, I would suggest that if Maria is able to attend she remains for four-six hours only".

7.9.3 "Hopefully once her treatment is commenced and symptom control is achieved she will be able to perform her usual role and hours….."

7.12 It is apparent from the above that the reasonable adjustment suggested was conditional upon the claimant returning to work whereupon she should remain for only four to six hours. Effect was not given to that reasonable adjustment, however, because the claimant did not return to work. Rather, she commenced a fairly lengthy period of sickness absence from that day of 14 September 2016 until 16 November 2016 (inclusive). Thereafter there was little actual attendance at work until the end of that year as she took a number of days' holiday; in fact she appears to have been in work on only five full days (325). Her attendance then improved in the first quarter of 2017 albeit with occasional periods of absence (326).

7.13 The claimant was then absent from work during April, the early part May and commencing 26 May 2017. She returned on 5 June 2017. It was agreed that she should be referred to OH prior to a RTW interview being conducted. That referral took place on 6 June (149) and Mr Raine conducted a RTW interview with the claimant that day (146 and 147). The letter from OH of 11 June 2017 (149) records the claimant's condition and her symptoms, which had affected her ability to attend work, and advised that the claimant "would benefit from redeployment into a sedentary role which hopefully would enable her to sustain her attendance at work." That said, the claimant was then absent from work until 12 July and was not in a position to undertake any work, sedentary or otherwise.

7.14 Given the OH advice that the claimant would benefit from redeployment into a sedentary role Mr Raine spoke to his manager, Mr Hodgson, as he would be in a better position to determine any sedentary roles available on site. Mr Hodgson confirmed that he would explore the options available that would be suitable and began to do so.

7.15 The claimant was then absent from 13 June 2017 returning on 12 July 2017 and a further RTW was conducted with her that day (150 and 153). At that RTW meeting Mr Raine informed the claimant that he had contacted OH who had advised that the claimant should work four hours a day until her appointment on 13 July. He also advised the claimant that she should continue to 'self-restrict' her duties within her own limitations until OH advised otherwise; the claimant confirmed that she was advised to self-restrict in this way and that OH had agreed with that. Mr Raine informed the claimant that he had escalated the OH advice regarding redeployment to a more sedentary role to his manager, Mr Hodgson. Finally, he informed her that her level of absence would be escalated to the next level of the AMP beyond the informal counselling that had arisen from the RTW meeting on 6 June 2017.

7.16 The letter of advice from OH is dated 14 July 2017 (152). It is apparent from the phrase, "I understand that the exploring of redeployment opportunities for Maria continues which hopefully will help her manage her condition more proactively", that redeployment continued to be an issue and Mr Hodgson agreed in evidence that the advice regarding redeployment in the earlier letter of 11 June still stood. Despite that, however, OH advised that the claimant could return to "perform her usual mover role" albeit initially on a phased basis working for four hours daily for two weeks and then extending that by one hour each week until back to full-time but "using lifting aids available and seeking assistance for the DUAC campaign which involves increased walking for components". It was explained at the hearing that the reference to "lifting aids" is a reference to an electrical pallet mover and the DUAC campaign refers to the periodic production of particular dermatological produce, which included walking because it used refrigerated products and the fridge containing those products required access by a lift in respect of which the claimant could seek assistance from colleagues.

7.17 On 31 July 2017 another First Line Leader ("FLL"), PC, asked the claimant to do the Mover role again on two lines. The claimant told her that she was not supposed to be doing that role and was trying to do just paperwork but she was told there was no one else and she would have to do it and just do what she could manage. Although the claimant took exception to having been asked by PC to do the Mover role, even on her evidence, it is clear that PC maintained the overall 'self-restricting' approach of the respondent's managers in that she told the claimant to "just do what I could manage".

7.18 The claimant was then absent from work on 8 August 2017. She contacted Mr Raine that day (153) to say that she had been signed off for a week and was scheduled to return the following Tuesday. She mentioned that in the previous week she had been requested to do the Mover role (as referred to in the preceding paragraph) and had carried out some physical tasks that had affected her current condition. She had obtained a written restriction note from her GP, which Mr Raine said should be directed to OH who would advise him accordingly. He advised the claimant that she was still at liberty to self-restrict from any physical duties as previously agreed and that he would share any further information with his peer group (ie. other FLLs including PC) of any such self or formal restrictions the claimant may have in case he was not available himself.

7.19 This approach of the respondent's managers in encouraging the claimant to 'self-restrict' the activities in her role to only what she felt she could do is echoed in the letter of 29 September 2017 from the claimant's consultant rheumatologist to the respondent's OH adviser in which it is stated, amongst other things, "While her arthritis remains active, phased hours and modified duties may be appropriate. The nature and duration of work is really dependent on what Maria feels she is able to do, rather than from any specific direction from me." (157)

7.20 At this time other developments were taking place not related directly to the claimant. On or around August 2017 the respondent carried out a review into absences on site, which was partly in response to a costing exercise that indicated that its Barnard Castle production costs had increased and were likely to be higher than the other three production sites. One of the reasons was absence. Derms had the worst absence figures on site and the claimant's absence levels were noted as they were the most significant on the site

7.21 Mr Hodgson informed Mr Raine that given that Mr Hodgson was already looking at possible sedentary roles for the claimant and in light of the absence review, he would take responsibility for managing her absence.

7.22 Also at this time a recruitment freeze was placed on the site and subsequently, in May 2018, a headcount reduction was announced, which would include a number of compulsory redundancies.

7.23 HR asked Mr Hodgson to meet the claimant on an informal basis, which he did on 12 October 2017 (161/184). He was accompanied by an HR colleague and the claimant was accompanied by her trade union representative. Amongst other things, the claimant agreed that when she had returned to work in June 2017 she had been told only to do what she could manage but her Mover role involved physical aspects and she could not do her role. The possibility of splitting the claimant's role so that she only did the administrative side was considered but even then the claimant could not confirm that she could return to work. Indeed, throughout the discussions at this meeting the claimant repeatedly stated that she was currently signed off from work and even if a suitable alternative opportunity were to be available she would not be able to return to work at that time. Mr Hodgson mentioned, for example, that she could return to create training documents but the claimant said that she could not return. He stated that he had funding for the claimant and another employee to do a paperwork role from August 2017 to December 2017. The claimant's evidence in her witness statement is that she was currently in too much pain and was signed off and that she also asked Mr Hodgson why he was only informing her of this now. In her oral evidence, however, this latter point seemed to be the principal issue, the claimant declining the opportunity to undertake the short term paperwork role as she appeared to have been miffed at Mr Hodgson having delayed from August until the date of this meeting in October before offering if to her.

7.24 Also at this meeting the claimant mentioned other employees whom she considered had received more favourable treatment than her. For example, one woman (ER) had been offered a role in the Operational Quality department ("OQ"), another had been moved to Process Support on a secondment and a third (EH) had been offered a FLL role, while a man was doing a job that did not have any title or budget. Mr Hodgson explained, however, that although he could not go into the personal circumstances of others, the claimant's understanding of these situations was factually incorrect. He referred to the claimant not having said that she wanted to go down the FLL career path.

7.25 In oral evidence, Mr Hodgson explained that ER was a high-performer who had expressed interest through her development plans to explore opportunities such as OQ but she had never been offered a job, and a job had never been withdrawn. As to EH, the respondent has a succession planning process through which consideration is given to potentially high performing candidates who might go on to FLL roles. EH had performed well on a secondment and Mr Hodgson had a conversation with her as to whether she was interested in attending a FLL Assessment Centre but she chose not to. He had not had a similar conversation with the claimant for a number of reasons: she had never displayed such behaviours, her attendance would prohibit him promoting her into a managerial role, she was rarely at work to fulfil that activity and she had never talked to him or other managers about an FLL role being something that she could aspire to.

7.26 At the meeting on 12 October, in the context of considering alternative roles, Mr Hodgson remarked that if there was a secondment opportunity the claimant could be considered but she would need to understand that this would only be a temporary measure so when the secondment came to an end she would be at risk of there not being a role to move into and the question of her capability would stand (168/9). The HR officer highlighted that the claimant's absences would have triggered formal meetings under the AMP (77) but the claimant's disability had been taken into consideration and the triggers and sanctions under the AMP had not been applied. In oral evidence the claimant confirmed that the triggers under the respondent's AMP had been dis-applied although adding that that had not just been in her case. Action points were agreed at the end of the meeting, which are summarised in a letter HR sent to the claimant dated 2 November 2017 (178).

7.27 One important action was that it was agreed that Mr Hodgson would arrange for an independent workstation assessment. This was carried out by a Senior Occupational Health Physiotherapist at Nuffield Health Wellbeing in November 2017. He produced a JobFit Plus report (175) on the basis of an interview with the claimant and observations of other employees doing the Mover role as she remained absent from work at this time. Although only recording what the claimant had said, it is clear from paragraph 5 of the report that the claimant was ill at this time and unable to be at work. Paragraph 6 undertakes a detailed review of the duties of the claimant's post albeit not on the basis of an assessment of her performing those duties as she was absent. The report divided the claimant's duties into six main categories. With the exception of office-based duties, the remaining five categories were considered to be physically demanding. The recommendations contained in the report are as follows:

> "Due to Ms Yorke's current on-going physical problems, that are yet to be managed/controlled with medication from consultant level, she is at high risk of exacerbating her symptoms significantly returning to her current job role, with a high probable chance of

> further sick leave based on her current irritability and nature of her reported symptoms.
>
> Once she has controlled her symptoms better with medication she could realistically return to work, however due to the chronic nature of her symptoms this would be recommended only in a light capacity and not in her current role. Sitting based tasks without manual lifting/twisting/turning, repeated gripping would be realistic if this option is available to her."

7.28 To a large extent this JobFit Plus report reflected the earlier observations of OH but with what the Tribunal considers to be a very significant difference. Thus far OH, while suggesting that the claimant would benefit from redeployment had also focused on the prospect of her returning to her Mover role. This JobFit Plus report seems to shift the emphasis to recommending a return to work only in a light capacity and not in the Mover role.

7.29 In light of the report's recommendations, Mr Hodgson raised the claimant's case at the weekly meeting of all the Production Operations Managers on 3 November 2017. This is a meeting of all those Managers on the site who are present on site that day along with someone from HR. He followed that up in an email (180) to the Operations Managers who attend the weekly meetings and also to the Operations Managers from Laboratories and Logistics asking them all to consider and let him know of any roles within their areas that might be suitable for the claimant. All the responses he received confirmed that no such role was available. At one stage it appeared to the Tribunal that Mr Hodgson had limited his enquiries to Operational Managers on the site and that he had not considered, more widely, other areas (for example in administration, in which sedentary jobs might have been available) but it became clear in later evidence that he had, indeed, made such enquiries across the site. On this point also regarding enquiries made across the site, at this time, the HR Manager who had attended the meeting on 12 October 2017 wrote to the respondent's Recruitment Account Manager-GMS enquiring what vacancies there were for redeployment options for the claimant who required a sedentary role or, alternatively, whether there were any existing vacancies that he felt could be adapted (182). He responded that there were none available or suitable whereupon the HR manager asked, "if any do become available anytime soon then you let me know to try and support this redeployment opportunity" (181).

7.30 The claimant was critical of the respondent's managers for not having done more to give effect to the advice from OH that the claimant would benefit from redeployment into a sedentary role but Mr Hodgson's evidence was that as soon as this issue had been escalated to him by Mr Raine, he had explored the suitable available options and, before going on to raise the issue with other Managers across the site, it was sensible to await the production of the JobFit Plus report so that, rather than asking a general question about redeployment, he was able to be more specific in light of the report's recommendations. As he put it, "we needed to

understand the claimant's limitations of medical capability and assess the Mover role to understand redeployment roles".

7.31 A second informal absence review meeting took place on 17 November 2017 (197) with the same persons being present as had been at the first meeting. The claimant was still signed off as unfit to work. Mr Hodgson explained that it would not be possible for her to carry out only the administrative aspects of the Mover role. He enquired, however, whether she thought she was fit to return to work to carry out the trainer role that he had raised at their previous meeting. As Mr Hodgson explained in oral evidence, this was a temporary administrative role requiring someone with strong experience with the shop floor and familiarity with the operations and machines to create standard work training packages out of the respondent's Standard Operating Procedures for delivery to new and existing staff. Contrary to the claimant's evidence this role did not need to be located "on the shop-floor" but could be anywhere. He had talked to the claimant over the telephone about her being located, not in the basement, but in the area where his office was located on the first floor although there were offices on the ground floor too. At their meeting the claimant responded, however, that she was not fit to return to work in that role at that time and explained that she had stopped taking her medication. She was anticipating starting new treatment later in the year and hoped to return to work after Christmas. Later in this meeting, after having referred to having sat in the office for two hours on a previous occasion, the claimant commented, "If you can't sit in a chair for two hours how would that be any different if you were sat at work in an office role?"

7.32 Mr Hodgson aimed to have weekly catch-up calls with the claimant. He spoke to her on 22 December 2017 and she advised him that she had not in fact started the new treatment and a further review was unlikely to happen until the New Year. Nevertheless, she suggested that she may be able to return to work in January 2018 in a limited capacity.

7.33 On 3 January 2018 they spoke again (270) and the claimant advised Mr Hodgson that she had now been accepted on the new treatment programme for her arthritis and expected to receive her first treatment involving injections by no later than 12 January 2018. When they spoke on 18 January 2018, the claimant advised that she intended to return to work on 29 January (269). Mr Hodgson expressed his concern about that and explained that in light of the recent JobFit Plus report he would need to review her position in advance of her return. The Tribunal accepted that in this he was exercising what he referred to as the respondent's duty of care towards the claimant.

7.34 On 18 January 2018, the claimant provided a statement of fitness for work in which her GP had set out that she might be fit for work on a phased return basis and with amended duties (206). Mr Hodgson met the claimant on 22 January 2018 to discuss her return and then spoke to her on 23 January (268). The claimant was very clear that she wished to return to work but Mr Hodgson was concerned that it might be too early and that could potentially hinder her recovery. The claimant had arranged an OH

appointment on 29 January 2018 and it was agreed that they would be guided by the outcome of that appointment. During the course of this conversation Mr Hodgson mentioned that during the previous week the respondent had announced a review of administrative roles across the site that had resulted in a reduction of such roles from 10 to 5 positions; and he added that there were approximately 9 people across the site requiring sedentary roles, which were therefore in high demand.

7.35 In a letter dated 29 January 2018 (207), OH advised that the claimant should attend work for two hours daily that week (2-4pm) and the next, with an hourly increase every week thereafter until back to full-time hours in the week commencing 19 March. The advice continued that on her initial return the claimant should regain access to the IT systems and complete outstanding 'Mylearning' after which she could move on to pc/paperwork and gradually increase her physical activities. It concluded that it was difficult to determine whether the claimant would be able to return to the full remit of her Mover role and that if her symptoms remained unstable, redeployment options would need to be explored for a less physically demanding, office based role. At this time, however, the focus remained on the claimant returning to work initially on what might be termed 'light duties' albeit with a gradual increase in physical activities. There was no clear-cut recommendation that, at that time, the claimant should be moved permanently to a sedentary role.

7.36 On this basis the claimant returned to work on 29 January 2018. Thus, as the claimant confirmed in evidence, she had been absent from work from 8 August 2017 until 29 January 2018 although she might have come in for "odd shifts" and while she complained generally about the respondent not having followed the OH advice regarding redeployment she also confirmed that, in any event, during this period she was not able to attend to do any work, whether sedentary or otherwise and that she had been consistently signed off.

7.37 On the claimant's return to work, Mr Hodgson had an informal absence review meeting with her the following day (210/214). The claimant explained that she needed to get back to work but not to her Mover role as even using her thumb to operate the controls on the electric pallet truck would be very painful. Asked what would be the best working environment for her she replied, "In a bubble". That was obviously a flippant remark but it made the point as to the type of activity and position that the claimant considered she was capable of undertaking. Mr Hodgson described the position regarding sedentary roles again explaining a reduction across site from 10 roles to 5 and the fact that there were 9 people including the claimant looking for sedentary positions. The claimant queried why he thought admin was a sedentary role commenting, "I would not thank you for a secretary position" and that she saw a sedentary role in either PMQC (a quality control laboratory) or OQ. Mr Hodgson's evidence, on which he was not challenged, was that there were no posts available in PMQC but, in any event, it was not suitable as it still involves a not insignificant physical element; and there were no vacancies in OQ when the claimant was fit for work and it was also a mix of administrative and physical work.

The claimant mentioned two other employees who had been given alternative job opportunities. Mr Hodgson's evidence, which again he was not challenged, was that after JB returned to work following surgery he actively sought alternative opportunities and was successful in gaining an administrative position in an advertised role in about June 2018; GP also actively worked with the respondent and was given an on-the-job training opportunity which suited his experience and medical needs. In contrast, the claimant did not work actively with the respondent's managers in an attempt to return to work of some kind even if on a temporary basis. For example, at this meeting, it was suggested to the claimant that there was an opportunity for her to work alongside GP but she did not think that the roles were suitable for her at the time. Also at the meeting, Mr Hodgson told the claimant that they were looking for opportunities and had reviewed recent and current vacancies across the site but had not identified anything suitable: he mentioned two vacancies that the claimant agreed were not suitable.

7.38 The claimant confirmed in oral evidence that she was "only sporadically at work" from the end of January until April 2018. She had a further appointment with OH on 8 March 2018. In a letter of 12 March the opinion was expressed that the claimant needed to perform a sedentary role, if possible completing pc/paperwork that are not physically demanding until better control of her symptoms is achieved. Mr Hodgson ensured that this advice was followed and that the claimant was not carrying out any physical tasks at work. In the letter OH also expressed the opinion that unfortunately the claimant did not currently meet the required criteria for ill-health retirement.

7.39 On 20 March 2018 the claimant informed Mr Hodgson that she was not feeling the benefit of the injections and remained unable to carry out any of the Mover role. He directed her towards non-physical tasks: accompanying a planned safety Gemba, helping JB with training packages and finishing off some of GP's work updating Standing Operating Procedures. He also informed her that they were looking to organise a formal meeting to discuss her situation as they were approaching the end of her phased return period.

7.40 The claimant then had absences at the end of March and throughout April 2018. Mr Hodgson spoke to her on 4 April 2018 she told him that in many ways her condition had deteriorated and she was unable to attend work. She remarked that unless the respondent had a job "licking stamps" she could not see herself taking on alternative roles within the factory (220). Again a flippant remark but it makes the point that at this stage the claimant seemed to have acknowledged that she could not return to work in either her Mover role or in any alternative role. Indeed, she told Mr Hodgson that she intended to make an appointment with her GP to seek medical guidance regarding ill health retirement. Mr Hodgson responded that this was a change in her approach. He also explained that a formal case review meeting would be necessary. This was, indeed, a fairly significant change in the claimant's approach to what she sought in respect of her ill-health. To this point the parties are agreed that the

claimant sought to return to work and that was the focus of OH. It was put to Mr Raine that during the time that he was the claimant's manager she was "keen to get back" and he confirmed that that was the basis of his discussions with her.

7.41 The claimant contacted Mr Hodgson again on 11 and 17 April (267). She explained that her situation was worse than before she had started the new medication and she was now using a walking stick. She had discussed with her nurse her intention to explore ill health retirement, which her nurse had agreed was becoming a realistic option.

7.42 The claimant returned to work on 23 April 2018 and met with OH who produced a report on 24 April (245). In this report (unlike the earlier reports in which the focus was on the claimant's return to her Mover role, albeit that she should return on a phased basis and initially undertaking light duties while gradually increasing physical duties, and would benefit from redeployment into a sedentary role) the advice was now more clear-cut to the effect that she should perform sedentary tasks such as pc work, document checking or paperwork as "anything more physically demanding is likely to increase her symptoms". Notwithstanding that shift in emphasis, however, the reality is that after this date the claimant never returned to work until her dismissal and maintained throughout that period until the meeting that resulted in her dismissal that there were no alternative roles on site to which she could return; this point is returned to in more detail below.

7.43 The Disability Policy requires the respondent to make reasonable adjustments and consider redeployment opportunities but provides that if it is impossible for the employee to continue to perform the main functions of their job a procedure would be followed that might lead to the termination of the employee's employment.

7.44 In accordance with the Disability Policy, Mr Hodgson invited the claimant to attend a first formal meeting on Tuesday, 24 April 2018 (247). At that meeting (249/271) the claimant was accompanied by her trade union representative. Amongst other things they discussed the claimant's sickness absence record since 2016 and her unsuccessful attempts to return to work; the claimant agreed that it was not possible for her only to undertake the administrative tasks of the Mover role; she stated (as she confirmed in oral evidence), "I said I couldn't do any role they offered on site" and the "only option was ill health retirement", adding (in accordance with the notes of the meeting, which the claimant was sent and had not amended) that she had also stated that she did not think "she could work ever again" and that she could not "manage an alternative role" (although in oral evidence the claimant denied having made these additional comments); the claimant was asked whether she would consider working part-time or in alternative roles outside the site or at a lower grade but she responded that her disease did not allow her to work and that she should get ill health retirement; Mr Hodgson made the point that they could not continue indefinitely on the same basis as at present and the notes of the meeting (251) record that the claimant "agree as with this and believe that

she shouldn't come back into the area with a walking stick"; Mr Hodgson would reach out to other managers in the interim to see if there was another team where the claimant could work perhaps in a temporary job; the claimant and her trade union representative would meet the next day to go through the job vacancy list at the site; the claimant believed that she was unfit to do her current role but that it was unfair to give notice which she would challenge; the HR representative at the meeting explained that no notice had been issued but merely that redeployment would be formally instigated for a 12-week period while her ill health retirement application was pending as the claimant could not do the full scope of her contractual role, which she agreed. In respect of working part-time referred to above the claimant confirmed in oral evidence that she had not applied as it would not work; she was not prepared to try because it was not suitable. She was also asked whether OH had advised that she should apply for flexible working and confirmed that they had asked if she would be interested but she was not as she would have had to return to her Mover role after 12 months and would then be dismissed.

7.45 There is a conflict of evidence as to what occurred after this meeting on 24 April 2018. The claimant states that she was about to go into her department to work using her walking stick when Mr Hodgson saw her and stated that he did not think she was well enough to work if she needed a walking aid and told her to go home. Mr Hodgson's evidence was that this simply did not happen. He believed that after what was a long and mentally exhausting meeting the claimant went home as she had already been in work for a few hours and, in line with her phased return, she was not working full days. Had he had this conversation he would have documented it as he had done with all other conversations with the claimant (264-270). In answering questions at the hearing each of these witnesses was adamant as to the accuracy of their differing accounts. That is always difficult for a tribunal and we gave this conflict of evidence considerable thought but, on balance of probabilities, the Tribunal preferred the evidence of Mr Hodgson that after their fairly lengthy meeting the claimant had simply gone home, which accords with the claimant's comments at the meeting that there were no roles that she could do on the site and the record quoted above that she believed she should not come back into the area with a walking stick. The Tribunal notes that although the claimant had previously made a number of manuscript amendments to the notes of her meetings with Mr Hodgson and had made amendments to parts of the notes of this meeting on 24 April, she had not amended that comment. Mr Hodgson's account is also supported, in a way, by the fact that the claimant contacted him the following day (253) to inform him that she was unwell and unable to attend work, which would not have been necessary if he had sent her home the previous day. Furthermore, during that conversation the claimant did not mention anything about him having sent her home and, to the contrary, expressed the view that she felt the meeting had been valuable. Indeed, she did not mention this issue at all at any stage of the Disability Policy process that ultimately led to her dismissal until she submitted her appeal against that dismissal. Finally, there is no dispute that KP and PB, who are well known to Mr Hodgson

(KP being part of his team) respectively used a walking stick and a walking aid after they had undergone surgical operations. Compared with the above points, the claimant did not bring forward sufficient evidence to satisfy the Tribunal, on balance of probabilities, that she and Mr Hodgson had met as she was about to return to her work in her department and he had sent her home.

7.46 As indicated above, following the claimant's attendance at the formal meeting on 24 April 2018 she was absent the following day of 25 April 2018 and never returned to work thereafter. Indeed, although what was referred to as being the "I-tag information" (showing when the claimant has passed through certain card-operated doors or other security barriers on the site) (358) and the charts upon which her attendance at work, sickness, holidays, paid leave, etc are recorded (326 and 358) are far from clear, it does appear that she might never have actually attended at work after 3 April 2018 other than to attend meetings.

7.47 The notes of the meeting on 24 April were sent to the claimant under cover of a letter from Mr Hodgson of 8 June 2018 (259). In that letter Mr Hodgson confirmed that the management team would perform a job search for her within her department/site and more widely within the respondent. He explained that the duration of the job search would be 12 weeks after which time she would have found an alternative role or would be invited to a further meeting in accordance with the Disability Policy.

7.48 In course of their conversation on 25 April the claimant informed Mr Hodgson that she realised that it was currently not practical for her to come to work in any capacity. He responded that that was consistent with his thoughts and, based upon her mobility and the respondent having a duty of care for her safety in the workplace, he had planned to contact her to advise that she remain absent. They spoke again on 3 May when the claimant explained her symptoms and said that she had been signed off work for four weeks. Mr Hodgson considered that this reinforced his decision that her health and capability prevented her attendance at work to any degree, with which the claimant agreed.

7.49 As part of the claimant's ill health retirement application, OH contacted her consultant rheumatologist. Amongst other things he advised that the claimant's "arthritis may well affect her ability to work for your organisation" and, in response to a question of whether she would be able to return to work within twelve months he advised that he thought it was "difficult to say with certainty that we will be able to adequately control her joint disease within twelve months" (257).

7.50 Mr Hodgson spoke to the claimant on 17 May but her condition remained as previously. He then met her on 22 May (266). The claimant stated that she "now felt unable to work in any capacity". Mr Hodgson told her that he had not been successful in identifying any redeployment opportunities: this in the context of staff facing redundancy being interested in vacant roles and the claimant's capability making it very difficult to identify a suitable role. The claimant agreed.

7.51 When they spoke on 1 June 2018 the claimant reported that she was feeling no better and that it remained impossible for her to attend work in any capacity. She thought that her ill-health retirement application would not be accepted and wondered if she could be considered for a redundancy package but Mr Hodgson explained that the respondent's redundancy proposals did not impact upon those in "the direct workforce" such as a Mover. The claimant commented that she could not think of any role on site that she could complete – she would like to work but physically cannot (265).

7.52 They spoke again on 6 June when the claimant explained that she was in agony. She had, for example, been unable to turn the ignition key in her car. Mr Hodgson said that he had discussed with others the possibility of redundancy but it would not be feasible as it was claimant who was unable to complete her role rather than her role being redundant. Mr Hodgson noted that the claimant had previously been very strong in expressing her expectations of returning to work in some capacity whereas it now appeared that she recognised that this was unlikely: the claimant had agreed. They had agreed to meet formally to consider the situation further.

7.53 On 14 June 2018 OH wrote to Mr Hodgson recording that based upon the current evidence the claimant did not meet the eligibility criteria for ill-health retirement but she was to see her specialist again for an up-to-date assessment.

7.54 Mr Hodgson wrote to the claimant on 15 June 2018, enclosing 17 appendices (included in the document bundle), inviting her to attend a second formal meeting under the Disability Policy (262). He explained the purpose of the meeting and warned that it could result in her dismissal. At this time Mr Hodgson also checked all responses he had received in respect of his email of 7 November looking for a suitable potential redeployment opportunity and he wrote again to one manager who responded that he did not have any suitable roles (275).

7.55 The claimant's consultant rheumatologist wrote again on 2 July 2018 having assessed her on 14 June. He remarked that her prognosis remained difficult to predict and it was "difficult to say with certainty whether or not we will have adequate control of her joint disease in the next 12 months" and that her arthritis "may well affect her ability to work for your organisation." (277)

7.56 The second formal meeting was rescheduled for 12 July 2018. The claimant was again accompanied by her trade union representative and Mr Hodgson was accompanied by two HR officers (282). Amongst the matters that were discussed were the following: the claimant's ill health retirement application would not be supported by OH but she could nevertheless proceed with the application herself; she said that she would pump herself up with steroids to get back to work if she was going to be sacked; she suggested that adjustments that could be looked at (not having raised these suggestions before) were whether lifts could be installed in C Block where she worked along with disability access and a mobility scooter could

be adapted for her to use to move pallets around; Mr Hodgson reminded the claimant that during her earlier phased return she had been unable to meet the return to work plan even while restricted to the non-physical aspects of the role; the claimant confirmed that there were no redeployment opportunities available and that her Mover role could not be adapted; the claimant asked again about redundancy but received the same answer that her role was not redundant whereupon she suggested a move to a Process Support role where redundancy was likely but Mr Hodgson responded that this was not an appropriate solution; the claimant complained that not one reasonable adjustment was made to her role but then agreed that the OH advice regarding phased returns to work had been followed; although accepting that she had been told by her managers only to do what she could manage the claimant considered that it was impossible to self-limit; the claimant stated that she was interested in the FLL role and questioned why it had not been given to her but Mr Hodgson responded that she had no management experience and had never expressed an interest in the role which, in any event, still involved physical activity and was not sedentary. In oral evidence Mr Hodgson confirmed these various reasons as to why the claimant had not been considered for an FLL role but added further factors of the claimant never having undergone any managerial training, not being suitable for the role, that the FLL role was not purely administrative but regularly involved physical work and her attendance record.

7.57 During an adjournment, Mr Hodgson discussed the case with the two HR officers and informed them that he had decided to terminate the claimant's employment given her condition, the medical advice and the lack of suitable alternative roles. He returned to the meeting and informed the claimant of his decision and that she would receive three months' notice to terminate her employment on 12 October 2018 on grounds of capability. He told her that that during that time she would not be required to attend at work, would receive her full wages and was still able to apply for any suitable internal vacancy. Mr Hodgson confirmed his decision in a letter to the claimant dated 20 July 2018 (288) and informed her that she had a right to appeal, which the claimant exercised by letter of 26 July 2018 (291).

7.58 Ms Angus was appointed as the appeal manager. On 14 June 2018 she received the quite considerable number of papers relating to the claimant's case, which she reviewed. On 14 August 2018 she wrote to the claimant inviting her to attend an appeal hearing on 22 August. Ms Angus was accompanied by a HR Manager and the claimant was accompanied by her trade union representative. The claimant's grounds of appeal are fully set out in the notes of the meeting (303/314) and in the outcome letter of 31 August 2018 (311) and do not need to be repeated here at any length. In summary:

7.58.1 The claimant did not feel that she had been given the same opportunities as some other staff members, which could be deemed discrimination.

7.58.2 When told to only do what she could manage she had complied to the best of her ability, and although she could carry out manual tasks she had no way of knowing the effects afterwards.

7.58.3 After reading the reports of her consultants in relation to her ill-health retirement (which she had now decided not to pursue) she felt that she could well return to full capability.

7.58.4 The last time she attempted to return to work she had her walking stick and was advised by Mr Hodgson that he did not feel she was well enough to the work if she needed a stick and that she should go home, which she did.

7.58.5 Stress is a major cause in flare ups and the whole procedure, along with her mother's illness, had only added to her condition.

7.59 At the appeal meeting Ms Angus worked in detail through each of the above grounds. She explained, in turn, the information that she had found relating to, first, redeployment and, secondly, the three informal absence review meetings and the two formal meetings; she acknowledged the position regarding the ill-health retirement application commenting that that did not appear to be an appeal point; she noted the claimant's issue about being told to go home when she came into work with her walking stick when other people on site had sticks; she recognised that stress could exacerbate various conditions and illnesses. In each of these respects the claimant was offered the opportunity to comment further, which she did: for example, by providing examples of roles that she considered would be suitable for her and individuals whom she considered had received more favourable treatment from the respondent.

7.60 After the meeting Ms Angus undertook further investigations of the points the claimant had raised. As to the first ground of appeal she looked into the positions of the other employees whom the claimant had asserted had been given opportunities not given to her. Ms Angus found that JP [*in fact the Tribunal considers that this is a reference to JB*] had a long-term medical condition, which I meant she was unable to perform her contractual operator role. She completed a full-time secondment in Process Support and was being progressed through the Disability Policy when she successfully applied for an alternative role at a lower grade. GP was also unable to complete his contractual role due to medical reasons and completed a temporary secondment to on-the-job training. That was the same role that had been offered to the claimant in October 2017. After the secondment, GP returned to his contractual role with minor adjustments. The claimant believed that ER was offered a role in OQ that was not advertised but she had merely had a discussion with her manager as part of her personal development plan and had not been offered a role in OQ. DH was an operator who had applied for an advertised role in OQ, which ultimately she did not take. TR had a full-time role as an operator with some restrictions applied, which adjustments had been in place for a number of years.

7.61 Ms Angus wrote to the claimant on 1 August 2018 with her decision, which was that the claimant's appeal was not upheld (311). Ms Angus addressed each of the claimant's grounds of appeal in turn including as follows:

7.61.1 During the 2½ year absence period the claimant had not actually applied for any new roles; she had consistently stated that she did not believe she would be able to return to any role on site; each of the individuals identified by the claimant had been reviewed and the standard process had been followed for their roles; there was no evidence of discrimination against the claimant to whom the respondent had provided a lot of support and made reasonable adjustments; flexible or part-time working would not have been appropriate given the unpredictable nature of her condition; although the claimant had maintained that she would be able to continue in her Mover role if all the physical elements had been taken away there was no business case for a role encompassing solely the administrative side of it.

7.61.2 The claimant's medical condition was variable and unpredictable and it would have been difficult for management to provide absolute guidance on tasks to be performed daily; although the Jobfit Plus Report could have been conducted earlier, once it was complete the recommendations were implemented; an 8-week phased return on reduced hours on dayshifts and paperwork activity had been agreed to facilitate her return to work; reduced duties were given to the claimant to the extent that she was able to self-determine the scope of the physical role that she was able to deliver, and management had delivered a consistent message that she should not attend work if she was not be fit to be there.

7.61.3 The claimant had consistently said that she did not believe she would be able to return to any role on site and there was no new medical information stating that she was likely to be able to make a return to full capacity in her current role; it had been confirmed that she did not meet the criteria for ill-health retirement.

7.61.4 From Ms Angus's review of the papers it was not clear that the incident to which the claimant had referred when she attended work with a walking stick had happened. Ms Angus had reviewed Mr Hodgson's email of 27 April (253), which detailed a conversation he had had with the claimant on 25 April during which they both agreed that it was not suitable for the claimant to be in work. Ms Angus considered that Mr Hodgson had applied duty of care principles in relation to this matter (as he had stated in that email) and there was no supporting evidence to show that the claimant's use of a walking stick would have increased the likelihood of a full return to work; there was no evidence to support the claim that Mr Hodgson based his view of the claimant's fitness to be at work solely on the fact that she had come in with a walking stick.

7.61.5 It was recognised that medical evidence confirmed that stress can exacerbate various conditions and illnesses but support had been provided to the claimant in the form of occupational health and EAP, and it was disappointing that the claimant had not accessed the latter or re-requested counselling from her GP that she had found useful previously; the respondent could have taken an alternative approach through Absence Management which would have likely resulted in the claimant's employment ending sooner but the Disability Policy was applied to provide her with the best opportunity remain in its employment.

7.62 In summary, Ms Angus believed that the respondent had done everything it could reasonably do for the claimant and had looked at all possibilities of allowing her to remain in work, adjusting her duties and considering redeployment to other roles but ultimately her medical situation was such that she was unfit to carry out any role on site and did not want to consider roles in another of the respondent sites.

7.63 In relation to her claim of unfair dismissal the claimant asserted that the respondent had applied inconsistent treatment to her when compared with five named employees. She had not made such comparisons at the meeting at which she was dismissed, however, and only raised a comparison with one of those employees (TR) at her appeal meeting. The respondent's position, which the claimant did not challenge, was that none of the five were disabled and that none had comparable sickness absence. The claimant also sought to compare herself with JB whom she said had been given a sedentary role but the respondent's position, which again the claimant did not challenge, was that JB, too, had been subject to formal absence management procedures and had applied for an advertised role for which the claimant could have applied; indeed the claimant confirmed that she had not applied for any role. Additionally, the claimant had been offered sedentary roles in training and administration. In respect of other employees, the claimant's evidence was that because of her length of service she should have been given a FLL role occupied by PS who was "on contract", although she had not raised this matter before either.

Submissions

8 After the evidence had been concluded, the parties' representatives made oral submissions by reference to comprehensive skeleton arguments, which addressed the matters that had been identified as the issues in this case in the context of relevant statutory and case law. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from the findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made, both orally and within the respective written submissions, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to our decisions. That said, the key points in the representatives' submissions are set out below.

9 The respondent's representative made submissions including as follows:

9.1 Arising from a Preliminary Hearing held on 11 December 2018, the claimant was ordered to provide further information in respect of her claims and the parties were required to produce an agreed list of issues for the purposes of this hearing. The claimant's witness statement went beyond those agreed issues and introduced a raft of new allegations. The respondent had sought to deal with those but, for the purposes of adjudicating on the claimant's claims the Tribunal was not required to determine any matter outside the agreed list of issues: Parekh v The London Borough of Brent [2012] EWCA Civ 1630.

Unfair dismissal

9.2 The claimant had confirmed that she raises no complaint of procedural unfairness. It is not said that the respondent did not adhere to its procedures set out in the Disability Policy or the AMP.

9.3 The respondent relies upon the potentially fair reason of capability and it had shown an honest belief, based on reasonable grounds, that the claimant was incapable of performing her job:

9.3.1 The claimant had admitted that her record of sickness absence was substantial.

9.3.2 Her worsening record showed no sign of improvement despite the adjustments that had been implemented. She repeatedly told the respondent that she was not capable of performing any role and should be medically retired.

9.3.3 Following the first formal review meeting on 24 April 2018 the claimant did not return to work and she understood that dismissal on grounds of capability was a possible sanction.

9.3.4 Although the claimant had asserted that she had been treated unfairly compared to colleagues with greater sickness absence, in questioning she had accepted that their records of absenteeism did not exceed hers and suggested that if they had not been working reduced duties they would have been absent for longer than her.

Discrimination arising from disability

9.4 Applying Secretary of State for Justice v Dunn UKEAT/0234/16 there are four elements to be established:

9.4.1 there must be unfavourable treatment;

9.4.2 there must be something that arises in consequence of the claimants disability;

9.4.3 the unfavourable treatment must be because of the something;

9.4.4 the alleged discriminator cannot justify the unfavourable treatment.

9.5 The unfavourable treatment relied on by the claimant is as follows:

9.5.1 A failure to redeploy her permanently to a less physical role in accordance with OH advice.

Broadly, that advice was given at times when the claimant was absent; in any event, the claimant consistently refused to contemplate any non-manual or sedentary role proposed by the respondent, did not apply for any alternative role and did not meaningfully engage in seeking opportunities for redeployment; indeed, at every point until the second formal meeting on 12 July 2018 the claimant's priority to which she devoted her energies was proving that she was unfit to perform any role whatsoever, which was central to her application for ill-health retirement Mr Hodgson's evidence countering the new allegations advanced by the claimant in her witness statement regarding roles that she thought had become available and had not been offered to her went unchallenged.

9.5.2 A failure to conduct return to work interviews following periods of disability-related sickness absence.

Although the claimant had referred in her witness statement to 7 occasions during 2016 and 2017 when Mr Raine had not conducted such interviews, in oral evidence she was able to identify only one occasion when she returned on 27 July 2016 but Mr Raine had not failed to conduct the interview but delayed it until 1 September 2016 because OH had provided a "clear steer" regarding the claimant's limitations and restrictions. The claimant had not complained at the time and given her evidence that Mr Raine had not conducted such interviews in respect of her absence proceeding her disability or in respect of other staff who are not disabled, his oversight was not connected to the claimant's disability.

9.5.3 The claimant being sent home from work on the basis that she was allegedly unfit because she was using a walking stick and, in this regard, her having been assessed as unfit to return to work without any reference to OH or other medical opinion.

[*As the Tribunal has unanimously not accepted the claimant's evidence in these respects it is unnecessary to set out the submissions.*]

9.5.4 Dismissing the claimant for her disability-related absence.

The respondent accepts that the claimant's absence arose in consequence of the disability and the dismissal amounts to unfavourable treatment but the claimant has not shown that the latter was caused by the former. This is because she did not meaningfully seek to avoid dismissal by way of engaging with the respondent and seeking to avoid dismissal by redeployment, her

priority being to show that she could not work in order to obtain ill-health retirement. This deprives the claimant of the causation element. Her dismissal was not the product of the disability related absence but was a dismissal at the stage where every attempt had not improved matters. In any event, the respondent was justified in dismissing the claimant as a proportionate means of achieving a legitimate aim: see General Dynamics Information Technology Ltd v Carranza [2015] ICR 169. The legitimate aim is requiring its staff to maintain consistent levels of attendance at work and the dismissal was a proportionate means of achieving that aim. The claimant was managed in accordance with the respondent's policy and the decision to dismiss was based upon the claimant's current health, OH advice, the nature of the job and needs of the business, reasonable adjustments and progress to date in identifying a suitable alternative role.

Failure to make reasonable adjustments

9.6 The Tribunal is to identify the PCP, the comparators, the substantial disadvantage suffered by the employee and the steps that it was reasonable for the employer to have to take to avoid the disadvantage: see Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341.

9.7 Of the three PCPs relied upon by the claimant only "Requiring a certain level of attendance failing which disciplinary sanction rent including dismissal) would be imposed" is a PCP. The respondent accepts that this placed the claimant at a substantial disadvantage in comparison with persons who were not disabled because she was subjected to a disciplinary sanction of dismissal.

9.8 Of the adjustments relied upon by the claimant, the only one that can amount to an adjustment is that relating to adjusting the policy so as to remove sanctions when this is the cause of the absence or not taking the absence into account when considering sanctions, or adjusting the trigger points so as to increase the number of days' absence before sanctions are imposed. That adjustment cannot be said to be reasonable given the respondent's policies that contemplate dismissal and there is no warrant for those sanctions to be to be disapplied in the claimant's case or otherwise. Moreover, the triggers for instituting formal management which ultimately led to dismissal had been repeatedly and significantly extended in the claimant's case without any improvement in her attendance at work. As such the proposed adjustment would have had no prospect of ameliorating any substantial disadvantage the claimant suffered. It would simply have preserved her unpaid sickness absence, which would not have been either party's interest.

9.9 All the adjustments recommended by OH were implemented except redeployment, which could not be effected owing to the claimant's lack of cooperation; in the absence of which there was every likelihood that she would have been redeployed to a sedentary role.

Jurisdiction

9.10 Whilst the claimant's complaints of disability discrimination arising from the dismissal are in time her earlier discrimination claims are out of time and she has not suggested that she relies on conduct extending over a period. As to any just and equitable extension of time, the burden is upon the claimant and the exercise of the Tribunal's discretion is the exception rather than the rule: see Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13. The claimant has not addressed the two questions set out in that case of why the primary time limit has not been met and why, after its expiry, the claim was not brought sooner than it was. As such, the Tribunal does not have jurisdiction to consider any of her claims outside the three-month primary limitation period.

10 The claimant's representative made submissions including as follows:

10.1 The respondent has massive resources yet its premises are not suited to disabled people and it provided no diversity and equality training to those who managed the claimant.

10.2 As to reasonable adjustments, an objective test is to be applied. The EHRC Code of Practice sets out, at paragraph 6.28, factors that might be taken into account when deciding what is a reasonable step for an employer to take. An employer cannot justify a failure to comply with its duty but will only breach the duty if the adjustment in question is reasonable. The duty overrides appointment on merit: see Archibald v Fife Council [2004].

10.3 The respondent failed to make reasonable adjustments in that it

10.3.1 failed to follow recommendations from OH;

10.3.2 failed to implement RTW interviews following sickness absence.

10.4 Because of these failures the claimant's condition was exacerbated and as a result she was obliged by her disability to spend long periods of absence from work that resulted in financial loss and eventually dismissal.

10.5 Regarding jurisdiction, the respondent knew that the claimant was disabled from 2016. The last act of discrimination, her dismissal, was on 12 July 2018. All other acts of discrimination were a course of conduct amounting to a chain of events. In the alternative, given the claimant's position at the time of these events, it would be just and equitable to extend the jurisdiction. The respondent's representative had submitted that the claimant had omitted to make any complaint back to 2016 but after 29 years' service, she did not want to fall out with the respondent: she wanted to work. It was reasonable not to run to the Employment Tribunal every time but to wait until dismissal. All the events should be taken into account with a just and equitable extension.

10.6 The claimant had had rheumatoid arthritis for a long time causing pain to her hands, wrists and feet. Drugs were available but all had a detrimental

reaction. The upshot of the reaction was the absence. New drugs by way of weekly injections became available to the claimant from 2018, which seemed to stabilise her condition but there were still flareups.

10.7 Counsel then reviewed the several OH reports and their content (including that the third expressed the opinion that the claimant met the Equality Act criteria regarding reasonable adjustments and the fourth that she would benefit from redeployment), the advice from the claimant's consultant rheumatologist of 29 September 2017 and the report from Nuffield Health. In regard to the latter, Mr Hodgson had conceded that the only task that the claimant could undertake without pain was office-based duties. After 11 June 2017 the claimant was apparently told that she should self-limit herself from physical activities and work within her own capabilities but it was difficult to see how she could do that if she was employed as a Mover and five out of her six duties (as identified in that report) were painful and could not be done by others. The claimant was being set up to fail.

10.8 The claimant's issues were exacerbated by her working in the basement where she needed to use stairs to get to the lavatory and several flights of stairs to the restaurant. The claimant had suggested the installation of lifts in the building as an adjustment that would have assisted her and, with the respondent's resources, it would have been reasonable. It would also have been reasonable to provide the claimant with bespoke footwear (as had been given to employees suffering from diabetes) to make her more comfortable, and her mobility issues could have been alleviated by her being given a Mover position on the ground floor; possibly a job swap with others.

10.9 The claimant could have been redeployed but the respondent had not done anything following the OH recommendation on 11 June 2017. Not until 7 November 2017 did Mr Hodgson email Heads of Department after the Nuffield Report. There were jobs she could have done such as the FLL role some aspects of which she had carried out during night shifts. Mr Hodgson said he had not considered her for that role because of the claimant's attendance record from which a number of points arise: the claimant only had poor attendance because of her disability and the exacerbating effects resulting from the physical demands of her role, and the FLL role may have involved some physical activity but nothing like the Mover role. It was reasonable at least to try the FLL role even if it did not work.

10.10 JB was not a disabled person but was given secondments on three separate occasions and a permanent position in approximately April 2018 in a role that could have been suitable and offered to the claimant but was not.

10.11 The claimant submits that her sickness absence record was not good but this is because of her conditions and the problems associated with it. At the time redundancies were taken place and the claimant's role was not backfilled and another employee in a Mover role retired and was not replaced. This begs the question of whether the respondent's motivation

behind the apparent reluctance to redeploy the claimant was financial that should have been dealt with under the respondent's redundancy policy bringing the claimant a substantial redundancy payment, which was avoided by dismissing her under the AMP.

10.12 [*Counsel also made submissions regarding the 'walking stick incident' on 24 April 2018 and the implications of that on Mr Hodgson's credibility but, as with the submissions of the respondent's representative in this connection, as the Tribunal has unanimously not accepted the claimant's evidence in these respects it is unnecessary to set out the submissions.*]

The law

11 The principal statutory provisions that are relevant to the issues in this case are set out below:

11.1 Discrimination arising from disability - Equality Act 2010

"15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

11.2 Failure to make adjustments - Equality Act 2010

"20 Duty to make adjustments

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

"21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

"39 Employees and applicants

(4) A duty to make reasonable adjustments applies to an employer."

11.3 Unfair dismissal - Employment Rights Act 1996

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if ……

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

"98 General.

(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, …

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality,…..

(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.

Application of the facts and the law to determine the issues

12 The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

13 There is a degree of overlap between the complaints presented by the claimant that the Tribunal has considered and each of those complaints was born in mind throughout our deliberations. Although it would often be appropriate to address first a claimant's complaint that the respondent failed to comply with its duty to make adjustments, in this case the Tribunal considered it preferable first to consider the complaint that the respondent discriminated against the claimant by treating her unfavourably because of something arising in consequence of her disability. This accords with the approach suggested in Carranza that "it can be difficult to analyse a claim relating to dismissal for poor attendance as a claim of failure to make reasonable adjustments" due to, first, the selection of a PCP. The Tribunal adopts the reasoning in that case as applicable in the case before us that, "in truth this was not a case about taking practical steps to prevent disadvantage, but a case about the extent to which an employer was required to make allowances for a person's disability".

14 First, however, the Tribunal records that the respondent accepts that the claimant is a disabled person, her impairment being that she suffers from rheumatoid arthritis. It also accepts that at the times material to these claims it had knowledge of that disability.

Reasoning related to the majority judgement

[*Note: The following section relates to the reasoning of the majority of the Tribunal members. In the interests of simplicity, and so as to avoid repetition, any references to "the Tribunal" in the remainder of these Reasons means the majority of the Tribunal.*]

Discrimination arising from disability - section 15 of the 2010

15 In connection with this aspect of the claimant's claims, the Tribunal adopted the approach as set out in Pnaiser v NHS England and another [2016] IRLR 170 which, so far as is relevant to this case, is as follows:

> "(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, …. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. …..

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

16 In this regard the Tribunal also reminds itself that "unfavourable" does not equate to a detriment or less favourable treatment but to an objective sense of that which is adverse as compared to that which is a benefit: Trustees of Swansea University Pension and Assurance Scheme v Williams [2018] ICR 233. Thus, the 'test' is an objective one requiring the Tribunal to make its own assessment. In addition, the concept of "something arising in consequence of" disability entails a looser connection than strict causation and may involve more than one link in a chain of consequences: Sheikholeslami v University of Edinburgh [2018] UKEATS/014/17.

17 With regard to this aspect of her claims the claimant first relies upon five instances of unfavourable treatment, which we quote from the agreed list of issues as follows:

17.1 "Fail to redeploy her permanently to a less physical role in accordance with which advice."

17.2 "Fail to conduct return to work interviews following periods of disability-related sickness absence."

17.3 "Send her home from work on the basis that she was allegedly unfit because she was using a walking stick."

17.4 "Assess her as unfit to return to work without any reference to OH or other medical opinion."

17.5 "Dismiss her for disability-related sickness absence."

18 The Tribunal addresses each of these issues using the truncated side headings below.

Permanent redeployment

19 To a limited extent, this assertion can be said to be correct as it is strictly accurate that the claimant was not redeployed permanently to a less physical role but a closer analysis is required.

20 First there is the phrase, “in accordance with OH advice” and, secondly, there is the question of whether the claimant not being redeployed came about as a result of a failure on the part of the respondent.

21 As to the OH advice, the first three OH reports were in the second half of 2016 (133, 134 and 137). They did not advise that the claimant should be redeployed. That issue first appears in the OH report of 11 June 2017 (149) in which it is stated that the claimant “would benefit from redeployment into a sedentary role”. Unfortunately, at that time the claimant was absent from work until 12 July and could not undertake any work, sedentary or otherwise. Upon her return, the OH report of 14 July (152) refers to the exploring of redeployment opportunities continuing but, nevertheless, suggests that following a structured phased return to work, “she can perform her usual mover role” using available lifting aids and seeking assistance for the DUAC campaign. That phased return was never completed, however, as the claimant was absent again from 1 August 2017 until 29 January 2018 and, once more, the claimant could not undertake any work at all, and the question of redeployment became almost theoretical. As noted above, the claimant confirmed in oral evidence that during this period she was not able to attend to do any work, whether sedentary or otherwise and that she had been consistently signed off. The next OH report is dated 29 January 2018 (207). The focus of that advice is on a phased return to work rather than redeployment and recommends that the claimant should complete outstanding mylearning then move on to pc/paperwork “and gradually increase her physical activities”. The point is made that it is difficult to determine when the claimant would be able to return to the full remit of her Mover role but that the above adjustments should allow sufficient time for her to medication to reach its therapeutic effect. That focus on returning to the Mover role is only cautioned by the remark, “although there is a possibility that if her symptoms remained unstable redeployment options would need to be explored for a less physically demanding, office based role.” Considering the totality of that advice, the Tribunal does not see it as constituting advice that, at that stage, the claimant should be redeployed “permanently to a less physical role”.

22 The OH report of 12 March 2018 (218) maintains the opinion that the claimant “needs to perform a sedentary role, if possible completing pc/paperwork tasks that are not physically demanding until better control of her symptoms is achieved.” As with the previous report Tribunal does not consider that opinion to be advice that the claimant should be redeployed “permanently to a less physical role”. Additionally, from the date of that report it appears that the claimant was only at work for six full days and three half days until she once more became absent on 4 April 2017, and she did not return thereafter before her dismissal; redeployment again becoming somewhat theoretical.

23 Moving on to consider the aspect of this treatment on which the claimant relies of the alleged failure on the part of the respondent to redeploy her permanently to a

less physical role, the overarching finding of the Tribunal is that, as recorded above, it accepts the evidence of the respondent's managers that the OH advice was followed in respect of both the several recommendations relating to the claimant's phased return to work (which the claimant has not disputed) and also the opinions expressed from time to time that the claimant would benefit from redeployment into a sedentary role or needed to perform such a role. The Tribunal accepts the evidence of Mr Raine that as soon as this matter was raised with him he escalated it to Mr Hodgson and accepts the evidence of Mr Hodgson that he immediately began considering redeployment opportunities both within his own department and informally with his colleagues on site. He also considered whether it would be possible to separate out a role for the claimant undertaking only the administrative tasks of a Mover role but the Tribunal accepts his evidence that that was not a feasible alternative other than in the short term during the claimant's phased returns to work.

24 The Tribunal also accepts Mr Hodgson's evidence that once it had been agreed, at the meeting on 12 October 2017, that an independent workstation assessment should be undertaken it was appropriate that more formal steps to identify redeployment opportunities for the claimant should await the production of the JobFit Plus report so as to achieve a better understanding of the claimant's limitations and identify redeployment roles in light of the report's recommendations. The report is dated 1 November 2017. On receipt, Mr Hodgson did not delay in raising the question of the claimant's redeployment at the meeting of the Production Operations Managers on 3 November and then writing to them and others on 7 November stating that he would appreciate them "considering if you have any suitable vacancies, either now, the near future or perhaps occupied by a contingent worker". At the same time, the HR Manager who had attended the meeting on 12 October 2017 wrote to the respondent's Recruitment Account Manager-GMS enquiring what vacancies there were for redeployment options for the claimant who required a sedentary role or, alternatively, whether there were any existing vacancies that he felt could be adapted (182). He responded that there were none available or suitable whereupon the HR manager asked, "if any do become available anytime soon then you let me know to try and support this redeployment opportunity" (181). The Tribunal is satisfied that this approach by the HR manager was appropriate: first, it not only enquired about existing vacancies that were suitable but also whether any could be adapted become suitable for the claimant; secondly, it 'cast the net' widely across the respondent's business.

25 Also at the first formal meeting with the claimant under the respondent's Disability Policy it was confirmed that the formal 12-week redeployment exercise would be instigated in accordance with that Policy and Mr Hodgson undertook that he would reach out to other managers to see if there was another team where the claimant could work perhaps in a temporary job. Then, in preparation for the second formal meeting (at which the claimant was dismissed) Mr Hodgson checked all the responses he had received to his email of 7 November and wrote again to one manager who responded that he did not have any suitable roles. Thus the Tribunal is not satisfied that there was any failure on the part of the respondent in these respects.

26 In relation to this issue of the claimant being redeployed into a temporary job, her oral evidence was that if she had done that she would have been dismissed when the temporary role came to an end. The claimant did not produce any evidence support of that contention. It is accepted that at the meeting on 12 October, in the context of considering alternative roles, Mr Hodgson remarked that if there was a secondment opportunity the claimant could be considered but she would need to understand that this would only be a temporary measure so when the secondment came to an end she would be at risk of there not being a role to move into and the question of her capability would stand (168/9). The Tribunal does not construe that remark as meaning that the claimant would be dismissed on completion of the temporary role but only that if there was not another suitable role into which she could move she would return to her substantive post and consideration of her capability in that role would need to be addressed.

27 A second aspect of this asserted failure to redeploy the claimant is the claimant's own involvement in this exercise. In this respect the Tribunal accepts the evidence of Mr Hodgson that he raised with the claimant the possibility of her returning to work to create standard work training packages, which required someone with her experience and practical knowledge. She could have undertaken that role in any location convenient to her such as the ground floor or first floor of the building. This possibility was first raised with claimant at the meeting on 12 October 2017 but the claimant said that she could not come back. As mentioned above, it appeared to the Tribunal from her oral evidence that the principal reason for declining this opportunity was that she was miffed at the delay in offering to her.

28 At the meeting on 17 November 2017 Mr Hodgson again raised with the claimant the possibility of her undertaking this training role but, once more, she declined that opportunity stating that she could not do that right now (200). Also at that meeting the claimant made the remark referred to above, "If you can't sit in a chair for two hours how would that be any different if you were sat at work in an office role?" In similar vein, at their meeting on 30 January 2018 the claimant queried with Mr Hodgson why he thought administration was a sedentary role and commented, "I would not thank you for a secretary position". It was also at that meeting that the claimant responded that the best working environment for her would be, "In a bubble". As noted above, that was obviously a flippant remark but it made the point as to the type of activity and position that the claimant considered she was capable of undertaking and the extent to which she was prepared to work with the respondent in identifying a suitable role into which she could be redeployed. Likewise, during a conversation with Mr Hodgson on 4 April 2018 the claimant remarked that unless the respondent had a job "licking stamps" she could not see herself taking on alternative roles within the factory (220).

29 When matters moved on to the formal stages of the Disability Policy, at the first formal meeting on 24 April 2018, in the context of redeployment, the claimant stated that she could not do any role that was offered to her on site and that "the only option was ill health retirement", that she did not think "she could ever work again" or that she could "manage an alternative role". She similarly said that she was not well enough to consider working part-time, in alternative roles outside the

site or at a lower grade and was not interested in applying for flexible working. The Tribunal accepts the evidence of Mr Hodgson that at this stage the claimant "seemed only interested in ill-health retirement – she was intent on that".

30 Only at the second formal meeting, by which time the claimant had concerns that her application for ill-health retirement would not be approved did the claimant change tack and suggested that she "would pump myself up with steroids to get back if I'm going to be sacked" but that is not the answer and Mr Hodgson was rightly alert to the respondent's duty of care in that regard.

31 The claimant's position in respect of ability to return to work in any role did not change during the few months after the first formal meeting. In a meeting with Mr Hodgson on 22 May she told him that she "now felt unable to work in any capacity" (266) and, similarly, during a conversation they had on 1 June, she stated that she could not "think of any role on site that she could complete" (265). It was at this meeting that Mr Hodgson identified a clear shift in the approach of the claim from being very strong in her expectations of returning to work in some capacity to recognising that this was unlikely; and the claimant had agreed.

32 This continued into the second formal meeting on 12 July 2018 when the claimant stated that there were no opportunities available and there was not any alternative role which would support her condition in a better way (284). Indeed, the claimant's evidence was that she had not applied for any alternative roles by way of redeployment and, although in her witness statement the claimant raised comparisons with other persons whom she says had managed to gain roles that might have been offered to her, the Tribunal accepts the evidence of Mr Hodgson Ms Angus that these were not true comparisons.

33 In that respect the remark made by Mr Hodgson in oral evidence that one of the reasons why the claimant had not been considered for an FLL role was her attendance record requires attention. In isolation, that could be said to be indicative of discrimination arising from disability but, considering Mr Hodgson's fuller explanation (ie. that the claimant had no management experience, had never undergone any managerial training, had never expressed an interest in the role, was not suitable for the role, it was not purely administrative but regularly involved physical work and was not sedentary) and the totality of the evidence before the Tribunal in the round, the Tribunal does not consider that that remark can or should be considered in isolation. In any event, the matter is to an extent hypothetical as it is not the case that the claimant had ever registered any interest in the FLL role (or even in attending the Assessment Centre) and had been overlooked or refused it because of her disability; that might have amounted to discrimination arising from disability.

34 In summary of this asserted treatment of the respondent failing "to redeploy the claimant permanently to a less physical role in accordance with OH advice", for the reasons set out above the Tribunal is not satisfied that the clear-cut OH advice was to redeploy the claimant permanently to a less physical role and even when that opinion was expressed and did become clearer, especially in the shape of the Jobfit Plus report there was no failure on the part of the respondent whose managers did everything they could to explore redeployment opportunities timeously but the claimant did not cooperate in that and, especially in the later

stages, steadfastly refused to consider any return to work in any capacity, her focus being on ill-health retirement.

35 Thus, considering the above points in accordance with the approach in Pnaiser the Tribunal is not satisfied as to the very first limb in that it finds that the claimant was not treated unfavourably by the respondent in relation to permanent redeployment as she asserts.

Return to work interviews

36 Notwithstanding the order for further particulars issued by the Employment Tribunal at the Preliminary Hearing on 11 December 2018 and further correspondence between the parties' solicitors, the claimant has not actually particularised the seven occasions during 2016 and 2017 to which she refers in her witness statement when she alleges Mr Raine did not carry out RTW interviews and actually referred only to her return to work on 27 July in respect of which the interview was not carried out until 1 September 2016.

37 Mr Raine accepted that he delayed the RTW interview and also accepted that the AMP requires that such an interview should be held with any employee returning to work after any amount of sickness absence. Thus, as noted above, there was at least a technical failure on his part. The claimant suggests that it is more significant than that because had the interview been carried out it would have assisted him "with properly understanding my condition, the related reasons for my absence and what steps may have been taken by the Respondent to assist me with performing my duties, or alternative duties, and continuing to work with reduced absence levels.

38 In a way, this makes the point made by Mr Raine that he did not need to conduct the RTW interview immediately because "a clear steer" had been given to him by OH in the letter of 12 July 2016 (133) to the effect that the claimant would be well enough to commence a phased return to work on the expiry of her fit note on 27 July; similarly in the letter of 8 August 2016 (134), which confirmed that the claimant had returned to work as planned "performing her usual role which she has managed without issue" and set out the agreed pattern of the claimant's phased return to work before achieving full-time work in the week commencing 12 September. Thus, Mr Raine did have from OH the proper understanding that the claimant wished him to have from the RTW interview.

39 Although repeating that the claimant has not fully particularised her complaints in this respect, it appears that she did return to work on 16 November 2016 but it is not clear whether there was a RTW interview at that time; if there was not, it is perhaps because, as we have commented above, following that return there was little actual attendance at work until the end of the year. The claimant was then absent and returned to work on 5 June 2017. At that time she agreed that she should be referred to OH prior to a RTW interview. That referral took place on 6 June and Mr Raine conducted the RTW interview that day. As such the Tribunal is satisfied that there can be no criticism of Mr Raine in this respect. Mr Raine then ceased his involvement in these matters, which were taken over by Mr Hodgson and it is clear from the claimant's witness statement that she makes no criticism of him in respect of conducting RTW interviews as appropriate. For

completeness, however, the Tribunal records that it is satisfied that Mr Hodgson did conduct such interviews in accordance with the respondent's AMP.

40 Thus, there was treatment of the type of which the claimant complains in that Mr Raine did not conduct the RTW interview in relation to her return to work on 25 July 2016 as soon as he should have done. The Tribunal notes, however, that it is not strictly accurate to say that Mr Raine failed to conduct the interview; rather he delayed holding it for a little over one month until 1 September 2016. Further, the Tribunal has already found his explanation that he had a clear steer from OH to be an understandable explanation and, as mentioned above, that advice enabled him to have the proper understanding that the claimant asserts he should have had.

41 The first element in the analysis in Pnaiser is that a tribunal must first identify whether there was unfavourable treatment. Even accepting that the Tribunal must consider the term "unfavourable" in an objective sense of that which is adverse as compared to that which is a benefit (Trustees of Swansea University Pension and Assurance Scheme), for the reasons set out above, the Tribunal is satisfied that this technical failure on the part of Mr Raine to delay holding this RTW interview from 27 July to 1 September 2016 did not amount to "unfavourable treatment".

42 Had our decision in that respect been to the contrary, we would have moved to the second element in the analysis in Pnaiser that the tribunal must determine what caused the impugned treatment: ie. what was "the reason in the mind of" Mr Raine. As indicated above, the Tribunal is satisfied that Mr Raine's reasoning, and, therefore, the "something" was quite simply that he had sufficient information from OH regarding the claimant's limitations and restrictions and knew that she had commenced a phased return to work in her usual role in the week commencing 25 July, which she had "managed without issue"..

43 On this basis, the third element in the analysis in Pnaiser would have come into play, namely that the "tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability""; that involving an objective question and not depending on the thought processes of the alleged discriminator.

44 In this regard the claimant's evidence was that Mr Raine did not always conduct the RTW interviews and he confirmed that to be the case, commenting, "some were missed". More importantly in this context, the claimant was clear that Mr Raine had not conducted such RTW interviews with her in relation to her absences from the beginning of 2013 before she had received the diagnosis of rheumatoid arthritis. Further, that Mr Raine failed to conduct RTW interviews with many employees and no one complained; "it was commonplace". For these reasons, the Tribunal is satisfied that, on objective analysis, it cannot be said that the "something" arose in any way in consequence of the claimant's disability. That is clear from the fact that Mr Raine's failures, first, in respect of the claimant occurred both before and after she became a disabled person and, secondly, applied to many employees regardless of disability.

45 In summary of this asserted treatment, the Tribunal is not satisfied that Mr Raine's delay in holding this RTW interview following the claimant's return to work in July 2016 amounted to "unfavourable treatment" but even if it did it was not because of something arising in consequence of her disability.

Sending her home for using a walking stick

46 The Tribunal has set out above that having given the conflict of evidence between Mr Hodgson and the claimant in this regard considerable thought, for the reasons to which we have referred, we prefer, on balance of probabilities, the evidence that he gave.

47 That being so it follows that we do not accept that this asserted treatment occurred at all and we need not consider this aspect further.

Assessing her as unfit to return to work

48 Although not entirely clear, it does appear that this asserted treatment also relates to the allegation that Mr Hodgson sent the claimant home after their meeting on 24 April 2018 on the basis of his own assessment and, therefore, without reference to an appropriately qualified person.

49 Once more, however, we have already found that we prefer the evidence of Mr Hodgson in this respect and we do not accept that this asserted treatment occurred at all. As such, we do not need to consider this aspect further.

Dismissing her for disability-related absence

50 In relation to this asserted treatment, the respondent has accepted, first, that the claimant's absence arose in consequence of her disability and, secondly, that her dismissal amounts to unfavourable treatment.

51 The respondent's representative submitted, however, that the claimant had not shown that the unfavourable treatment of dismissal arose in consequence of her disability because she did not meaningfully seek to avoid her dismissal by way of redeployment. Tribunal rejects that submission.

52 Thus, in connection with this asserted treatment, and addressing the above points in Pnaiser and using the notation there:

(a) The Tribunal is satisfied that there was unfavourable treatment (namely the claimant's dismissal) and that was effected by Mr Hodgson on behalf of the respondent.

(b) The cause of or reason for that treatment (focusing on the reason in the mind of Mr Hodgson) was the claimant's significant sickness absence, both intermittent and long-term, which was caused by her disability.

(d) The Tribunal is therefore satisfied that the reason for the unfavourable treatment was something arising in consequence of her disability (ie. her rheumatoid arthritis): see Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14.

Justification

53 That is not an end to the matter, of course, as it is provided in section 15(1)(b) of the 2010 Act that there will not be discrimination in the circumstances where the respondent can "show that the treatment is a proportionate means of achieving a legitimate aim."

54 In this connection, the Tribunal adopts the two stage approach suggested at paragraph 4.27 of the Equality and Human Rights: Code of Practice on Employment (2011) ("the Code") (albeit there relating to the question of indirect discrimination) namely:

> "Is the aim ….. one that represents a real, objective consideration?
>
> If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?"

55 The Tribunal has also had regard to the guidance contained in the Code that the aim pursued should be legal, not discriminatory and must represent a real, objective consideration, which can include reasonable business needs and economic efficiency. To be proportionate, it should be "an 'appropriate and necessary' means of achieving a legitimate aim" which should not be achievable "by less discriminatory means". Finally, as to the meaning of "disadvantage", "It is enough that the worker can reasonably say that they would have preferred to be treated differently."

56 We also apply the decision in Hardys & Hansons v Lax [2005] IRLR 726 that in considering the principle of proportionality, our task is to strike an objective balance between the reasonable needs of the respondent against the discriminatory effect of its measure in order to assess whether the former outweigh the latter; that is an objective test. There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases unfair dismissal

57 The Tribunal is satisfied that in this respect the aim of the respondent was to ensure that its staff maintained consistent levels of attendance at work, which is the purpose of the AMP and the Disability Policy, and the Tribunal is further satisfied, in terms of the Code, that that "represents a real, objective consideration". As was said in Carranza, "it was legitimate for an employer to aim for a consistent attendance at work".

58 Moving onto the question of proportionality, in oral evidence the claimant accepted that she was managed in accordance with, first, the AMP and later the Disability Policy and she made no complaint about the application of either of those policies in themselves. The issue of the delayed return to work meeting in September 2016 apart, the Tribunal is satisfied that the respondent did apply those policies appropriately, particularly so when matters relating to the claimant came to be managed by Mr Hodgson who was assiduous in his approach to both the informal and formal meetings. At the conclusion of the first formal meeting on 24 April 2018 it was clear to the claimant that unless she was unable to return to work in her contractual role or by redeployment to an alternative role she faced

the prospect of dismissal. That is apparent from the note that the claimant "believes that she is unfit to do her current role but that is unfair to give her notice and that she would challenge this." (252). Following that meeting, the respondent instigated the formal 12-week redeployment process in accordance with the Disability Policy but to no avail. Then, in the letter of 15 June 2018 inviting the claimant to the second formal meeting, she was warned that in the circumstances, "the outcome of this meeting could result in your dismissal" (262). At the meeting, having discussed the claimant's current health, the OH advice on the claimant's prognosis and her ability to meet the requirements of her role, the nature of her job, the needs of the business for her role to be carried out, the reasonable adjustments made and the progress in identifying a suitable alternative role, that was indeed the outcome (288). The employment of the claimant was to end on 12 October 2018 unless an alternative role could be found for her during her notice period.

59 A particular point arises in this regard in that at various times during the evidence from the respondent's witnesses at the Tribunal hearing reference was made to the claimant applying for vacancies. The Tribunal considered this point carefully given that it has long been established in decisions such as Archibald v Fife Council [2004] IRLR 651 that where an employee is unable to continue in his or her current job as a result of a disability, the duty to make reasonable adjustments will often extend to taking positive steps to facilitate the employee's redeployment: ie. to treat the disabled person more favourably than other, non-disabled, employees who are interested in being appointed to a particular post. From the oral evidence of the witnesses, particularly Mr Hodgson, however, it was apparent that in that sense the respondent was only looking to the claimant to express an interest in vacancies, which the claimant confirmed she had not done. Had she done so, although she might then have been interviewed, the focus of that interview would have been on ensuring that the claimant was able to do the job rather than it being a competitive interview with other candidates in the normal sense. That much is borne out by the evidence of Mr Hodgson who, in answer to a question from a Tribunal member, gave an example of JB who suffered from a restriction that prevented her performing her usual role and expressed an interest in a vacant role and, although she had not interviewed as well as another person, she had been appointed in preference. On a related point, the Tribunal accepted the evidence of Mr Hodgson, which was unchallenged, that the claimant is the only person he had ever dismissed under the Disability Policy as in all other cases the respondent had been able to adjust individual roles or redeploy the person successfully.

60 At paragraph 4.26 of the Code it is stated that "it is up to the employer to produce evidence to support their assertion". On the basis of the findings summarised above, the Tribunal is satisfied that the respondent has done that.

61 In all the above circumstances, therefore the Tribunal is satisfied (again with reference to the Code) that the means the respondent used to achieve its legitimate aim was proportionate: it was "appropriate and necessary in all the circumstances".

62 In conclusion of this aspect of the claimant's claim in respect of discrimination arising from disability, for the reasons set out above, the Tribunal is satisfied that

the claimant's complaint that the respondent discriminated against her by treating her unfavourably because of something arising in consequence of her disability as described in Section 15 of the 2010 Act, and discriminated against her contrary to Section 39 of the 2010 Act by dismissing her and subjecting her to other detriment is not well-founded.

Failure to make adjustments

63 The following propositions can be said to emerge from relevant case law in the context of the above statutory framework and the Code to which the Tribunal has had regard:

63.1 It is for the disabled claimant to identify the PCP of the respondent on which she relies and to demonstrate the substantial disadvantage to which she was put by that PCP.

63.2 There must be a causal connection between the PCP and the substantial disadvantage contended for: "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(i) of the Disability Discrimination Act 1995 provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP.": Nottingham City Transport Ltd v Harvey UKEAT/0032/12.

63.3 It is also for the disabled claimant to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; she need not necessarily in every case identify the step(s) in detail but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable. There must be before the tribunal facts from which, in the absence of any innocent explanation, it could be inferred that a particular adjustment could have been made: Project Management Institute v Latif [2007] IRLR 579.

63.4 "Steps" for the purposes of section 20 of the 2010 Act encompasses any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP: Griffiths v Secretary of State for Work and Pensions [2017] ICR 160.

63.5 It is important to identify precisely what constituted the "step" which could remove the substantial disadvantage complained of: Carranza.

63.6 That said, the disabled claimant does not have to show that the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage: Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10.

63.7 Once a potential reasonable adjustment is identified, the onus is cast on the respondent to show that it would not have been reasonable in the circumstances to have had to take the step(s): Latif [2007].

63.8 The question of whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include the following:

63.8.1 the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

63.8.2 the extent to which it is practicable to take the step;

63.8.3 the financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of the respondent's activities;

63.8.4 the extent of the respondent's financial and other resources;

63.8.5 the availability to it of financial or other assistance with respect to taking the step;

63.8.6 the nature of its activities and the size of its undertaking.

63.9 If a Tribunal finds that there has been a breach of the duty, it should identify clearly the PCP, the disadvantage suffered as a consequence of the PCP and the step(s) that the respondent should have taken.

64 Moving on from the general position to consider the claimant's complaint in this case, the Tribunal reminded itself that it first must identify the PCP that the respondent is said to have applied: Environment Agency v Rowan [2008] IRLR 20. In the agreed list of issues the claimant relies upon the following three PCPs:

64.1 "Failure to institute return to work interviews following sickness absence (2015-2018)".

64.2 "Requiring a certain level of attendance failing which disciplinary sanctions (including dismissal) would be imposed".

64.3 "A failure to follow the recommendations of OH (failure to substantively follow/implement advice dated 11 June 2017 and 14 July 2017 to redeploy C to a sedentary role)".

65 In the context of the comment in Carranza referred to above as to the difficulty in analysing "a claim relating to dismissal for poor attendance as a claim of failure to make reasonable adjustments" due to, first, the selection of a PCP, the Tribunal has first considered whether the above PCPs contended for by the claimant are, in fact, properly to be regarded as PCPs.

66 Although PCPs are not defined in the 2010 Act, useful guidance is set out in paragraph 4.5 of the Code where it is stated, "The phrase should be construed widely so as to include, for example, any formal or informal policies, rules,

practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions". Those are only examples and are clearly not exhaustive, and the Tribunal accepts that it should construe the phrase "widely". Even having done that, however, we are not satisfied that the first and third of the PCPs contended for by the claimant are, indeed, PCPs as that term has been used and applied (if not actually defined) in the case law some of which is cited above.

67 Had the Tribunal's conclusion in that regard been otherwise, however, we have already addressed those two PCPs in the above section of our reasons addressing the complaint of discrimination arising from disability. For the same reasons as are set out there, the Tribunal does not accept that there were the asserted failures, first, to institute return to work interviews or, secondly, to follow the recommendations of OH.

68 Thus, on either basis, we need not consider those two PCPs further and, as they fall away, so do the instances of substantial disadvantage relied upon by the claimant in the agreed list of issues arising from those PCPs.

69 The second PCP contended for is, however, a PCP upon which the claimant can rely. That has been accepted on behalf of the respondent as has the fact that it would put the claimant "at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled". The Tribunal so finds. Thus, the duty is 'triggered' for the respondent "to take such steps as it is reasonable to have to take to avoid the disadvantage": section 20(3) of the 2010 Act.

70 The substantial disadvantage relied upon by the claimant in respect of that PCP is, "She was subjected to disciplinary sanction, i.e. dismissal" while the reasonable adjustment she relies upon is as follows:

> "Adjusting the disciplinary policy in cases concerning disability-related sick leave so as to remove sanctions when this is the cause of the absence or not taking such absence into account when considering sanctions. Alternatively, adjusting the trigger points for sanctions in cases of disability-related sick leave so as to increase the number of days applicable before sanctions are imposed."

71 As set out above, therefore, applying the decision in Latif, the onus is cast on the respondent to show that it would not have been reasonable in the circumstances to take one or both of these steps to adjust its policy.

72 The Tribunal has already found above in relation to the claimant's complaint of discrimination arising from disability that the respondent was entitled to ensure that its staff maintained consistent levels of attendance at work, and to achieve that through the application of its AMP and Disability Policy. We have also already found that in this case the respondent's managers properly followed those policies, apart from the delayed RTW interview on 1 September 2016. In accordance with each of those policies an employee might ultimately be dismissed. That is not unreasonable and, therefore, the Tribunal does not consider that to "remove sanctions" or completely disregard disability-related sick

leave (as contended for by the claimant) would be steps that it is reasonable for the respondent to have to take to avoid the disadvantage.

73 The second of the adjustments contended for by the claimant relates to adjusting the trigger points for sanctions. The Tribunal is satisfied that that adjustment was made. As recorded above, at the meeting on 12 October, for example, the HR officer highlighted that the claimant's absences would have triggered formal meetings under the AMP but the claimant's disability had been taken into consideration and the triggers and sanctions under the AMP had not been applied. Further, in oral evidence the claimant confirmed that the triggers under the respondent's AMP had been dis-applied although adding that that had not just been in her case.

74 The Tribunal reminded itself, as set out at paragraph 6.29 of the Code, that the test of the reasonableness of any step "is an objective one and will depend on the circumstances of the case". For the above reasons, although the Tribunal is satisfied that this second PCP did put the claimant at such a substantial disadvantage in that she was ultimately dismissed, for the reasons set out above it is not satisfied that the adjustments contended for by the claimant in relation to this second PCP were reasonable for the respondent "to have to take to avoid the disadvantage": more specifically, the first step was not a reasonable step and the second step was taken.

75 Also in relation to the question of reasonable adjustments, the claimant's representative relied quite heavily upon the problems she had at work as result of the stairs in her workplace and the fact that she was required to wear what he described as clumsy and heavy safety shoes. The Tribunal notes, however, that the adjustments in these respects are not mentioned in the list of issues agreed between the parties further to the Orders of the Employment Tribunal arising from the preliminary hearing held on 11 December 2018. The respondent's representative submitted that the Tribunal was therefore not required to determine such matters outside the agreed list and relied upon the decision in Parekh. In that decision, however, it was stated that a Tribunal is not required to stick slavishly to a list of issues if to do so would impair the discharge of its core duty to determine the case in accordance with the law and the evidence. Further, in Saha v Capita plc EAT 0080/18, it was held that the duty of an employment tribunal is to determine the claims before it. That said, the Tribunal does consider the following points to be of significance:

75.1 The matters of the stairs and shoes are not contained in the agreed list of issues, by which time the claimant was represented.

75.2 Despite the reference to "walking" they are not specifically mentioned in any of the seven OH reports either by the OH adviser herself for by the adviser reporting what the claimant had said to her.

75.3 Although the claimant briefly mentioned the problem of stairs at the first informal absence review meeting on 12 October 2017 and again at her first formal meeting on 24 April 2018 (including showing on her mobile 'phone a video of herself at home), she did not make a great deal of this aspect and did not mention the shoes at all; neither had she requested,

while she had been at work, alternative shoes such as those given to employees with diabetes.

75.4 Similarly, the claimant did not mention in her witness statement any problem with her shoes and only made brief mention of the fact that in the factory block where she worked, "There are stairs to every level." She did, however, introduce at the commencement of the Tribunal hearing two drawings of her building upon which she had written the number of steps that she had to use at the beginning and end of shifts, for breaks and, if necessary, to go to the lavatory between breaks.

76 In the above circumstances, it seemed to the Tribunal that these matters were seized upon during the course of the Tribunal hearing as potential weaknesses in respect of which the respondent's witnesses had not prepared. Alluding to the propositions set out above, the claimant had not identified the PCP upon which she relied or clearly demonstrated the substantial disadvantage to which she was put by it and, that being so, had not identified the causative link between the PCP and the disadvantage or the adjustments sought (except for suggesting the installation of lifts at the second formal meeting) that might have avoided the disadvantage. For these reasons, therefore, despite the submissions made by the claimant's representative, the Tribunal does not consider that matters relating to the stairs or shoes should be taken further.

77 Before leaving the matter reasonable adjustments the Tribunal considers it appropriate (in the context of the claimant's suggestion at the second formal meeting, which she repeated in evidence, that not one reasonable adjustment had been made to her role) to record the adjustments that it finds the respondent did make. These include as follows:

77.1 Fundamentally, from the very outset, after the claimant returned to work on 27 July 2016 the respondent's managers encouraged her to self-restrict her activities within her own limitations and only undertake tasks that she felt capable of doing, which the claimant confirmed had been the case. Indeed, even in the case of PC of whom she was critical the claimant confirmed that she had been told to "just do what I could manage".

77.2 The claimant returned to work on a phased basis in accordance with OH advice (for example working alternate days and reduced hours) on 27 July 2016, on 12 July 2017 and on 29 January 2018.

77.3 The claimant had available to her the lifting aid of an electric pallet mover and was able to seek assistance as necessary from other Movers and Supporters, including seeking assistance during the DUAC campaign.

77.4 The 'triggers' in the AMP were not applied to the claimant.

77.5 The claimant's duties were amended to concentrate on, for example, pc/paperwork and gradually increasing physical activities when she returned on 29 January 2018.

77.6 On 20 March 2018 the claimant informed Mr Hodgson that she was not feeling the benefit of the injections and remained unable to carry out any of the Mover role. He directed her towards non-physical tasks: accompanying a planned safety Gemba, helping JB with training packages and finishing off some of GP's work updating Standing Operating Procedures. He also informed her that they were looking to organise a formal meeting to discuss her situation as they were approaching the end of her phased return period.

Unfair dismissal

78 The issues in respect of the claimant's complaint that her dismissal by the respondent was unfair that are relevant to the determination of this case (arising from the relevant statutory and case law) are summarised at paragraph 5 of these reasons. In this regard we considered and applied section 98 of the 1996 Act and the relevant precedents in this area of law as more fully set out below.

79 The first questions for the Tribunal to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within sections 98(1) and (2) of the 1996 Act? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of its dismissal of the claimant.

80 On the evidence before it, especially given the claimant's absences from work, in the context of the AMP and the Disability Policy, the Tribunal is satisfied that the respondent has discharged the burden of proof to show that the reason for the claimant's dismissal was related to capability, that being a potentially fair reason.

81 Having thus been satisfied as to the reason for the dismissal, the Tribunal moved on to consider whether the dismissal of the claimant was fair or unfair under section 98(4) of the 1996 Act, which requires consideration of whether the respondent acted reasonably in dismissing the claimant for the reason of capability. In this regard we reminded ourselves of the following important considerations:

81.1 neither party now has a burden of proof in this respect;

81.2 our focus is to assess the reasonableness of the respondent and not the unfairness or injustice to the claimant, although not completely ignoring the latter;

81.3 the decision in Polkey v AE Dayton Services Ltd [1988] ICR 142 firmly establishes procedural fairness as an integral part of the issue of reasonableness, which applies equally in cases of ill health dismissal such as this, including as to the procedure an employer has followed regarding such matters as engaging in discussions with the employee and obtaining up-to-date medical advice, both of which elements we address below;

81.4 our consideration of whether the claimant's dismissal was fair or unfair is a single issue involving the substantive and procedural elements of the dismissal decision;

81.5 the 'range of reasonable responses test' (referred to in the guidance in Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439 and Post Office v Foley [2000] IRLR 827), which will apply to our decision as to whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses of a reasonable employer acting reasonably, applies equally to the procedure that was followed in reaching that decision: see, in the context of an ill health dismissal, Pinnington v City and County of Swansea EAT 0561/03, applying J Sainsbury plc v Hitt [2003] ICR 111.

82 Regarding the general consideration of fairness, the Tribunal records that it brought into consideration of the issues considered below and its ultimate decision regarding the fairness of the claimant's dismissal, relevant factors including the impact of the claimant's absence on her colleagues and the respondent's business; for that reason it has formal, structured policies (the AMP and the Disability Policy) which it applies in circumstances such as this; the significant size of the respondent (that being a specific element in section 98(4)); the fact that the claimant was contractually entitled to sick pay but which she had exhausted; and her having had almost 29 years' employment with the respondent.

83 The Tribunal acknowledges that while East Lindsay District Council v Daubney [1977] IRLR 181 is accepted as being a leading authority on medical investigation in the context of a fair capability dismissal, the well-established principles in British Home Stores Limited -v- Burchell [1978] IRLR 379 (albeit there in the context of a conduct dismissal) that were more recently endorsed in the decision of the Court of Appeal in Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903 apply equally in the case of a dismissal for ill-health: see DB Schenker (UK) Ltd v Doolan [2010] UKEAT/0053/09. We have brought each of those principles into account in making our decision.

84 Against the above background, addressing those three well-established principles in turn the Tribunal is satisfied on the basis of the evidence before it as follows:

84.1 At the time the respondent (in the shape of Mr Hodgson) took the decision to dismiss the claimant and (in the shape of Ms Angus) upheld that decision on appeal they did genuinely believe (in the context of the matters that were discussed at the second formal meeting that are detailed in the next sub-paragraph) that the claimant's capability was such that her employment with the respondent should be terminated. The reality was, as the claimant accepted in oral evidence, that she had had substantial absences from work, which had not shown any improvement notwithstanding the adjustments that the respondent had made and her returns to work even on a phased basis had often broken down. Moreover,

latterly, the claimant had repeatedly stated that she was not capable of performing any role and she should be granted ill-health retirement.

84.2 They had in in their respective minds reasonable grounds upon which to sustain that belief. In Mr Hodgson's case given that at the second formal meeting there had been discussed, as recorded above, the claimant's current health, the OH advice on her prognosis and ability to meet the requirements of her role, the nature of the job and the needs of the business for her role to be carried out, the reasonable adjustments made to date and the progress to date in identifying a suitable alternative role for the claimant (inclusive of any adjustments), all of which are recorded in the dismissal letter (288), while in Ms Angus's case she had fully considered and investigated each of the points made by the claimant in her grounds of appeal.

84.3 At the stage at which they each formed that belief on those grounds the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. That investigation included two important aspects. The first is having frequently referred the claimant to OH so as to be aware of "the true medical position" (Daubney), supplemented by, first, OH being in contact with and obtaining the medical opinion and advice of the claimant's consultant rheumatologist and, secondly, the Jobfit Plus report. The second aspect is that there had been fairly extensive discussions with the claimant with regard to her ill-health and prognosis, in the later stages of which she was aware that, in the absence of being redeployed into an alternative role, she could be dismissed. These discussions included the formal meetings held by Mr Hodgson with the claimant (at which she was represented by her trade union) and Ms Angus having discussed the claimant's grounds of appeal with her at the appeal hearing and then further investigated the points the claimant had made during that hearing. The Tribunal is satisfied that these discussions satisfied the guidance in Daubney: "Unless there are wholly exceptional circumstances, before an employee is dismissed on grounds of ill-health, it is necessary that he should be consulted and the matter discussed with him …", "If the employee is not consulted and given an opportunity to state his case, an injustice may be done", and in Spencer v Paragon Wallpapers [1976] IRLR 373 where it is stated, "Usually what is required is a discussion of the position between the employer and the employee so that the situation can be weighed up, bearing in mind the employer's need for work to be done and the employee's need for time to recover his health".

85 In the above circumstances, therefore, the Tribunal is satisfied that the claimant's complaint that her dismissal by the respondent was unfair is not well-founded.

Claims in time?

86 A final aspect of the agreed issues is whether the Tribunal had jurisdiction to consider the claimant's claims.

87 Although the Tribunal comes to this question last we record that it was obviously something that we had at the forefront of our minds throughout our deliberations given that a tribunal either has or does not have jurisdiction; it is not a matter for discretion.

88 That said, given our findings thus far, this question is now academic and the Tribunal does not consider it appropriate that we should engage in what would be a largely speculative exercise of seeking to establish whether the acts or omissions relied upon by the claimant in respect of her discrimination claims occurred within the initial time period of three months set out in section 123(1)(a) of the 2010 Act, whether those acts or omissions related to "conduct extending over a period" in accordance with section 123(3)(a) on the 2010 Act or whether, in accordance with section 123(1)(b) of the 2010 Act, the claimant's complaints were presented within "such other period as the employment tribunal thinks just and equitable"; neither would it be proportionate for us to do so.

Reasoning related to the minority judgement

89 The respondent failed to address its legal responsibilities in this matter for the reasons set out below.

90 Mr Raine and Mr Hodgson admitted in not having any training in equality matters.

91 Mr Raine admitted not carrying out RTW interviews; it being noted that in his witness statement he had stated that he did not have to do so in relation to short periods of absence, which was retracted at the beginning of the hearing. Throughout Mr Raine's evidence he responded by stating "he would have done" or that "he could not remember", which rendered his evidence questionable.

92 The first OH report in June informed the line manager that the claimant would be covered by the Equality Act and therefore reasonable adjustments would be required but nothing was done until September when the claimant was informed to "work on her own initiative". Another manager who was unaware of this informal instruction told the claimant that as she was the only one there she would have to carry out the full duties.

93 The respondent's failure to take the matter seriously added to the claimant's problems, which in turn increased her level of absences.

94 It was not until almost a year later that another OH report suggested a redeployment that Mr Raine handed responsibility to Mr Hodgson. His response was to ask if any departments had vacancies. As none were forthcoming his advice was that the claimant look for vacancies and apply for them. Alternatively, a temporary position was offered to the claimant but with the caveat that she would not have a job to return to after it ended.

95 These responses did not amount to a reasonable adjustment.

Conclusion

96 These conclusions are the conclusions of the majority of the members of the Tribunal as it is their decision that takes precedence.

96.1 The claimant's complaint that the respondent unlawfully discriminated against her contrary to sections 15 and 39 of the 2010 Act 2010 is not well-founded and is dismissed.

96.2 The claimant's complaint that, contrary to section 21 of the 2010 Act, the respondent failed to comply with its duty under section 20 of the 2010 Act to make adjustments is not well-founded and is dismissed.

96.3 The claimant's complaint that her dismissal by the respondent was unfair being contrary to sections 94 and 98 the 1996 Act is not well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 8 August 2019