EMPLOYMENT TRIBUNALS

Claimant: **Mrs H Spackman**

Respondent: **Cardiff & Vale University Health Board**

HELD AT: **CARDIFF** **ON:** READING DAY 13 MAY: HEARING 14, 15, 16 & 20 MAY 2019: SUBMISSIONS 9 SEPTEMBER 2019

BEFORE:

EMPLOYMENT JUDGE: N W BEARD **MEMBERS: MRS KIELY**
MRS HUMPHRIES

Representation:

For the claimant: In Person

For the Respondent: Ms J Williams (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The claimant's claim of unfair dismissal pursuant to sections 95(1)(c) and 98 is not well founded and is dismissed.

2. The claimant's claims of disability discrimination pursuant to section 15 of the Equality Act 2010 are not well founded and are dismissed.

3. The claimant's claim of disability discrimination pursuant to section 20 and 21 of the Equality Act 2010 is well founded and there shall be a hearing to consider remedy.

4. The claimant's claims of disability discrimination pursuant to section 26 of the Equality Act 2010 are not well founded and are dismissed.

REASONS

PRELIMINARIES

1. The claimant represented herself. The respondent was represented by Ms Williams of Counsel.
2. The tribunal has been provided with a bundle of documents eventually running to almost 1100 pages once additional pages were added during the hearing. The tribunal has not considered or taken account of any document unless it was specifically referred to in a witness statement, during cross examination or in final submissions.
3. The tribunal heard oral evidence from the claimant; she tendered the witness statement of Mr Stuart Egan. The respondent did not require Mr Egan to be cross examined and his evidence was taken as read. The respondent called: Ms Bayliss, Deputy Director of Operations; Ms Hiscocks, Project Nurse; Mr Daniel Deputy Director workforce; Mr A Jones, Lead Nurse; Ms Walker Director of Nursing; Ms Chin, Lead Nurse; Ms B Jones Education Lead; Ms Tottle Director of Nursing.
4. At the outset of the hearing the tribunal, in discussion with the parties, identified the issues to be resolved.
   4.1. Dealing first with unfair dismissal:
      4.1.1. The respondent contends that the reason for the claimant's dismissal was capability, this was based on the claimant's continuing ill health absence.
      4.1.2. The respondent contends that the respondent followed a fair procedure in the various meetings held with the claimant and the attempts to return her to work.
      4.1.3. The claimant relies on the entire history of the matters that she alleges as discrimination (see the schedule prepared by the parties) as demonstrating that the respondent did not follow a fair procedure and that the decision to dismiss was substantively unfair in the circumstances.
   4.2. In respect of disability discrimination, the parties agreed that the factual and legal issues in respect of disability discrimination were those set out in the schedule at pages 47 to 59 of the bundle.
      4.2.1. The respondent accepted that the claimant was a disabled person at all material times in relation to the back injury. However, the respondent only accepted that the claimant was disabled with depression/ anxiety from early 2015 onwards.
      4.2.2. The respondent contends that even if the claimant was disabled it did not have actual or constructive knowledge of that disability until 2015.

4.2.3. There were time limit issues to be resolved in respect of many aspect of the acts relied upon as discrimination. The claimant argued that there was a continuing act or, in the alternative, that the tribunal should extend time on a just and equitable basis. The respondent contends that even if the claimant was disabled there was no continuing act the events described involving a separate people and processes.

THE FACTS

Medical and Disability Evidence

5. The claimant complains that she was suffering significant anxiety problems from early 2013 and was not sleeping well.
   5.1. In March 2013 the claimant attended an occupational health appointment she was required to do so by her line manager who suspected that the claimant had continence problems. The report prepared following that appointment dealt with the issues about the claimant using the toilet and made it clear that the claimant had no medical difficulties and was continent.
   5.2. There is no indication in the report of any other condition being discussed at that time. In addition, the GP medical notes all point to the claimant reacting to the events at work and not suffering any identified problem. The claimant's medical notes do not show the claimant reporting any stress or anxiety problems to her GP before June 2013.
   5.3. The claimant remained at work until September 2013 at which point her GP advised that the claimant was not fit for work because of work related stress. The notes of the GP clearly relate this to the ongoing investigation into the claimant's complaints (dealt with below).
   5.4. The claimant's GP notes indicate that the claimant was fit enough to return to work by January 2014. On 28 January 2014 it is recorded that the claimant was ruminating over events at work but was not clinically depressed.
   5.5. No medication or other form of therapy for mental health issues is recorded before the beginning of 2015. There is a significant bereavement event in early February 2015, and this clearly leads to a breakdown in the claimant's mental health as is accepted by the respondent.

6. The claimant contends that she found matters difficult during the period from February 2013 onwards. However, the claimant was able to attend work for much of that time and was able to provide instructions to her union representative. In addition, she was able to attend and deal with meetings with the respondent. The claimant does not provide evidence of specific things she could not do, instead the claimant talks about her feelings and the anxiety related to her former line manager. The tribunal accept that the claimant was clearly anxious about working with and encountering the line

manager about whom she had complained. However, we have heard no evidence of any impact on the claimant's day to day activities prior to February 2015 other than that sense of anxiety and discomfort in particular situations.

General facts

7. The claimant began working for the NHS in May 1987 and for the respondent specifically on 13 May 2005. Throughout the period from 1987 to 2009 the claimant worked as an auxiliary nurse, in September 2009 the claimant was deemed unfit for her then role because of her back disability but was redeployed to work in the ENT outpatient department, still as an auxiliary nurse.

8. The events the claimant complains of start in late 2012 and the beginning of 2013. The claimant raised a dignity at work complaint about events involving her then line manager in February 2013. The complaint of bullying was about several events but included complaints that: the manager had prevented her from using the toilet when necessary; she had been referred to occupational health about the frequency she used the toilet when there was no problem with her toilet use. The claimant also complained about the general conduct of her manager towards her. The claimant raised the grievance after consulting her union. The claimant felt that the manager was displaying favouritism towards some staff and singling her and some others out for poor treatment. The claimant's union representative Mr Egan was involved in supporting the claimant in all matters between the claimant and the respondent from then on.

9. On 4 April 2013 a meeting was held with the claimant, her union representative and Ms Bayliss. The claimant requested a move away from her then manager. The claimant was moved to work on ward A5 North whilst the dignity at work process was underway (the claimant did not request this as a specific move but did ask not to work with her line manager). The claimant made no complaints and appeared to be content with the move. There is no indication that the work expected of the claimant caused her to raise the issue of her back. There was a level of dispute between the parties as to the duties on the ward. In our judgment the claimant was not required to carry out any of the lifting or manoeuvring that would cause difficulties with her back or she would have raised the issue at the time. The claimant worked on this ward between April and September 2013 and made no complaints despite attending a number of meetings with the respondent about her grievance. It appears to us that, if the claimant was having the difficulties she claimed, then she would have raised these matters at the time. We prefer the evidence of the respondent in this regard and find that the claimant was happy to work on the ward and was not placed in a position where she had to lift or manoeuvre patients or objects.

10. In a meeting on 21 May 2013 the claimant decided that she did not wish to engage in mediation and wished to pursue a formal process. At that stage the respondent began the process of seeking an investigator. Angela Jones was

appointed to investigate. The claimant was informed of this on 19 June 2013. Angela Jones wrote to the claimant on 12 July 2013. Thereafter there appeared to be no progress for a significant time. The respondent accepts that there was a delay and is unable to provide a specific explanation for this. The investigation into the claimant's complaints began, according to Mr Egan, in October 2013 and was undertaken not by Angela Jones but by Gemma Murray. At this stage the claimant was absent from work due to ill health. The respondent has been unable to call evidence from either of these individuals (we understand that they have left their employment). Gemma Murray met with the claimant on 3 October 2013 to obtain her account. The investigation was apparently completed in December 2013; however, the report was not completed until March 2014.

11. In March 2014 the claimant had returned to work. However, she was not placed back on the ward but took up a position at the Outpatient Department Llandough Hospital. This was because the claimant did not wish to return to ward A5 north because some of her duties might cause her to come into contact with the manager that she had complained about, we note that it was not because she had complained about the duties otherwise. The claimant did not specifically request Llandough. The respondent received advice on the claimant's ability to carry out such a role given her back condition and applied adjustments as appropriate. The respondent organised this role as a supernumerary, the claimant's pay coming out of the budget from ENT where her substantive role was based. The claimant's requests as to start and finish times were accommodated. The occupational health advice made no reference to lone working as an adjustment.

12. The claimant was not provided with any form of outcome of her dignity at work complaint until 17 June 2014 and the claimant received a written outcome on 1 July 2014. On any basis this was an inordinate amount of time taken to complete such an investigation. The only explanation, which is itself limited, comes from the review report (below) which indicates that there were difficulties appointing an investigator. Mr Daniels told us, and, in the absence of contrary evidence, we accept, that this was not a typical length of time taken for a dignity at work investigation and was specific to the claimant's case. The report recognised that there was an issue in the relationship between the claimant and her line manager but indicated that the evidence was not sufficient to recommend disciplinary action against the manager. The outcome recommended that the claimant and her line manager engage in mediation. The letter did not inform the claimant that there was a right to request a review of the decision, there is no specific explanation for this right not having been set out in the letter. The respondent's expectation was that the claimant would return to her substantive role and a meeting was arranged to discuss this on 7 August 2014.

13. The claimant requested review of the decision by letter date 13 July 2014. The claimant referred herself to occupational health. On 29 July an occupational health report was sent to Mrs Hiscocks setting out a

recommendation that the claimant remain in her temporary role until "her concerns are addressed" the concerns related to her having requested a review of the dignity at work outcome. At the meeting of 7 August 2014, the claimant having expressed to the respondent that she was happy in the temporary role, the respondent decided to continue the existing arrangement but to start looking at permanent redeployment options. The claimant was not willing to engage in mediation at this or any stage.

14. The review process had been commenced and at the claimant's request an external investigator, Sarah Brooks, was appointed. Sarah Brooks' conclusions, although raising some concerns about the process, were that the conclusions and recommendations of the original report were appropriate. She did, however, recognise that the time taken to deal with the matter was not appropriate. Further, she recognised that the claimant's unwillingness to participate in mediation had prevented and continued to prevent mediation taking place. She recommended that the respondent should consider redeploying the claimant on a permanent basis. This report was concluded by 23 December 2014.

15. Arrangements were made for the claimant to meet with the respondent to discuss the outcome of the review. This took place on the 3 February 2014. The decision was made that the respondent's efforts would now be concentrated on redeployment of the claimant. The fact that the claimant should not return to ENT and her line management was a recommendation of the report and the wish of the claimant. No indication was raised at this meeting by the claimant or Mr Egan that there were any issues of discrimination. The redeployment process was not to rigidly apply the twelve-week period (set out in the respondent's policy) to find a new role, there was to be a degree of flexibility. However, it was made clear that this could not be open ended, and it was intended that a post be found as soon as possible.

16. The respondent, throughout the period between 2013 and February 2015 had no knowledge or indication that the claimant was suffering a mental impairment. The tribunal accept that there was nothing in the material available to the respondent throughout 2013 and 2014 which could have led the respondent to conclude that the claimant was suffering from anything greater than the stress of being involved in a difficult internal process. The claimant's absence was linked to work related stress. The occupational health reports identified nothing beyond the relationship with the manager and there was nothing specific to indicate that this was a pathological problem. There was no evidence to indicate that the claimant was unable to carry out day to day tasks.

17. A terrible and tragic event intervened on 7 February 2014. The claimant's son, aged only 22, passed away suddenly. This obviously had a dramatic and immediate impact on the claimant's health. The claimant began a period of long-term sickness absence.

18. The respondent arranged a long-term sickness absence meeting with the claimant on 27 May 2015. At that meeting the claimant, supported by Mr Egan, explained that she was still coming to terms with the loss of her son and was upset throughout the meeting. The claimant was asked on more than one occasion whether she wanted the meeting to stop, the claimant indicated she was able to continue. It was confirmed that the claimant had not been sent a copy of the dignity at work review because of the bereavement and it was confirmed that it would only be sent to the claimant when the claimant had indicated she was ready to receive it. One thing that emerged from this meeting was that the claimant wished to return to the temporary role in the Outpatient Department, but as a permanent appointment. The respondent indicated that this would be explored. The claimant was told that a further meeting would be arranged. A referral was made for the claimant to attend an occupational health appointment.

19. Mr A Jones took over managing the claimant as Mrs Hiscocks had retired. He received a copy of the occupational health report (7 July 2015). This report confirmed that the claimant was not fit for work and that a review would be held after six weeks. The next sickness absence meeting was arranged for 6 August 2015. At that meeting it was indicated that the temporary outpatient role was not available as a permanent role and that there should be concentration on finding the claimant suitable alternative position once she was fit to return to work.

20. Mr Jones arranged a further meeting for 25 September 2015. It was still clear that the claimant was not fit to return to work at this point. Discussion of the circumstances made it clear that it was not possible for timescales to be identified at that point in time. The claimant indicated that she was to see her GP on 5 October 2015 and suggested a meeting should be arranged after that appointment.

21. Mr A Jones' next meeting with the claimant took place on 5 November 2015. The claimant was still subject to a GP sickness certificate taking her to January 2016 when this meeting took place. The claimant indicated at this meeting that she felt she would be able to return to work at the expiry of that certificate. As a result, discussion centred on the claimant's needs and preferences in respect of alternative roles. At this meeting the claimant requested that she be provided with a copy of the dignity at work review report.

22. The claimant next met with Mr A Jones on 18 December 2015. The claimant appeared positive about returning to work at this meeting. The claimant was looking to return in January 2016 and discussed taking leave at the time of the anniversary of her son's decease. The respondent indicated that having made enquires there was no permanent role in the Outpatients Department but that a phased return to work in that area was possible. Arrangements were made for an occupational health referral in order to consider adjustments for a return to work. The claimant and respondent agreed to a further meeting for 22 January 2016.

23. The next meeting took place on 22 January 2016 and the claimant sought to take leave up to 1 March, consequently arrangements were put in place for the claimant to return on a phased basis from 1 March 2016 to the Outpatients Department. At the meeting the respondent also shared details of various vacancies for which the claimant could be considered. The claimant provided a CV and completed a redeployment form. As a result of these discussions Mr A Jones then began to put in place arrangements for the claimant's return to work. Hours of work were altered so that the claimant could be brought to and from work and not use public transport. He discussed the various arrangements with staff at the Outpatients Department. The claimant met with those from the Outpatients Department and the discussion showed that the claimant and those she met had different views as to the role she was required to undertake on her return. The tribunal take the view that from as early as this point the claimant became reluctant to return to work and was beginning to give reasons to the respondent which set up barriers to her employment. Although it is right to say that the claimant overcame this reluctance at this stage when she began working in the PROTECT project. The claimant did not return to work in outpatients. The claimant was signed off sick once again with stress at the end of February 2016. There was a further sickness absence meeting on 3 March 2016. The most recent occupational health report indicated that the claimant was fit to return to work.

24. Mr A Jones identified an administrator's role for the claimant in a research project PROTECT. This was set away from the areas where the claimant had felt that she might encounter her former line manager. The claimant said in evidence that this was a role that involved significant manual handling and manoeuvring. We heard contrary evidence that in fact involved moving files which were easily manageable. We preferred the respondent's witnesses' evidence. The claimant only raised this as a complaint at the time of giving evidence, all previous indications were that the claimant was content in this role. We are also of the view that the claimant's evidence that this placed her at risk of coming into contact with her former line manager are without substance. All the indications from the time are that the claimant was generally content in this role with only that one issue causing the claimant concern. The respondent, in any event, adjusted the claimant's duties when she raised with them the issue of a risk of contact with her former line manager by arranging that the claimant be met in a corridor away from any place where such contact was likely. The claimant complained of having to work alone. On the evidence we heard this was not an accurate description, although there were times when the claimant would be in the office alone these were limited, as the two nurses involved in research would mostly be present. Nothing in the medical notes indicates that the claimant should not work alone.

25. The claimant next met with Mr A Jones on 6 April 2016 to discuss the phased return to work at PROTECT. Mr A Jones told the claimant that the redeployment process was a for a fixed period and a further meeting was arranged for May 2016. Mr A Jones followed this up with a letter which

indicated that the redeployment process would last for twelve weeks. The claimant raised a grievance about this.

26. Mr A Jones received feedback about the claimant's work in PROTECT. The claimant was not leaving the office citing the fear of encountering her former line manager as a reason. It is to be noted that the claimant was working in a separate part of what is a vast hospital complex with many thousands of staff. The tribunal again drew the conclusion that this was part of a developing trait for the claimant to place obstacles in the way of the claimant working in any role with the respondent.

27. The claimant's grievance complaint about the time limited nature of redeployment was upheld following a hearing on 9 June 2016. The decision was made by Mrs Walker. She considered that Mr A Jones had conflated the sickness and redeployment processes. As a result, when the claimant should still have been dealt with under the stages of the respondent's sickness policy, in April 2016 Mr A Jones had introduced the redeployment policy too early. She also considered that the claimant had not had a trial redeployment as required under the policies. Given her conclusions she recommended that the claimant should be assigned a new independent manager, that the redeployment process should be halted to identify a suitable alternative role for the claimant and that training and educational support should be provided to the claimant.

28. Ms Chinn was appointed to be the independent manager dealing with the claimant from this point. However, the claimant had once again been certified as unfit to work because of work related stress by her GP. Ms Chinn focused on seeking a redeployed role as it was clear that the claimant could not return to her substantive role. Ms Chinn arranged a long-term sickness absence meeting for 16 August 2016. A referral for an occupational health assessment was arranged. At the meeting the claimant raised two potential redeployment roles that would interest her. The first role was patently unsuitable in our judgment. The role had a requirement that the post holder could drive, the claimant could not drive (it had already been previously confirmed to the claimant that funding could not be provided for an intensive driving course). The second role was at a higher band than the claimant's role (band 3 rather than 2) and not available as redeployment, but the claimant was reminded that she could apply for it herself if she wished. The tribunal explored this with the respondent's witnesses and in the course of the evidence it became apparent that the claimant's existing skills would not have met the requirements of this role. At the meeting it was also confirmed that the claimant had accessed support from the respondent's "well-being" service, and the claimant was reminded that there was a further service (Confidential in Care) which the claimant could access.

29. On the same date in August the claimant met With Mrs B Jones. Mrs B Jones brief had been to provide the claimant with tailored support on training and development; she was well suited as an education lead in one of the respondent's directorates. She was to give the claimant help in writing her CV

and in identifying support for her. Mrs B Jones gave her email address to the claimant for the claimant to make contact when she was ready to do so. On 31 August 2016 the claimant emailed and arranged to meet Mrs B Jones. The arrangements were unusual in that the claimant asked to meet at the chairs outside the occupational health unit. The meeting was to discuss the claimant's CV. The claimant provided a paper copy and in turn Mrs B Jones gave the claimant an RCN document on developing CV's. Mrs B Jones sent an email to the claimant on 13 September with suggestions for improving the claimant's CV. The claimant responded indicating that she would contact Mrs B Jones again when the claimant returned from a planned holiday.

30. The claimant remained absent with a diagnosis of stress at work and Ms Chinn met with her again on 20 September 2016. The claimant was unable to explain how she felt at this meeting providing Ms Chinn with a written document. Ms Chinn suggested that the claimant include in her CV detail on transferable skills. There was further discussion about the Band 3 role, this had been followed up and it was demonstrated to the claimant that it did not match her skill set. It was agreed that the respondent would meet the claimant much more frequently than the usual to provide additional support to the claimant in her return to work.

31. The claimant presented a GP certificate for an eight-week period on 3 October 2016. On 4 October 2016 the claimant met with Ms Chinn again. At this meeting the claimant told the respondent that she wanted a redeployed role "in a clinic in the community". The claimant was informed that there were no current vacancies of that type. The claimant was told that a role had been identified on the nephrology ward, to which the claimant's response was that she could not work on a ward because of her back issues, the respondent agreed to continue looking.

32. Ms Chinn held a further meeting with the claimant on the 17 October 2016. At this meeting training possibilities were discussed with the claimant. The claimant was given a prospectus for her to consider if there were any training courses she might wish to take up. The claimant agreed to follow up a stress resilience training day and also some assertiveness training; the claimant did not actually do this. A receptionist role was discussed; the claimant told the respondent she did not want a role other than in nursing, her reason was that an administrative role would depress her. The claimant had not made it known previously that she did not want to take up an administrative role. Ms Chinn was concerned that in limiting herself to nursing the claimant was creating a difficulty because there were only a small number of nursing roles which did not involve manual handling.

33. Mrs B Jones was to meet with the claimant on 2 November 2016. In advance of the meeting she emailed a copy of the claimant's CV to which she had made additions so that this could be discussed. The CV was discussed as were several courses which the claimant might wish to take up. The claimant informed Mrs B Jones that she had not been offered suitable employment and so did not feel that she was able or ready to access any courses. The meeting

ended with the claimant agreeing to contact Mrs B Jones when she was ready. Before us the claimant did not accept that this had been the arrangement, however in our judgment it is the only sensible interpretation of events. Mrs B Jones had provided the claimant with advice, the claimant was indicating that she could not take training further without a prospective role. The obvious arrangement would be for the claimant to contact Mrs B Jones when she had a role or felt ready for training. Mrs B Jones did not meet with the claimant again.

34. Ms Chinn met with the claimant again on 3 November 2016. At that meeting the claimant expressed that she wanted “no ward work or office work”. The tribunal consider that by this stage the claimant was clearly erecting barriers to a return to work and limiting the options for the respondent. The respondent had identified three redeployment opportunities at this meeting. All the opportunities were on wards, and Ms Chinn attempted to discuss with the claimant the potential of her working on at least one of these wards as the work was less manual and with adjustments as recommended in the most recent occupational health report being put in place. The claimant however made it clear that she would not consider any ward work. It was also made clear that the claimant would not consider work at the hospital where her previous manager was based. It was explained to the claimant that the report and her GP indicated that the claimant was fit to return to work with appropriate adjustments; this meant that the redeployment policy now needed to be applied. The claimant was urged to continue working with Mrs B Jones.

35. On 7 November 2016 the claimant became ill once more with an acute stress reaction. The GP certificate indicated that the claimant would be unfit for work for 28 days. The claimant attended a further Occupational Health appointment on 23 November 2016 and on 28 November Ms Chinn contacted the claimant via Mr Egan to attempt to maintain a level of support. On the 7 December 2016 the respondent received a report indicating that the claimant was likely to be unfit for work for the foreseeable future. The report suggested that ill health retirement might be an option. A further sickness certificate was provided at the beginning of December.

36. There was a further long-term absence meeting between the claimant and Ms Chinn on 15 December 2016. It was explained to the claimant that ill health retirement was not in the gift of the respondent. Arrangements were made for an application to be made which the respondent would support. On the 19 December 2016 the claimant was given a further sickness certificate for 42 days. The paperwork for ill health retirement was submitted by the respondent on 22 December 2016. In January 2017 the claimant was given a further certificate for 84 days.

37. The claimant was invited to a further long-term absence meeting on 15 February 2017, however the claimant was not available to attend. The application for ill health retirement was refused and Ms Chinn was informed of this on 20 February 2017. A number of meetings were arranged by the respondent but because of the availability of the claimant or Mr Egan these

did not proceed. Arrangements were made by the respondent asking the claimant and Mr Egan to provide their availability and a meeting was held on 12 April 2017. On 7 March 2017 Ms Chinn obtained an update from Occupational Health. The claimant was fully aware that the meeting related to her employment and although the respondent did not formally warn the claimant in a standard letter of the potential outcomes for the meeting of 12 April, she had bee so warned in respect of the other meetings arranged for 15 February 2017 and other dates. The claimant knew she could be dismissed at this meeting.

38. At the meeting questions were raised by Mr Egan about whether the claimant was, actually, unfit for work long term. Ms Chinn had checked with occupational health whether she needed to update the report for this meeting. In response to her enquiry on 7 March she was advised that nothing had changed, and that the opinion remained the same, that the claimant was not fit for the foreseeable future. At the meeting the claimant suggested she could work at an outside clinic, naming a specific area with the alternative of somewhere similar. There were no roles available of the type or in the areas which met the limited criteria the claimant was suggesting. Ms Chinn gained the impression that the claimant could not get past the dignity at work issues from the past. (The tribunal, having seen the claimant give evidence have come to the same conclusion, the claimant can simply not move past the matters from 2013, albeit that this has been exacerbated by the tragic loss she has suffered.) Ms Chinn drew the conclusion from the medical evidence, the absence of suitable roles and the approach of the claimant to roles that did exist that there was no foreseeable prospect of the claimant returning to work for the respondent. In the circumstances she considered that it was appropriate to dismiss the claimant. The claimant appealed the decision to dismiss her.

39. The claimant's appeal was heard on 31 July 2017 by Ms Tottle. The claimant's grounds of appeal were: that she had an outstanding grievance and that should have been completed before she was dismissed; that the claimant had not provided consent to occupational health being contacted; that dismissal of the claimant was inappropriate because of the respondent's treatment of her over the previous four years. However, the claimant sent a letter on the 9 May 2-017 outlining further elements to her appeal which were: that the was no procedure set out for appeals in the Sickness Absence Policy; that the claimant had been sent a letter wrongly setting out that her dismissal was under the disciplinary policy; that the November 2016 report from Occupational Health was not included in the pack for the dismissal hearing; and the respondent had not complied with the recommendations in that report.

40. The claimant, represented by Mr Egan was permitted to present arguments for the claimant and was questioned, Ms Chinn presented her case for dismissing the claimant and Mr Egan was permitted to question her.

41. The claimant relied on an outstanding grievance being an application for injury allowance which had been refused and she was appealing. At the hearing it was clear that the appeal had since been held and had been unsuccessful. This application was entirely unrelated to questions of the claimant's ability to return to work and could not have provided evidence which could have fed into the capability hearing. Ms Tottle did not uphold this as a ground of appeal.

42. The medical report available at the dismissal hearing on the 12 April related to November of the previous year. The other medical evidence available was the GP certificate indicating a period of absence of 12 weeks. The claimant had not provided any medical evidence at the dismissal hearing and it was known that the claimant was seeking ill health retirement. Ms Tottle had information from the Occupational Health department which had confirmed that advice given to Ms Chinn for the April decision was based on the existing medical information and the claimant had given consent for that to be disclosed. Ms Tottle drew the conclusion that there was no basis to this ground of appeal based on that.

43. Ms Tottle then considered the claimant's contention that dismissal was inappropriate because of her treatment over four years. She considered the processes that had been followed, the outcomes of the processes, the support that had been given to the claimant as described above.

44. However, the claimant had added elements to the appeal in a letter on 9 May 2017 and pressed these issues at the meeting. In addition, the claimant raised other details at the meeting and so Ms Tottle considered those matters also. Ms Tottle considered a key element to the decision was the Occupational Health advice that the claimant was unfit to work for the foreseeable future. She concluded, correctly, that the claimant's contention that she was dismissed before the decision on ill health retirement had been made was factually incorrect. She considered that the claimant being unable to return to her substantive position was because the claimant had not been willing to take part in mediation and that the dignity at work issues had been addressed. Her view was that the claimant had been offered appropriated redeployment opportunities based on what was available and that the claimant's continued change of parameters as to the roles she might undertake, she concluded that the claimant had not committed herself to the redeployment process. Ms Tottle decided that she could not uphold the claimant's appeal based on the grounds of appeal or the other matters raised.

THE LAW

45. Disability being a protected characteristic under the Equality Act 2010 the relevant aspects of the legislation are as follows:

    45.1. The definition of disability set out in section 6 Equality Act 2010 which provides that:

(1)A person (P) has a disability if—

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

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

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(6) Schedule 1 (disability: supplementary provision) has effect.

46. Schedule 1 Equality Act 2010 deals with some aspects of disability, indicating in particular that the effect of an impairment is likely to be long-term where it has lasted or is likely to last 12 months. Previous decisions in the appeal courts have indicated that when deciding if the effect of an impairment is substantial that decisions should be based on whether the effects are more than merely trivial.

46.1. Section 15 provides:

(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.

46.2. Section 20 deals with the Duty to make adjustments and provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(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.

46.3. Section 21 deals with the Failure to comply with the duty and provides

(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.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

46.4. Section 26 provides:

(1)A person (A) harasses another (B) if—
(a)A engages in unwanted conduct related to a relevant protected characteristic, and
(b)the conduct has the purpose or effect of—
(i)violating B's dignity, or
(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
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(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.

47. Section 136 deals with the Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
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(6)A reference to the court includes a reference to—
(a)an employment tribunal;

48. In addition, regarding the Burden of Proof, the provision in section 136 above is the UK implementation of the EU Directive 2000/78/EC general framework for equal treatment in employment and occupation at Article 10 which provides

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish,

> *before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.*

49. The tribunal is required to examine evidence in a broad way in dealing with issues of discrimination. We are not concerned with an overt motive (whilst such a finding would obviously be relevant) so much as examining the mental processes (conscious or subconscious) of those alleged to have unlawfully discriminated. We must consider the approach in ***Anya –v- University of Oxford & Anr. [2001] IRLR 377*** which demonstrates that it is necessary for the employment tribunal to look beyond any particular act or omission in question and to consider background to judge whether the protected characteristic has played a part in the conduct complained of. This is particularly important in establishing unconscious factors in discrimination. ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** indicates that the tribunal in examining whether there has been less favourable treatment compared to a real or hypothetical comparator should note that a bare difference in treatment along with a difference in the protected characteristic is insufficient. It is always necessary to find that the protected characteristic is an operative cause of the treatment. In ***Zafar v Glasgow City Council [1998] IRLR 36*** it is made clear that unreasonable treatment should not necessarily lead the employment tribunal to a conclusion that the treatment was due to discrimination. Unfairness does not, even in an employment situation, establish discrimination of itself. Further a tribunal is not entitled to draw an inference from the mere fact that the employer has treated the employee unreasonably see ***Bahl v The Law Society and others [2004] IRLR 799***

50. Section 15 requires no comparator; we are concerned with unfavourable treatment, not less favourable treatment. Unfavourable treatment is treatment that is disadvantageous to the claimant see ***Swansea University v Williams [2018] UKSC 65*** anything done which is advantageous, even if less advantageous than it might be if not for the consequence of the disability, is not unfavourable. The tribunal must consider two distinct elements of causation. Firstly, what is the something caused by the disability, what arises as a consequence of the disability? This must not be considered narrowly, there can be a number of links in this chain of causation. Secondly, we must consider whether that “something” has caused the respondent to treat the claimant unfavourably; the something must be a significant or effective cause of treatment it need not be the sole or even principal cause. anything done which is advantageous, even if less advantageous than it might be if not for the consequence of the disability, is not unfavourable.

51. The test for justification is whether the unfavourable treatment is "a proportionate means of achieving a legitimate aim” this test is squarely one

of objective justification. It is for the Tribunal to conduct a balancing exercise based on all the facts and circumstances of the case as to whether the legitimate aim relied upon justified the unfavourable treatment. The employer needs show that unfavourable treatment was reasonably necessary in order to achieve the legitimate aim. If it is shown that the respondent could have taken other measures with a less discriminatory impact, but which would have achieved the same legitimate aim, the treatment would not be considered to be reasonably necessary. Less favourable (here unfavourable) treatment will be incapable of objective justification where there was an obviously less discriminatory means of achieving the same legitimate aim

52. In terms of disability discrimination relating to a failure to make reasonable adjustments, the Tribunal has in mind the decision of the Employment Appeal Tribunal in the ***Environment Agency v Rowan UK EAT/0060/07/DM***, it is indicated that a Tribunal must identify the provision criterion or practice applied by or on behalf of an employer, the identity of non-disabled comparators where appropriate, and the nature and extent of the substantial disadvantage suffered by the Claimant, indicating that it is clear that the entire circumstances must be looked at, including the cumulative effect of the provision criterion or practice, before going on to judge whether an adjustment was reasonable. The Tribunal are aware that it is its duty in the light of the decision in Rowan, to identify the actual provision criterion or practice on the facts of the case.

53. In ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336*** it is made clear that there are three elements required to establish harassment. The first is that the conduct complained of is unwanted. Secondly it must be related to the particular protected characteristic in question. Finally, the purpose or effect of violating the individual's dignity or creating a proscribed environment for the individual. The law draws a distinction between purpose and effect. If it is the perpetrator's purpose to violate dignity or create a hostile environment, then (if all other elements are in place) harassment is established. However, in order to demonstrate the element of "effect" it should be shown to be reasonable that it would be so caused in all the circumstances. The circumstances must include the individual's perception.

54. The tribunal has sought to remind itself of the statutory reversal of the burden of proof in discrimination cases. We consider the reasoning in the cases of ***Igen Ltd v Wong [2005] IRLR 258; Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332*** and ***Madarassy v Nomura International PLC [2007] IRLR 246***. Where it was demonstrated that the employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit

the unlawful act of discrimination. The ***Madarassy*** case also makes it clear that in coming to the conclusion as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

55. In respect of Unfair Dismissal, it is for the employer to show that there is a potentially fair reason for the dismissal under Section 98 of The Employment Rights Act 1996. However, once the employer has established the reason for dismissal, the burden of proof is then shared equally between the parties in respect of determining whether the dismissal is fair or unfair under Section 98(4) of the Employments Rights Act 1996. That section provides:

> *the determination of the question whether dismissal is fair or unfair, having regard the reason shown by the employer (a) depends on whether in the circumstances (including the size and administrative resources of the employers 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 substantial merits of the case.*

43 The respondent in this case relies on capability which is a potentially fair reason. The tribunal therefore is required to examine the process by which the decision to dismiss was taken. The tribunal recognise that the decision of the Employment Appeals Tribunal in the case of ***East Lindsey District Council -v- Daubney*** sets out a clear summing up of the law in respect of dismissals arising out of capability where it sets out:

> *'We turn to the second reason relied on by the tribunal. There have been several decisions of EAT in which consideration has been given to what are the appropriate steps to be taken by an employer who is considering the dismissal of an employee on the ground of ill health.* ***Spencer v Paragon Wallpapers Ltd*** *and* ***David Sherratt Ltd v Williams*** *are examples. It comes to this. Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be*

taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done.'

ANALYSIS

56. The tribunal consider the question of the claimant's disability discrimination complaints first.

56.1. We deal with the question of disability in dispute. The claimant contends that she was disabled with a mental impairment from the outset of her complaints. The respondent contends that it only from the beginning of 2015 that the claimant can establishes such an impairment. The tribunal considers the respondent is correct.

56.1.1. There is no medical evidence of any mental health problem before June 2013. At that point the evidence in GP notes refers to stress.

56.1.2. No medication or other form of therapy for mental health issues is recorded before 2015.

56.1.3. The descriptions of the claimant's mental health complaints in 2013 and 2014 appear to relate the situation to work.

56.1.4. There is nothing to indicate that the claimant's life reaction to adverse events became a significant problem requiring specific medical intervention before 2015.

56.1.5. Although the claimant was required to take time off work there is no evidence that the claimant was unable to carry out day to day activities at this time.

56.1.6. On that basis the tribunal conclude that the claimant has not established that she was someone disabled with a mental impairment until early 2015.

56.2. The first complaint is that the respondent failed to make reasonable adjustments in requiring the claimant to make a temporary move to ward A5 north in April 2013. The claimant relies upon both a mental impairment and her back condition.

56.2.1. In respect of the mental impairment the tribunal does not consider that the claimant is able to establish that she is disabled with such an impairment at this time.

56.2.2. The claimant was disabled with a back condition. She had previously moved from working on wards because of the back condition. That was because on wards there is a general requirement that staff be involved in lifting and manoeuvring.

56.2.3. If there is a PCP therefore it must be related to the duties expected of the claimant on the ward. As our factual findings are that the claimant was not required to carry out the lifting and manoeuvring duties usual on a ward, we consider that the claimant has not established a PCP that would have caused her a disadvantage.

56.2.4. Without the PCP and in the absence of a disadvantage the claimant cannot establish a failure to make reasonable adjustments. The claimant's complaint pursuant to sections 20 and 21 Equality Act 2010 in respect of this aspect is not well founded and is dismissed.

56.2.5. In addition, we consider this complaint to be out of time: we deal with the question of time limits generally below.

56.3. The claimant's next complaint is that over the period from 5 May 2013 to 17 June 2014 there was a failure to make reasonable adjustments because of the extended time taken to deal with her grievance. This claim must fail as it is based on the claimant being disabled with a mental health condition. However, even if we were wrong about that the following matters apply.

56.3.1. The tribunal did not find that there was a systematic practice of extended process of grievance investigation. The evidence was that the timescale in this case was out of the ordinary. However, the claimant contended that there was a criterion that she remain temporarily redeployed from her original role. In our judgment this criterion is not one that applies to the whole workforce but is specific to the claimant's case in that she requested a move. As such we do not consider it falls within the meaning of criterion within section 20.

56.3.2. In the absence of the PCP we are of the view that the claimant cannot establish a claim. However, were we considered to be wrong about that, the claimant still has the difficulty that, on the evidence, the claimant cannot establish that she met the requirements to establish that she was disabled with a mental impairment.

56.3.3. The claimant's complaint pursuant to sections 20 and 21 Equality Act 2010 in respect of this aspect of her claim is not well founded and is dismissed.

56.3.4. In addition, we consider this complaint to be out of time: we deal with the question of time limits generally below.

56.4. The claimant's next complaint refers to March 2014. The claimant contends that there is a disadvantage in respect of her mental health and her back. Because of our decision on disability we only deal with the latter.

56.4.1. The claimant complains about being moved to Llandough hospital. The claimant requested a change of role but did not specifically request to work at Llandough.

56.4.2. It is difficult to identify the PCP that the claimant relies upon. The move was specific to her. The claimant does state that she had to work alone often. The tribunal, although doubtful, shall treat that as a PCP for the purposes of this decision.

56.4.3. The claimant has identified the disadvantage as a risk because of her back condition. The claimant has not set out what the detail of that risk is in relation to her back. We are unable from the claimant's evidence to identify a specific disadvantage that those with the claimant's type of back problem would be at risk of from working alone. The claimant does not identify a specific feature of the condition which means that lone working places the claimant at risk. Neither does the claimant explain what she would be at risk of suffering by being alone at work.

56.4.4. The tribunal consider that the claimant has not established that a person with the claimant's back condition would suffer a disadvantage from working alone. Further she has not established that she would be at a disadvantage because of her disability.

56.4.5. On that basis the claimant's claim of a failure to make reasonable adjustments is not well founded and is dismissed.

56.4.6. In addition, we consider this complaint to be out of time: we deal with the question of time limits generally below.

56.5. The claimant's next complaint relates to a mental health condition, this was in June 2014. Given our findings the claimant is unable to establish that she was disabled by this condition at that time. If we were wrong about that we make the following findings.

56.5.1. The claimant's complaint is about being required to work with the line manager about whom she had complained. However, in fact to the claimant as the respondent did not, in fact require the claimant to return to that role, but once the claimant had refused mediation sought to redeploy her to a new role.

56.5.2. This was her substantive role, the reason for the decision was that the result of the dignity at work investigation had concluded that steps should be taken to facilitate the resumption of the claimant's working relationship with the manager. If there is a PCP it

is to require an employee to work in a substantive role when a dignity at work complaint has not been upheld and the respondent did not, in fact insist upon that but sought to make an adjustment.

56.5.3. The claimant therefore has not established a PCP, nor has she established that she suffered a disadvantage. In any event even if the claimant had established those elements the claimant would fail because the respondent sought to make an adjustment by redeploying the claimant.

56.5.4. The claimant's complaint pursuant to sections 20 and 21 Equality Act 2010 in respect of this aspect of her claim is not well founded and is dismissed.

56.5.5. In addition, we consider this complaint to be out of time: we deal with the question of time limits generally below.

56.6. The claimant next complaint is also pursuant to sections 20 and 21 of the Equality Act 2010, it is that the respondent failed to include an indication that the claimant had a right to appeal in the outcome letter related to her dignity at work complaint. This relates again to the mental health impairment and must fail because of our finding that the claimant was not disabled with this condition at the relevant time in July 2014. Again, we consider the issue more broadly as to the conclusions we would draw if we were wrong about disability.

56.6.1. The claimant has not identified a PCP in relation to this complaint. The evidence indicates that the respondent would usually include within a letter giving an outcome an indication of the right to apply to review the dignity at work decision. As this was not included in the letter it was specific to the claimant and not a general approach.

56.6.2. The claimant contends that she was given insufficient time to prepare. This would be a disadvantage to someone with a diagnosis of anxiety and depression if the time was curtailed by the failure.

56.6.3. However, there was no such disadvantage for the claimant as she was represented by her union and was aware of the right to review, did so, and the review was considered.

56.6.4. The claimant's complaint pursuant to sections 20 and 21 Equality Act 2010 in respect of this aspect of her claim is not well founded and is dismissed.

56.6.5. In addition, we consider this complaint to be out of time: we deal with the question of time limits generally below.

56.7. The claimant's next complaint also relates to July 2014 and the claimant's mental health and therefore cannot succeed at the early part. However, the claimant extends this complaint to December 2016 when she states the outcome of the appeal was given. This complaint is also of a failure to make adjustments.

56.7.1. The tribunal have considered what the PCP in this claim could be. There was a further investigation into the claimant's complaints, that was finished in December 2014, there was a meeting

with the claimant in February 2015 and the written report was provided in December 2016. There is no specific reason advanced for the delay between the first event and the second. There was a standard position that when the complaint was not upheld the full report would not be given. However, in this case the respondent did decide to provide the claimant with a copy. The delay between February 2014 and December 2016 was related, in the major part, to the claimant's absence from work due to a tragic bereavement and the impact of that upon the claimant's mental health.

56.7.2. On that basis the question for the tribunal is was the second period of a delay a PCP. In our judgment it is a specific decision related to the claimant's particular circumstances. We had no evidence that this is a general approach of the respondent to occasions of bereavement. We cannot say it amounts to a PCP on that basis.

56.7.3. If it were a PCP, we have no evidence to indicate that failing to provide the complete report is a disadvantage which a group of those with the claimant's mental health impairment would suffer. The impact of failing to provide the report could differ with each individual, the impact of providing or not providing the report could be one of exacerbation, amelioration or be entirely neutral in effect.

56.7.4. The claimant's complaint pursuant to sections 20 and 21 Equality Act 2010 in respect of this aspect of her claim is not well founded and is dismissed.

56.7.5. In addition, we consider this complaint to be out of time: we deal with the question of time limits generally below.

56.8. The claimant's next complaint relates to a decision on 3 February 2015 that the claimant should be permanently redeployed to a different role. The respondent only required the claimant to redeploy because of the claimant's position that she could not return to her substantive role while the manager she had complained about remained in position. Therefore, in our judgment, this was a decision by the claimant and not the respondent, although the respondent agreed with this in recommendations. Additionally, at this stage we cannot say that the claimant was suffering from a disability in respect of her mental health, or if she was that the respondent had or should have had knowledge of her condition. However, if we are wrong about that:

56.8.1. The only PCP that the tribunal can identify would be requiring the claimant to work with her existing manager.

56.8.2. The disadvantage in requiring the claimant to work with her existing manager would relate only to disability arising from the mental impairment. Given the claimant suffered depression and anxiety and there was clearly a relationship difficulty from the claimant's perspective then this was likely to impact on the claimant as it would other persons with her disability, to her disadvantage. This

is because the stress of working in those circumstances would be likely to exacerbate symptoms of depression and anxiety.

56.8.3. The means of alleviating that disadvantage would be to move either the claimant or her manager. The respondent had considered the claimant's complaints and had not upheld them after a lengthy investigation, decision and appeal process. In those circumstances requiring the manager to move would present difficulties for the respondent. The respondent had no grounds for requiring the manager to move and there would be the need to recruit a replacement. There was the alternative of redeploying the claimant. The difficulties in doing so would be that the claimant's disabilities might limit the number of opportunities available. However, the respondent is a large organisation with many roles and with the ability to adjust those roles.

56.8.4. Given that balancing exercise it would not have been reasonable for the respondent to have to make the adjustment of redeploying the claimant's manager.

56.8.5. The claimant's complaint pursuant to sections 20 and 21 Equality Act 2010 in respect of this aspect of her claim is not well founded and is dismissed.

56.8.6. In addition, we consider this complaint to be out of time: we deal with the question of time limits generally below.

56.9. The claimant's next complaint relates to the frequency and degree of contact during the claimant's absence following the claimant's loss of her son and bereavement from 7 February 2015. The claimant complains pursuant to sections 15 and section 20, both complaints are based on disability arising from a mental impairment.

56.9.1. Dealing with the reasonable adjustments claim the tribunal consider that the only PCP is the respondent's practice of keeping in touch with employees who are on long term absence.

56.9.1.1. The tribunal consider that it is potentially a disadvantage to be contacted frequently when a mental impairment of depression and anxiety is the cause of absence. Equally, however, depending on the individual failure to maintain contact can amount to a disadvantage.

56.9.1.2. On the evidence the tribunal are not convinced that the frequency of contact caused disadvantage to the claimant. There was no significant complaint by the claimant about the frequency or about the impact of visits on the claimant. We do not consider that the claimant has established that these visits were to her disadvantage because of her disability.

56.9.1.3. On the same basis we do not consider that the respondent could reasonably be expected to know that any disadvantage arose from this contact without the claimant, at the very least, giving some indication to the respondent of difficulties arising from the contact. By that we do not expect the claimant to

necessarily tell the respondent, but there would need to be something to put the respondent on notice e.g. demeanour and/or conduct.

56.9.1.4. The claimant's complaint pursuant to sections 20 and 21 Equality Act 2010 in respect of this aspect of her claim is not well founded and is dismissed.

56.9.2. The claim pursuant to section 15 requires the claimant to establish unfavourable treatment arising because of a consequence of the claimant's disability.

56.9.2.1. Clearly the claimant's absence was a consequence of her disability, further the respondent's contact with the claimant for the purpose of dealing with that absence was caused by the absence.

56.9.2.2. Therefore, the only question is whether the treatment was unfavourable. As we set out above whether there is a problem arising out of the respondent's contact with an employee is dependent on the reaction of the individual.

56.9.2.3. On that basis treatment will be unfavourable if it causes disadvantage. We indicate that in the claimant's case we did not find that disadvantage on the evidence. On that basis we conclude there was no unfavourable treatment.

56.9.3. In addition, we consider the complaints under sections 15 and 20 to be out of time: we deal with the question of time limits generally below.

56.10. The claimant's next complaint relates to claimant's return to work in March 2016. The claimant complains pursuant to sections 15 and section 20, both complaints are based on disability arising from a mental impairment.

56.10.1. Dealing with reasonable adjustments first the tribunal has had great difficulty in identifying any PCP that relates to this complaint. The phased return was a specific arrangement for the claimant as was the temporary assignment to the PROTECT office. If the claimant argues that this was the approach the respondent took to all such phased returns, there was no evidence to support that.

56.10.2. In those circumstances the claimant complaint pursuant to section 20 is not well founded and is dismissed.

56.10.3. The claimant's complaint in respect of section 15 must rely on the need for a phased return to work being a consequence of her disability.

56.10.4. Was there unfavourable treatment? The claimant was not met by anyone at the outset of the return. The claimant had a long absence and it is clear that the respondent failing to comply with the agreement to meet with the claimant was unfavourable in all the circumstances as it would have been a stressful situation and to the claimant's disadvantage.

56.10.5. However, the fact that the claimant was not greeted on arrival was due to accidental circumstances. The reason was not because the claimant was returning on a phased return.

56.10.6. Again, on that basis we consider that the claimant's claim on these facts is not well founded and is dismissed.

56.10.7. Further, in our judgment these matters are out of time. We deal with time limits generally below.

56.11. The claimant complains about being required to work in PROTECT from 7 March 2016. On our findings the claimant was happy to work in this position. The reason the claimant was given this position was that she did not want to work in her substantive role. The claimant made no complaints about this role at the time. The claimant complains pursuant to sections 15 and 20 EA 2010.

56.11.1. In respect of a PCP we do not consider that the respondent required the claimant to work in PROTECT. We take a similar approach to our conclusion on the claimant's complaint about redeployment. The only PCP can be requiring the claimant to work with her manager, there were no grounds to move the manager, moving the claimant was an adjustment.

56.11.1.1. We do not consider that the claimant has established any disadvantage from working at PROTECT which relates to the back disability. The claimant talked about the moving of files, however the evidence overall showed no specific problem related to her back. The claimant did not show that the risk of being in proximity of her former manager did result in any difficulties from her depression and anxiety, however we considered that this could be a disadvantage and one which could apply generally.

56.11.1.2. We did not consider that the respondent knew or ought to have known of the disadvantage. The claimant did not draw any attention and specifically asked to remain working at PROTECT.

56.11.1.3. The claimant's claim of a failure to make adjustments on this complaint is not well founded and is dismissed.

56.11.2. The section 15 claim is also not well founded in our judgment. The redeployment of the claimant to this role was not because of her absence from work but because the claimant did not want to work with her former manager. That was a decision which was entirely the claimant's. For the purposes of the judgment we consider that it is possible that the claimant's decision was a consequence of her mental health impairment, but the respondent's compliance with the claimant's wishes in that regard must be considered an advantage not a disadvantage. On that basis the claimant cannot establishes unfavourable treatment. In the circumstances the section 15 claim is not well founded and is dismissed.

56.11.3. In respect of both these claims we consider them to be out of time and we deal with those issues below.

56.12. The claimant was to be put on to a twelve-week redeployment plan (this decision was overturned before it was implemented). The claimant contends that this amounts to discrimination pursuant to sections 15 and 20 EA 2010.

56.12.1. In relation to section 20 the claimant cannot establish any disadvantage. The claimant's grievance altered this provision. The PCP of a twelve-week redeployment was never applied in practice. Therefore, there was an adjustment which prevented any disadvantage actually occurring.

56.12.2. In respect of the section 15 claim the claimant cannot show that the need for redeployment was because of the claimant's absence. As a matter of fact, the claimant was unwilling to work in her substantive role whilst the line manager remained. That was the reason and it does not arise as a consequence of the claimant's disability.

56.12.3. The claimant's claims pursuant to both sections based on this complaint are not well founded and are dismissed.

56.12.4. Further, in our judgment these matters are out of time. We deal with time limits generally below.

56.13. The claimant's next complaint relates to both impairments relied on as disabilities and the claimant pursues them under sections 15 and 20 EA 2010. The claimant contends that she was not provided with the support that had been promised by the respondent in the outcome to her grievance.

56.13.1. In respect of the section 20 claim the tribunal cannot identify a PCP relating to this claim. The promise of support, such as it was, was specific to the claimant and was a result of her specific complaints addressed by the grievance process. In any event, in our judgement, the claimant was provided with the support that had been offered.

56.13.2. It might be argued that the PCP was the ordinary support provided to employees who were seeking to return from sickness absence, and that the claimant's real complaint is that the adjustments promised were not made. Although the claimant never raised that explicitly we shall explore the issue on that basis.

56.13.2.1. We are of the view that there was an advantage to the claimant in the offer of specific support. There was no specific disadvantage to the claimant in the ordinary level of support. The claimant was indicating a readiness to return to work and as such, on the evidence, was able to engage in the processes. There is nothing in the medical evidence to indicate that the claimant needed additional assistance because of any aspect of her disabilities.

56.13.2.2. The claimant was, in any event, provided with additional support and as such were, we wrong about the issue of disadvantage then the respondent made adjustments.

56.13.2.3. The reason for the claimant not returning to work in a new role was not the absence of adjustments but the claimant's overly prescriptive response to the parameters of any new role.

56.13.2.4. In our judgment there is no evidence that any aspect of support that the claimant argues for would have alleviated a disadvantage not already dealt with by the adjustment made.

56.13.3. In respect of the section 15 claim there was no unfavourable treatment. The claimant was provided with support as had been set out. The claimant's complaint still arises from her stance that she would not work with her previous manager, that is not a consequence of her disabilities.

56.13.4. The claimant's claims pursuant to sections 15 and 20 in relation to this aspect is not well founded and is dismissed.

56.14. The claimant complains about the decision to dismiss her and the decision not to uphold her appeal against dismissal. She pursues these complaints under sections 15 and 20 EA 2010.

56.14.1. The claimant's claim pursuant to section 20 on both appeal and dismissal has no basis. The decision to dismiss the claimant was the result of a discretionary exercise as was the reason for refusing her appeal. There was no PCP in those circumstances.

56.14.2. The claimant's claim pursuant to section 15 is clearly without substance. Dismissal is unfavourable treatment. The claimant was to return to work after a long-term absence which was due to her disabilities. However, the claimant was not prepared to return to her substantive role or any role that could be offered to her. This was due to the claimant's insistence on specific parameters which meant there were no roles which could be offered to her which also fitted those parameters. Her absence had been due to her disabilities but her failure to return was not a consequence of those disabilities but the claimant's restrictive requirements.

56.14.3. If we were wrong about that we consider that the respondent has the defence of justification.

56.14.3.1. The respondent's legitimate aim was that someone it employed should be at work; in other words that both sides of the work wage bargain should be in place.

56.14.3.2. The respondent acted proportionately in our judgment. There is a need for an employee to provide service, otherwise there is a cost to the employer of employing others to fulfil a task which should be undertaken by the employee.

56.14.3.3. In this case the respondent had gone through a detailed process of attempting to return the claimant to work. The respondent had acted as reasonably necessary to achieve that

having kept the claimant as an employee, despite her absence, for a significant period.

56.14.3.4. Given that there was no prospect of the claimant returning to work because of the restrictive parameters the claimant placed on where she could work, it was appropriate for the respondent to dismiss at the stage it did.

56.14.4. The claimant's claims of discrimination based on dismissal and the failure of her appeal pursuant to sections 15 and 20 EA 2010 are not well founded and are dismissed.

57. A number of the claimant's claims of discrimination are outside the statutory time limit; most by a significant margin.

57.1. The claimant contends that there is a continuing act. Whilst the tribunal can accept that those matters which relate to the dignity at work complaint can properly be said to run together up to the point where the claimant is given the outcome. That cannot be said about events which relate to the claimant's absence from work from February 2015 onwards. The claimant includes a failure to provide her with the detailed outcome until December 2016. However, in our judgment this was a decision taken in February 2015 with ongoing consequences, not a continuing act.

57.2. Events after 2015 involve different individuals and different circumstances. The continuing act for the claimant appears to arise out of the fact that she would not work with her manager. This connects the claimant to all events but does not mean that there was a continuing state of affairs which links all actions.

57.3. There is no connection between the claimant's dismissal and the earlier events, that decision is entirely separate and related to the claimant's long absence and her unwillingness to return to her substantive role or accept any available role as redeployment.

57.4. The last event which the claimant claims amounts discrimination prior to dismissal is in the summer of 2016. The claimant presented her claim on 18 August 2017. Even if the tribunal were to consider that there had been an act which continued over a period, that means that the claimant's claim would be almost a year after the last act relied upon (removing the standstill period of 21 days for early conciliation). That means that the claimant's claims of discrimination are significantly outside the three-month time limit.

57.5. The claimant has provided no explanation for this delay other than reference to her health. Whilst that can explain some matters it does not explain the periods where the claimant was (a) working or (b) when she was able to return to work.

57.6. The claimant was complaining about her treatment and presenting detailed complaints in writing to the respondent. The claimant was therefore fully aware of the factual matters on which she considered she could base a claim.

57.7. In addition, the claimant was supported by a trade union representative throughout this process. The claimant was therefore in a position to seek advice to consider the legal basis for any discrimination claim.

57.8. The respondent has been asked to deal with events going back to 2013. Whilst the respondent gathered evidence at the time as a result of the claimant making complaints those were not directed towards an enquiry into discrimination as such.

57.9. The respondent was not able to call some witnesses it would have had the claimant claimed earlier. Some witnesses were less able to remember detail of events so long ago.

57.10. The tribunal has considered the claims of discrimination separately and as a whole. In terms we consider that there was no discrimination as claimed.

57.11. However, were we considered to be wrong about that, we are of the view that it would not be just and equitable to extend time for those claims prior to dismissal to be brought. The prejudice to the respondent outweighs the prejudice to the claimant, and the claimant has advanced no good reason why we should extend time.

58. The claimant's claim of unfair dismissal.

58.1. The respondent's reason for dismissing the claimant was capability that the claimant would or could not work in any role that the respondent could offer.

58.2. The respondent had sufficient evidence to support that conclusion. Having engaged with the claimant at several meetings.

58.3. The respondent had engaged in a lengthy process of attempting to find alternative work for the claimant and had discussed the possibility of adjusting work with her.

58.4. There was no prospect of the claimant returning to work in the foreseeable future.

58.5. In the circumstances, dismissal was a reasonable response to the available facts which had been obtained during a reasonable process.

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Employment Judge W Beard
Date: 4 November 2019

Order sent to Parties on 5 November 2019

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For the Tribunal Office