EMPLOYMENT TRIBUNALS

Claimant:	**Mrs N Rogers**	
Respondent:	**Brook Street Agency Limited**	
Heard at:	**Cardiff**	**On: 19, 20 and 21 August 2019**
Before:	**Employment Judge Harfield**	
	Members	**Ms WE Morgan**
		Mrs M Humphries

Representation:
Claimant: In person
Respondent: Ms Jennings (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

(a) the complaint of unfair dismissal is well founded and is upheld;
(b) the complaint of failure to make reasonable adjustments in relation to the provision of a fan is well founded and is upheld;
(c) the complaint of discrimination arising from disability (section 15 of the Equality Act) is not well founded and is dismissed.

REASONS

Introduction and background to the proceedings

1. By way of a claim form presented on 9 August 2017 the claimant brings claims of unfair dismissal and disability discrimination following an alleged dismissal on or around 11 May 2017. The claimant has epilepsy. The claimant worked as an agency worker employed by the respondent, who run an agency business. The claimant worked on assignment with Shared Services Connect Ltd ("SSCL"). The claimant's assignment with SSCL came to an end on 28 March 2017. She however remained an employee of the respondent. The claimant's case, as set out in her claim form, was

that on or around 11 May 2017 she received her P45 in the post which led her to believe that her contract of employment had been terminated. Acas early conciliation took place between 4 July 2017 and 1 August 2017.

2. By way of a response form dated 15 September 2017 the respondent denies the claims. In particular, the respondent denies that the claimant was dismissed, asserting that she was and indeed still remains an employee. Within the grounds of resistance, the respondent argues that the P45 was sent to the claimant in error as part of an automated process. Within the grounds of resistance as originally filed the respondent did not plead a fair reason for dismissal, were the Tribunal to find that the claimant had in fact been dismissed. The respondent simply argued that the claimant's complaint of ordinary unfair dismissal was unfounded as she had been told that her employment with the respondent was not impacted following termination of the assignment at SSCL, that there was no intention to dismiss the claimant, and that had there been an intention to dismiss the claimant she would also have received a letter serving her 2 weeks' contractual notice.

3. A case management preliminary hearing took place on 14 November 2017 at which the case was listed for an open preliminary hearing on the question of disability and whether the claim was presented in time. Disability was then conceded and further case management directions were made on 29 March 2018 to instead list the case for a full hearing. The directions were re-set at a further preliminary hearing on 21 December 2018. At that time the key issues were identified in the case [63] as:

    (a) Is the disability discrimination claim out of time?
    (b) Was the claimant dismissed?
    (c) Did the respondent apply a provision, criterion or practice that placed the claimant at a substantial disadvantage in comparison with persons who were not disabled;
    (d) Did the respondent dismiss the claimant for reasons specifically related to her disability?

4. The matter came before the Tribunal on 19 to 21 August 2019, on liability issues only. At the time the claim was issued the claimant had assistance from the Newport Citizens Advice Bureau. By the time the case came to a full hearing the claimant was a litigant in person (which is not unusual).

5. At the start of the claim the respondent made an application to amend their grounds of resistance to run an alternative argument that if there was a dismissal, that it was for the fair reason of "some other substantial reason, pursuant to s98(1)(b) ERA 1996, in that dismissal was in accordance with the claimant's terms and conditions of employment, specifically clause 7.5." The amendment was allowed by the Respondent on a majority basis. The

amended grounds of resistance are at [136A]. Oral reasons explaining why the amendment was granted were provided at the time and will not be repeated here save as to observe that during the currency of the proceedings the claimant had located a letter she had received from the respondent dated 11 May 2017 which says, amongst other things, "we hereby give you notice that your employment will be terminated with effect from 19/05/2017." The letter on the face of it clashes with the respondent's assertion at paragraph 59 of their grounds of resistance [38] that if they had intended to terminate the claimant's employment then the claimant would have received a letter serving her with 2 weeks' contractual notice in line with clause 7.2 of the Terms and Conditions of Employment for Temporary Employees.

6. The claimant emailed a photograph of the letter to the Tribunal and to the respondent on 25 March 2019. For reasons more fully explored in the amendment application the respondent's solicitor at the time did not realise that email attachment was there and it was only appreciated in the run up to the hearing when the claimant was chasing up the document's insertion into the hearing bundle.

7. During the proceedings the respondent's counsel drew attention to the fact that the claimant's witness statement (paragraph 8) complains that she was given shifts on her own, which she asserted would be dangerous in case she had a seizure, and that when she mentioned this to the respondent she was advised there was nothing the claimant could do because she had accepted the shifts. This is the first time that factual allegation had been made; it is not within the claimant's claim form as presented. The claimant was asked whether she wished to amend her claim to include it as a factual allegation and, in turn, a complaint about an alleged failure to make a reasonable adjustment. After time for consideration the claimant confirmed that she did wish to make an amendment and permission was given for the amendment as set out within the claimant's witness statement. The respondent submitted a further document to deal with the point which was inserted in the bundle at [136B].

8. Ms Jennings for the respondent, again quite properly, also questioned whether a particular complaint the claimant makes in her claim form and her witness statement about not being given a fan, could fit within the reasonable adjustment's claim as pleaded by the claimant. The claim form pleads a broad provision, criterion or practice of "all employees on the assignment at SSCL were required to deal with SSCL Management themselves, communicating any personal information regarding their ill health and requesting any adjustment to their working conditions themselves. The tribunal broached with Ms Jennings whether the complaint should in fact be considered as a failure to provide an auxiliary aid (which is not the claimant's pleaded case on reasonable adjustments). Ms Jennings, however, ultimately indicated that whilst the respondent did not admit that the

provision, criterion or practice was applied, she did not consider that the fan could not be fitted in to the provision, criterion or practice (if found to apply) even if it were via a somewhat circuitous route. As such the Tribunal did not pursue further whether any further application to amend was required.

9. At the hearing we heard evidence from the claimant and from her mother, Ms Sheedy. We heard evidence from Ms Eagle and Ms Gibby for the respondent. The respondent relied upon written submissions which Ms Jennings provided to the claimant in good time and were written in an accessible style; for which the Tribunal is grateful. We received oral submissions from both parties. There was not sufficient time within the listing to reach a decision and therefore judgment was reserved. The Tribunal subsequently held a chambers day before preparation of this written reserved judgment. References to numbers in brackets [ ] are references to the page numbers in the hearing bundle.

Findings of fact

10. The background and findings of fact necessary to decide the issues in this case are as follows. Where there is any factual dispute between the parties the Tribunal reached a decision applying the balance of probabilities. To reach a decision in the case it has not been necessary to decide all of the disputes of fact that may exist between the parties.

The claimant's first assignment and her pregnancy

11. On 13 February 2015 the claimant joined the respondent's agency. The respondent's agency functions by directly employing the agency staff who are placed on assignment with a third party client/ end user.

12. It is not in dispute that the claimant, on joining the respondent and as part of their onboarding process, disclosed she had epilepsy that was controlled by medication [70]. The respondent made no other enquiries of the claimant at the time about her condition or if she had any particular needs or safety considerations. Likewise, the claimant made no specific requests of the respondent at that time.

13. The claimant was placed on assigned at SSCL. Her line manager at the time at SSCL was HL. The claimant's contact at the respondent was Ms Eagle who was the Team Leader for public sector clients. She was assisted by Ms Gibby who reported to Ms Eagle.

14. The claimant became pregnant. On medical advice she stopped taking her medication. On a date in August 2015, after attending her first scan, the claimant visited the respondent's Newport offices and told the staff that she was pregnant. There is a dispute of fact as to what the claimant told the

respondent at that time. The respondent states the claimant did not tell them that she had stopped taking medication or that she was at greater risk of having seizures. The claimant states that she did tell the respondent that she had stopped taking her medication. But she also stated in evidence that she did not really ask the respondent to do anything at that point in time. The tribunal considers it is likely that there was only a brief conversation on that date and that it is unlikely that the claimant told the respondent at that time that she had stopped taking her medication, or that she was at increased risk of seizures or that she asked them then about taking any particular steps either relating to her pregnancy or her epilepsy.

15. At some point after that date the claimant did have a conversation with her line manager at SSCL about undertaking a risk assessment as a result of combined concerns about her pregnancy and her epilepsy and the potential for both to impact on the other. There is a dispute of fact as to whether and in what terms the respondent was asked about undertaking a risk assessment and whether that related to the claimant's pregnancy and/or epilepsy. The tribunal accepts that it is likely that HL initially told the claimant that the respondent, as employer, had to be asked about undertaking a risk assessment. The tribunal also accepts that it is likely that HL told the claimant that the respondent's response was that an individual risk assessment was not needed as they had undertaken a risk assessment on the whole building.

16. The claimant states that she also spoke directly herself with Ms Eagle who again told the claimant that they did not need to do a risk assessment as one had been done on the whole building. Ms Eagle, in evidence, could not remember saying this or indeed the claimant asking her for an assessment. Ms Eagle said that the respondent does not assess government buildings, and that any desk assessment is carried out by the client. Ms Eagle said that as a matter of policy the respondent does not undertake pregnancy assessments. In cross examination of the claimant it was accepted by the respondent in questioning that the claimant had asked for a desk assessment but it was put to the claimant that her request was for pregnancy reasons and not related to the claimant having epilepsy. The claimant said in cross examination that she had asked for a desk assessment and that the respondent should not have assumed it only related to pregnancy and should have made enquiries of the claimant. She therefore accepted that she had not expressly linked the request for an assessment with her epilepsy.

17. The tribunal finds it is likely that the claimant did ask the respondent for a risk assessment but that it is also likely that the claimant was not very clear in the terms of exactly what she was seeking and why. We consider it is likely that she was, in response, told words to the effect by Ms Eagle that the respondent did not step in to undertake individual risk or desk assessments. We consider it likely that the respondent did not appreciate

that the claimant had stopped taking her medication due to her pregnancy, and that she was asking for an assessment because of an increased risk of seizures. The respondent made no proactive enquiries with the claimant in that regard and likewise the tribunal finds that the claimant was not clear in what she was telling the respondent.

18. The claimant had a good working relationship with HL who took an interest in the claimant's condition. In view of the responses received from the respondent, HL visited the Epilepsy Action website and downloaded a form that guided users through a risk assessment process. HL and the claimant sat down and filled out the form together and HL then put a plan in place which included the following steps:

    - Ensuring there was a first aider in the room the claimant worked in;
    - Placing a fan on the claimant's desk;
    - Providing the claimant with a different chair;
    - Educating, at a team meeting, the claimant's colleagues about the different seizures the claimant could have, what to look out for, and what to do/ not do in response.

19. The claimant did not tell the respondent about the details of the plan. At that time, despite having come off her medication, the claimant had not started having seizures.

20. As the claimant's pregnancy progressed she had a period of pregnancy related sickness absence November and/or December 2015. The claimant states she was run down and stressed and that her medical practitioners were concerned about the prospect of her starting to have seizures. The claimant's GP recommended that she reduce her working hours to 4 days a week, which the respondent ultimately accommodated.

21. Again, there is a dispute of fact as to the respondent's knowledge at that time. The certificates provided by the GP were not before the Tribunal in evidence. The claimant stated that the certificates stated that the claimant had started having seizures again as they were not under control. The claimant said that before her maternity leave started she had one seizure which happened outside of work. Ms Eagle said that the reduction in hours was accommodated because of the claimant's pregnancy. She also accepted that when the claimant had been signed off work by her GP that the sicknotes did mention pregnancy related epilepsy but that she was not aware of the claimant having seizures. It was evident to the Tribunal that Ms Eagle had not really thought about what the term pregnancy related epilepsy could mean given that she knew the claimant had epilepsy before she ever became pregnant.

22. The Tribunal accepts that Ms Eagle was not aware that the claimant was having or had had a seizure or seizures. Ms Eagle had a poor understanding of the implications of the claimant being pregnant as an individual with epilepsy. This was both because it is likely the claimant was not clear with the respondent about her condition at the time and also because the respondent was not proactive in making enquiries with the claimant to fully understand her condition and any particular needs she may have, or changes in her condition, in light of the claimant's pregnancy.

23. The claimant worked 4 days a week until January 2016 and she then had to start her maternity leave early.

The claimant's maternity leave

24. There was no contact between the claimant and the respondent during her maternity leave other than administrative matters such as holiday pay.

The claimant's return to work

25. In November 2016 the claimant was looking to return to work but at the time the respondent only had night shifts available. The claimant therefore waited until day shift work became available. The opportunity then came up for the claimant to return to SSCL on a second assignment. Arrangements were made in January 2017, such as an updated DRB check, and the claimant returned to work on 6 February 2017.

26. The claimant had hoped to return to her former role but that team had been disbanded during her absence on maternity leave. She therefore returned to a new role with a new line manager at SSCL, JB.

27. Again, there is a dispute of fact as to the respondent's knowledge on the claimant's return to work. After the birth of her child the claimant restarted her epilepsy medication but unfortunately it failed to bring her condition back under control. The claimant states that on her return to work the respondent was aware that whilst she was back taking medication but her condition was not under control. The respondent disputes this stating they believed that the claimant's condition was still under control.

28. The claimant was unclear in evidence as to who she says was told what and when and her answers sometimes instead said that the respondent *should* have been aware or that they should have elicited the information by proactively making enquiries with her.

29. There was no second onboarding process and therefore no set form or questions and answered asked between the respondent and the claimant to elicit up to date information about the claimant's condition.

30. The Tribunal concludes on the balance of probabilities that on the claimant's return to work the respondent did not know that the claimant's condition was no longer controlled by medication. This is because the respondent did not proactively make enquiries and the claimant did not volunteer the information at that point in time.

31. The claimant's new line manager, JB, had not been told about the claimant's condition by the respondent. A couple of days after the claimant started her assignment she had a general brief introductory chat with JB in which she found out that JB was unaware of her condition. The claimant tried to tell JB about the two main types of seizure she may have and what to look out for. JB struggled to understand what she was telling him and he went to get a first aider to join in the conversation. The claimant tried again to explain, and in particular explain absence seizures, but neither JB nor the first aider appeared to fully understand. It was a brief conversation and there was no detailed discussion about any adjustments or arrangements the claimant may need.

32. A couple of days later the claimant had a grand mal seizure in work. She happened to be in the toilet with a friend at the time who knew what to do. The claimant told JB what had happened. The claimant felt increasingly scared and vulnerable in work as her seizures were not under control and she did not have the same kind of arrangements in place, or colleagues with knowledge of her condition and what to do, as she had had with her previous line manager, HL.

The claimant's email of 15 February 2017 and subsequent request for a medical report

33. On 15 February 2017 the claimant emailed [88] Ms Gibby to say:

> "Good Afternoon Sara, Just want to let you know my epilepsy is not stable at the moment and I am having seizures on a regular basis. Most seizures I can handle by myself but I'm not sure if I need to chat with you? Or my line manager etc? I have actually had one in work today so would like to sort this out as soon as possible so I feel safe here. Thanks Nicol Rogers/Ashman"

34. Ms Gibby passed this email message on to Ms Eagle who sent the claimant a text message [90] asking the claimant to call Ms Eagle saying: "need to check you are ok – thanks."

35. The claimant called Ms Eagle back. Ms Eagle initially told the claimant that the respondent needed a letter from the claimant's specialist confirming that the claimant was fit to be in work and addressing any adjustments that were required. The claimant became upset that this request was being made and

in particular that she was being required to get medical evidence to prove she was fit to be in work. The claimant protested that a report from a specialist would take too long. Ms Eagle stated that a report from the claimant's GP instead would suffice.

36. Ms Eagle followed the phone call up with an email [91] headed "Doctor's letter required – Urgent." The email stated:

> "We now require, as your employer, a note or letter from your Doctor to confirm that you are fit for work and to suggest what measures or adjustments they recommend to ensure that you are working safely. Please can you give this request your immediate attention and forward the note or letter directly to me."

37. The next day Ms Eagle telephoned JB. A summary of the call is at [92]. It records:

> "He is aware of her situation with regard to possible fits – spoken to her and she says that heat appears to be a trigger – he has now arranged for a desk fan to be placed on her desk. They have made her colleagues aware of the situation and they will all "keep an eye" on her."

38. The claimant doubts that this call between Ms Eagle and JB took place or that it took place in those terms. In particular she disputes that SSCL had made her colleagues aware of her situation or that they had been asked, or indeed trained, in how to "keep an eye" on her.

39. The Tribunal did not hear from JB (or indeed anyone from SSCL). The note appears to be a contemporaneous one and the Tribunal accepts that the note reflects the gist of the conversation between JB and Ms Eagle. That it is what JB told Ms Eagle is of course not the same as a finding that this is what actually had happened on the ground at SSCL.

The request for a fan

40. On 16 February 2017 Ms Eagle therefore learned from JB that the claimant considered that heat may be a trigger and that she needed a desk fan. The claimant cannot now recall the conversation with JB when she first spoke to him about a fan although it appears likely the conversation between the claimant and JB about the fan did take place. Ms Eagle was also told initially by JB that he had arranged for a fan on the claimant's desk.

41. That purported solution was not, however, successful as in fact SSCL did not give the claimant her own fan and she had to share with a colleague who was a permanent member of staff at SSCL. The claimant said, which

we accept, that this meant she only got a share of the fan when her colleague was not in work (for example, at the start or end of a shift).

42. The Tribunal is satisfied that at some point Ms Eagle became aware that the claimant did not have her own fan. Neither the claimant nor Ms Eagle could now recall in much detail their ongoing discussions between them about the fan, which the Tribunal accepts is due to the passage of time since the events in question. However, the Tribunal is satisfied that on a date after 16 February 2017 the claimant did ask Ms Eagle for her own fan and that Ms Eagle was aware the claimant was saying she needed her own fan. The Tribunal also considers it likely that the claimant and Ms Eagle had several discussions about it as time moved on. The Tribunal is also satisfied that it became clear to Ms Eagle that the issue was one of importance to the claimant. In particular it is not in dispute that on a date after 16 February 2017 the claimant's mother attended the respondent's Newport office and spoke to Ms Eagle about the fan. The claimant's mother in fact offered to herself buy a fan for the claimant to use in work to try to solve the problem/speed up a resolution but Ms Eagle told her it was not that simple as the fan would need to be PAT tested. Ms Eagle was waiting to receive the GP report before purchasing the fan for the claimant.

Lone working and knowledge within the SSCL workforce of the claimant's condition

43. At around the same time the claimant also became concerned about the prospect of lone working on her floor in SSCL if she had to work a shift finishing at 6pm. The claimant discussed this with JB who told her to speak to the respondent. The claimant says that she spoke with Ms Eagle. Ms Eagle cannot now recall a discussion with the claimant on this issue and said that given her knowledge of the number of staff working at SSCL, including on the floor that the claimant was based on, she would be surprised if the claimant was lone working. The Tribunal accepts that a discussion is likely to have taken place between the claimant and Ms Eagle on the issue in some format. The Tribunal finds it is likely that the claimant expressed concern to Ms Eagle about the potential for lone working if she worked a later shift and that Ms Eagle stated words to the effect that the claimant had agreed to work the hours and was therefore committed to work them. The Tribunal considers it likely that the claimant did not clearly tell Ms Eagle that she was concerned about working by herself because of the potential risk were she to have a seizure. The Tribunal also finds, as a matter of fact that the claimant was unlikely to be based on a floor entirely by herself when working a shift finishing at 6pm as whilst the claimant worked within a relatively small team the Tribunal accepts that there were others working on the floor in general.

44. The Tribunal considers that the claimant's concerns in fact related more to her worries about others on the floor (including those outside her team if she were working a later shift) not knowing about her condition and not knowing what to do were the claimant to have a seizure. The claimant had confided in a colleague, Nicole, about her condition but was not aware of JB having told anyone else about her condition. She wanted others to be educated about her condition as it would help her feel safe in the workplace and this is what her previous team leader, HL had done. The claimant stated in evidence that she had asked JB, although she was not now very clear on the details of their discussions or when they took place. The claimant accepted that she had not told him what HL had done in the past. The Tribunal accepts that it is likely the claimant asked JB about training colleagues and that she did not receive a very committal response. However, the Tribunal also accepts that the claimant did not expressly tell Ms Eagle of her concerns or her wishes in that regard to help her feel safe in the workplace and likewise Ms Eagle was not told by JB or anyone else in SSCL. Ms Eagle or anyone else at the respondent did not pro-actively consider the issue.

The latter part of February 2017

45. Ms Eagle chased the claimant's GP appointment and report by email on 21 February 2017 [93]. The Tribunal finds it is likely that led to a discussion between them about who would pay for the report and on 22 February 2017 [94], and again on 25 February 2017 [95] Ms Eagle confirmed that the respondent would fund the report.

46. In the week commencing 20 February 2017 the claimant took 3 days' annual leave which had been prebooked before she started the assignment.

47. On Monday 27 February 2017 the claimant did not attend work. Her husband had left her at the weekend. The respondent runs a night service message system who had told SH, the HR Services Operations Lead at SSCL that the claimant would not be in work for "personal reasons" [96]. The claimant was open with the respondent about the reason for her absence.

March 2017

48. SSCL pressed the respondent for updates and details on when the claimant would return to work. The claimant continued to be off work as the week progressed and saw her GP on 2 March 2017. At that time the GP also produced an invoice for the report the respondent had requested, stating payment was required in advance to release the report [102 and 103].

49. On 3 March 2017 the claimant gave the respondent a self-certificate form [105] stating she had been absent with "stress, depression -epilepsy

related." The claimant states that the personal issues in her life caused her stress which in turn led to seizures. Ms Eagle stated, and the Tribunal accepts, she was surprised by the content of the note as she had understood the trigger for the claimant's absence was the issues in her private life and whilst she understood that may cause stress or depression, she had not understood the claimant to be absent due to epilepsy related stress and depression. The claimant also passed on the GP's invoice.

50. It is clear that SSCL were becoming increasingly concerned about the claimant's attendance. On 7 March 2017 the claimant was half an hour late for work because she had a break in at home. This was initially recorded by SSCL as the claimant having a "brick put through her door" [108] which the Tribunal considers was likely to have been caused by a mishearing of the words "break in." SH reported the lateness to the respondent [106]. On 8 March SH asked Ms Eagle if she would be holding a return work meeting with the claimant following the claimant's absence the week before. Arrangements were made for Ms Eagle to meet with the claimant on site on 9 March 2017 [110]. SH expressed concerns to Ms Eagle about "regular and effective service" [110].

51. On 8 March 2017 the claimant emailed the respondent [109] to say:

> "Thank you for being so understanding about last week and I did provide a sick note when I popped in. Also I gave you the Doctors invoice and I am unsure what happens from here? Do you just pay and request it or do you give me the money?"

52. The claimant was in work from 8 March 2017 until 27 March 2017. She did not attend on 27 March 2017 because over the weekend of 25/26 March 2017 she suffered a serious seizure at home and injured her tongue. She states it was likely to have been triggered by an ear infection. Ms Gibby emailed SSCL to state the claimant would not be in work due to the after effects of a seizure [114]. SH made contact with Ms Eagle saying "Can I ask, did she supply the GP's letter regarding her 'Epilepsy' as requested" [115]. Ms Eagle responded to explain the claimant's husband was due to drop the letter in that day and that she would keep SH updated if it arrives.

28 March 2017

53. The claimant returned to work on 28 March 2017. SH asked the claimant why she had been absent the day before and the claimant stated it was because of an ear infection. SH emailed Ms Eagle [116] to confirm that the claimant had returned to work and said:

> "Can you confirm the reason why she was off yesterday? She has advised she has an 'ear infection' this morning not sure if this was

> the reason for her absence or her seizure? Also can you confirm if you have now received the letter from her GP regarding her Epilepsy as promised yesterday?"

54. Ms Eagle responded to state the report had been received and that the message on the night service did not mention an ear infection, only a seizure, and that she would ask the claimant to give her a call to discuss.

55. The GP report at [103] states:

> "I am writing as this patient's GP and can confirm that she has epilepsy and is under the care of a consultant neurologist. She has been put her on medication to control her symptoms and this dose is increasing slowly to reach her target treatment dose.
>
> Currently Nicol works in an office, doing HR and admin and I can see no reason why her condition should stop her working. Nicol advised me that heat is a trigger and a fan can be helpful to prevent this. She also feels that a manageable work load can help control her condition."

The claimant said in evidence she did not have issues with her workload.

56. Ms Eagle and the claimant spoke by telephone. The claimant became upset and angry at the questions asked as she felt that she was being accused of having lied about the reason for her absence. She said in evidence that she had been intending to speak with Ms Eagle about the fan that she was still waiting for and that she felt Ms Eagle took over the call and was asking lots of questions.

57. The claimant sent the respondent the email at [117] which states:

> "I am really unhappy with the phone call that I have just had with Lindsey & the way I am being treated by yourself and SSCL. By the way its not Lindsey that I am unhappy with.
>
> I have already spoken to yourself and night service about why I wasn't in yesterday and it was understood that I had an epileptic seizure as I had an infection (ear) and I have already explained to brook street on several occasions that I have seizures mainly due to infections and illness. This message should have been passed on to SSCL and I should not have to explain myself or be questioned about my disability or made out to be a liar on my return.
>
> When I came back I made people aware that I am currently going back on the correct dose of medication and seizures may occur. I do not feel like Brook Street or SSCL have taken any steps to make

> me feel safe in my work place. The last time I was here there was a plan put in place by SSCL (as brook street advised there was no desk assessment needed) yet I wasn't having seizures I was just off medication due to pregnancy. I am no longer pregnant but I am still have Epilepsy. This might not mean much to you but this is a condition that affects me daily.
>
> I have been back for 8 weeks now and have had several seizures at my desk (Petimals) or Partial Seizures and not one person has noticed other than the person I sit next to (they grew up with epilepsy). I can cope with these and can just get on with my work after. But its not very nice knowing something bad could happen to me and no one could notice. Please keep in mind I sit on a pod with my line manager and Team leader and Operational manager.
>
> I have had 2 grand-mals and have had to run off and hide in the disabled toilet due to the fact I don't feel like I could just have one at my desk as my team members have not been made aware even though I have asked on a few occasions for it to be brought to their attention and that I am worried of their reaction. I remained in work both times even though I was in pain and in shock as one came out of nowhere yet no one really knew what to do.
>
> When speaking to SSCL about this matter all I get is that because I'm an agency worker I need to speak to you, but I do not feel like anything is being done on your end.
>
> Granted you are trying to get me a fan but this was requested over three weeks ago. Why is my health being passed about between yourself and SSCL like I mean nothing?"

58. After sending the email the claimant became increasingly upset in work and left so that she could go and meet with Ms Eagle and Ms Gibby. The meeting took place at 2pm. The notes are at [122 – 123]. The claimant did not generally dispute, in evidence, the accuracy of those notes.

59. The notes show the claimant stating it was very unfair that the doctor's note had been requested and that LE had stated "we had a duty of care to NA to ensure that she was well and fit for work. LE stated that we were aware that she was diagnosed with pregnancy related epilepsy as we had received a Doctor's note stating this previously." The claimant pointed out at the meeting she had had epilepsy since a child.

60. The notes also state in relation to the fan "LE confirmed that we have received the Doctors report this morning and that she was due to purchase the fan required today" and "NA was very unhappy that SSCL did not give her a fan and that she had to share a fan with a perm member of SSCL

staff. LE explained that as soon as we received the doctor's report we were going to purchase a fan. As we had received this today a fan would have been purchased today."

61. On the issue of a desk assessment the notes state:

> "LE asked NA who she had asked for a desk assessment - LE was aware that this had been requested during NA's previous assignment at SCCL but had not been made aware of a request since NA had returned in the last 8 weeks. NA thinks that she had mentioned it to her TL (Jamie)."

62. In relation to monitoring of the claimant's health, LE stated that "SSCL had been informed of her condition and we had requested that they monitor her where possible." The notes record the claimant stating she did not feel safe at SSCL and that LE mentioned there were first aiders on site. The claimant stated she was positioned quite a distance from them and that if she had received a desk assessment she could have requested a move close to them. The claimant also complained that the first aiders had not spoken to her about her epilepsy, that the team leaders had not discussed it with her or taken an interest as HL had done previously and had not made the team aware. Ms Eagle stated that it was not part of the first aiders role to discuss a person's confidential information and that team leaders also had a responsibility to keep confidential information to themselves.

63. The notes record the claimant stating that she was unhappy with her treatment by SCCL and the respondent and she wanted to make a formal complaint. The claimant also stated that she did not "want to return to SSCL and has taken the decision to end her assignment with immediate effect." In response Ms Eagle "informed NA that she is still employed by Brook Street and we would do everything we can to find her another assignment."

64. The notes state the meeting concluded with the claimant stating she was unsure about what she wanted to do going forward and so she would have a think about it and come back to the respondent probably by the end of the week.

Events after the ending of the assignment at SSCL

65. On 29 March 2017 Ms Eagle emailed the claimant stating "in line with your contract of employment, termination of your assignment is not termination of your employment and you remain employed by Brook Street. Further to the above, we discussed that we would prioritise seeking alternative assignments for you and additionally you are welcome to apply for suitable roles that you find on our website." Ms Eagle also provided a copy of the

respondent's grievance procedure and invited the claimant to send across her grievance.

66. The respondents operate a system whereby after 28 days if an agency worker has not accepted a new assignment or contacted the agency to confirm their availability for work, their employment is automatically brought to an end. In particular, paragraph 7.5 of the Terms and Conditions of Employment for Temporary Employees [83] states:

> "You are obliged to work when required by Brook Street. You acknowledge that Brook Street may terminate your employment if, in Brook Street's sole discretionary opinion, you unreasonably refuse to undertake an Assignment offered to you. In particular, following the end of an Assignment you will be provided with information on potential future Assignments. If you do not accept a new Assignment within 4 weeks of the end of your last Assignment or if you fail to contact Brook Street within that period of time to confirm your availability for work, Brook Street may terminate your employment."

67. Ms Eagle had a discussion with HR about stopping that automatic "write off" in the claimant's case. On 4 April 2017 Ms McKrill in HR emailed payroll, copying in Ms Eagle, saying "please can you stop the right- off for Nicol Ashman… Kindly confirm once you have actioned this" [128].

68. Also on 4 April Ms Eagle emailed the claimant with details of a vacancy with the Ministry of Justice I Cwmbran [129]. The claimant contacted Ms Eagle to say the role was not appropriate for her as she was unable to drive.

69. On 11 April 2017 Ms Eagle emailed the claimant with details of a vacancy at the Intellectual Property Office in Newport [131]. The claimant contacted Ms Eagle to state she could not commit to full time working at that point in time.

70. Meanwhile on 10 April 2017 Ms Eagle chased up whether the claimant was still intending to pursue a complaint [130]. She also said:

> "However moving forward, should you have any further work related concerns whilst in assignment with Brook Street, I would encourage you to contact the branch as soon as you are able to ensure that you receive the appropriate support."

71. On 25 April 2017 the claimant telephoned Ms Eagle and spoke with Ms Gibby. Ms Eagle then emailed the claimant [133] asking her to confirm whether she was intending to make a complaint directly to SSCL and trying to clarify the claimant's intentions. The claimant responded on 27 April 2017 [133] to stated that she was going ahead with her complaint and requested

a copy of her staff file. Ms Eagle responded that day with details of how to may a subject access request [136].

72. There was no further contact between the claimant and Ms Eagle prior to the letter of 11 May 2017. Ms Eagle states that in the public sector team she led, there were no other vacancies that she could offer the claimant at that time. She passed on the claimant's details to the private sector agency team and encouraged the claimant (in the email set out above) to look out for vacancies on the website. Thereafter Ms Eagle did not review or monitor the claimant's situation or the offering of assignments to her. She did not double check that the automatic write off had been stopped.

Letter of 11 May 2017

73. Shortly after 11 May 2017 the claimant received in the post the letter at 136A, which is sent in the name of Ms Eagle. This states:

> "Thank you for completing your last assignment, which ended with us on 24/03/2017. We have not heard from you since then, but we would be happy to revisit your interest if you wish to seek further assignments with us in the future. However, as you are aware, it is a requirement of your employment contract that you stay in contact and attend assignments that may be offered to you. We appreciate that you may not have maintained contact for a variety of reasons, but in line with our policy we hereby give you notice that your employment will be terminated with effect from 19/05/2017. In the meantime, your P45 will be forwarded to you shortly and thank you once again for your work with Brook Street."

74. Shortly after this the claimant also received her P45 in the post.

75. As set out above, the respondent's position in these proceedings, until the start of the trial, was that the claimant had not been sent the letter of 11 May 2017. The respondent keeps no records or copies of correspondence automatically sent to its agency staff terminating their employment. It is now accepted that the letter was generated and sent (but not that it amounted to a dismissal), albeit the respondent says that it was by mistake and that the instruction to payroll to stop the write off process must have failed.

76. Ms Eagle's evidence was that whilst the letter was sent out in her name, she had no involvement in its sending and no knowledge of it being sent as it was automatically generated. The Tribunal accepts her evidence on this point and makes a finding of fact that it is likely the letter was generated and sent by mistake because the direction to stop the automatic write off process failed for some unknown reason.

77. The claimant states that in the period between 28 March 2017 and 11 May 2017 she was not ready to return to work. She was trying to figure out what was going on with her seizures and whether she could get them under control, and whether she could work full time or part time, when she then received the letter and P45 in the post.

78. The claimant's evidence is that she telephoned Ms Eagle to query her P45 as it missed off her maternity benefits. She states she was told that a new P45 would be sent. Ms Eagle could not recall the conversation. The Tribunal accepts it is likely that the claimant did telephone Ms Eagle to discuss her P45 and the maternity benefits. The claimant states that this shows that Ms Eagle was aware of the termination of her employment and that Ms Eagle did not say that the P45 had been sent in error and that the claimant was still employed. It does not, however, demonstrate that Ms Eagle was aware of the claimant having been sent the letter of 11 May 2017. Given the lack of contact by Ms Eagle after 25 April 2017 and the lack of her proactively monitoring the claimant's assignment situation, the Tribunal considers it likely that Ms Eagle was content to "let sleeping dogs lie" and simply did not turn her mind to the question of the claimant's ongoing employment status despite the claimant's call about her P45. Once the claimant telephoned Ms Eagle did not take any steps to find out what was happening and whether or not the claimant was officially still "on the books".

The relevant legal principles

Unfair Dismissal

79. Section 94 of the Employment Rights Act 1996 gives qualifying employees the right not to be unfairly dismissed. There is no dispute that the claimant qualifies for that right.

80. Section 95 sets out the circumstances in which there is a "dismissal." This includes where the contract under which the employee is employed is terminated by the employer, either with or without notice.

81. Section 98(1) states:

> "(1) In determining for the purposes of this Part whether 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."

82. Section 98(2)states:

> "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;
> (b) relates to the conduct of the employee;
> (c) is that the employee was redundant;
> (d) or that the employee could not continue to work in the position which he held with contravention (either on his part of on that of his employer) of a duty or restriction imposed by or under an enactment."

"Capability" is defined as the employee's capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

83. Section 98(4) states:

> "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 sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

84. Notice of dismissal can only generally be effective if and when received by the employee i.e. the dismissal has to be communicated to be effective. As a general rule, if an employer uses unambiguous words of dismissal, so understood by the employee, they will thereby dismiss the employee and terminate the contract of employment. If ambiguous words or actions are said to be in play, the Tribunal has to ask how they would have been understood by a reasonable recipient, taking into account what the recipient knew about the circumstances. Later events can be taken into account in that interpretation provided that they are genuinely explanatory of what happened; *East Kent Hospitals University NHS Foundation Trust v Levy* UKEAT/0232/17/LA.

85. Even where unambiguous words are used, the case law suggests there can in limited circumstances be exceptions to the general rule. The classic example of such an exception is where words are spoken in the heat of the moment or under emotional stress, where those words can be withdrawn if it is done timeously or the recipient ought to know that the words should not be taken seriously so that the purported dismissal will be of no effect.

86. In *Willoughby v CF Capital* [2011] IRLR 198 it was said that in cases of alleged special circumstances the Tribunal has to consider was the person to whom the words were addressed entitled to assume that the decision which the words expressed was a conscious, rational decision? On the facts of that particular case the employer's actions, based on a mistaken belief that a mutual termination of employment had been agreed, did not amount to "special circumstances" so prevent the dismissal from taken effect. On the facts of that case any reasonable recipient of the dismissal letter in question would have read the letter in isolation as dismissal and the claimant was entitled to regard the letter as a conscious, rational decision. The employee was entitled to assume that the words of dismissal were a conscious, rational decision of the employer. The Employment Appeal Tribunal said:

> "If the fact than an employer… might in some way have been mistaken in issuing a letter of dismissal … were of itself a special circumstances, the exception would to our mind have overtaken the rule….Employees must often think that an employer is making a mistake in dismissing them; but they are still generally entitled to take a letter of dismissal… at face value."

87. The Employment Appeal Tribunal also made it clear that any special circumstances retraction must be made timeously:

> "… if a clearly expressed dismissal is not to be taken at face value it must be retracted in short order."

Duty to make reasonable adjustments

88. Sections 20 and 21 of the Equality Act state:

> "*20 Duty to make reasonable adjustments*
>
> (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.
>
> (4) The second requirement is a requirement, where a physical feature 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.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
>
> 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…"

89. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

90. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account where relevant the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

91. In *Environment Agency v Rowan* [2008] ICR 218 it was emphasised that an employment tribunal must first identify the "provision, criterion or practice" (if the reasonable adjustments claim is framed that way) applied by the

respondent, any non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.

92. In general, the concept of a "provision, criterion or practice" is to be construed widely. However, case law has indicated that there are some limits as to what can constitute a "provision, criterion or practice". In particular, there has to be an element of repetition, actual or potential. A genuine one-off decision which was not the application of a policy is unlikely to be a practice; *Nottingham City Transport Limited v Harvey* [2013] ALL ER (D) 267.

93. The purpose of considering how a non disabled comparator may be treated is to assess whether the disadvantage is linked to the disability.

94. Substantial disadvantage is such disadvantage as is more than minor or trivial; Section 212 Equality Act.

95. In *County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England* EAT/0068/17/DA His Honour Judge Shanks helpfully summarised the following additional propositions:

- It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which she relies and to demonstrate the substantial disadvantage to which she was put by it;
- It is also for the disabled person 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;
- The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;
- Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s)
- The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:
    - The extent to which taking the step wold prevent the effect in relation to which the duty is imposed;
    - The extent to which it is practicable to take the step;

  - The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities;
  - The extent of its financial and other resources;
  - The availability to it of financial or other assistance with respect to taking the step;
  - The nature of its activities and size of its undertaking;
- If the Tribunal finds that there has been a breach of the duty; it should identify clearly the "provision, criterion, or practice" the disadvantage suffered as a consequence of the "provision, criterion or practice" and the step(s) the respondent should have taken.

96. Consulting an employee or arranging for an occupational health or other assessment of his or her needs Is not in itself a reasonable adjustment. This is because such steps do not remove any disadvantage; *Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.*

Discrimination arising from disability

97. Section 15 of the Equality Act states:

> "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."

98. The approach to determining Section 15 claims was summarised by the Employment Appeal Tribunal in *Pnaiser v NHS England and Another* [2016] IRLR 170. This includes:

- In determining what caused the treatment complained about or what was the reason for it, the focus is on the reason in the mind of A. This is likely to require an examination of the conscious or unconscious thought process of A;
- The "something" that causes the unfavourable treatment need not be the main or sole reason, but must at least have a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it;
- Motives are not relevant;

- The tribunal must determine whether the reason or the cause is "something arising in consequence of B's disability";
- The expression "arising in consequence of" can describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link.
- Knowledge is only required of the disability. Knowledge is not required that the "something" leading to the unfavourable treatment is a consequence of the disability.

99. The claimant bears an initial burden of proof to prove facts from which the Tribunal could conclude that there was Section 15 discrimination. This means that the claimant has to show that:-

    (a) She was disabled at relevant times;
    (b) She has been subjected to unfavourable treatment;
    (c) A link between the disability and the "something" that is said to be the ground for the unfavourable treatment;
    (d) Evidence from which the Tribunal could infer that the "something" was an effective reason or cause of the unfavourable treatment.

100. If the claimant proves facts from which the Tribunal could conclude that there was Section 15 discrimination, the burden then shifts in accordance with Section 136 of the Equality Act 2010 to the respondent to prove a non discriminatory explanation or to justify the treatment under Section 15(1)(b). That said it is not necessarily an error of law to apply the two stage test and in many cases moving straight to the second stage (whether the respondent has discharged the burden) will be the appropriate course.

101. The respondent will successful defend the claim if it can prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim. Legitimate aims are not limited to what was in the mind of the employer at the time it carried out the unfavourable treatment. Deciding whether unfavourable treatment was proportionate will involve an objective balancing exercise between the reasonable needs of the respondent and the discriminatory effect on the claimant; *Hampson v Department of Education and Science* [1989 ICR 179.

The time limit for disability discrimination complaints.

102. The initial time limit for complaints under the Equality Act 2010 is 3 months starting with the date of the act of discrimination complained about. The effect of the early conciliation procedure is that, if the notification to ACAS is made within the initial time limit period, time is extended, at least, by the period of conciliation.

103. Under Section 123(3) of the Equality Act conduct extending over a period is to be treated as done at the end of the period and a failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on a failure to do something when either P does an act inconsistent with doing it, or if P does not do an inconsistent act, on the expiry of the period in which P might reasonably have been expected to make the adjustment.

104. Sections 123(3) and 123(4) therefore establish a default rule that time begins to run at the end of the period in which the employer might reasonably have been expected to comply with the relevant duty. The period in which the employer might reasonably have been expected to comply with its duty is assessed from the claimant's point of view, having regard to facts known or which ought reasonably to have been known by the claimant at the relevant time; *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640.

105. A tribunal may consider a complaint out of time if it considers it just and equitable to do so in the relevant circumstances.

The Issues to be Decided

106. A list of issues was only produced at case management stage in short form. As set out above, it summarises the key disputes between the parties rather than addressing every question that the Tribunal has to determine. The Tribunal understood that it had to decide the following (applying the case as summarised in the claimant's claim form):

Unfair dismissal

(a) Was the claimant dismissed?

(b) If so, what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held. The claimant in her claim form asserts that she had to take time away from work because of reasons related to her disability and it was because of her prolonged absence that the respondent dismissed her. She states she was unfairly dismissed on grounds of capability.

(c) If so, was the dismissal fair or unfair in accordance with Section 98(4) ERA?

Discrimination arising from disability

(d) Did the respondent treat the claimant unfavourably as follows (no comparator is needed):

- In terminating the claimant's contract of employment

(e) Did the following thing(s) arise in consequence of the claimant's disability:

- The claimant taking time away from work/ prolonged absence?

(f) Did the respondent treat the claimant unfavourably because of any of those things?

(g) If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

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

Failure to make reasonable adjustments

(i) Did the respondent know or could it reasonably have been expected to know the claimant was a person with a disability?

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

- All employees on assignment at SSCL were required to deal with SSCL Management themselves, communicating any personal information regarding their ill health and requesting any adjustment to their working conditions themselves.

(k) Did any PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? The claimant states in her claim form that as a result of her disability she needed additional assistance in the workplace and had looked to the respondent to provide this. She states that without this support to deal with SSCL and her general

working conditions in their offices she was unable to remain in work which resulted in her losing income and ultimately in losing her job.

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

(m) If so, were there steps that were not taken that could have been taken by the respondent to avoid the disadvantage? The claimant in her claim form simply says it would have been a reasonable adjustment to vary the requirement. It became apparent, in practical terms, however, in particular through considering the claimant's witness evidence in conjunction with her claim form, that the claimant was complaining about:

- The absence of any risk assessment or referral to occupational health;
- Not ensuring that her managers and team at SSCL were educated about her condition, what to look out for, and what to do/ not do if she were to have a seizure;
- The failure to provide a fan;
- That due to the shifts she was placed on she could end up lone working.

In relation to SSCL staff being educated about the claimant's condition etc, Ms Jennings written submissions did not address this as a particular topic area. The Tribunal drew to her attention that we understood it was an allegation the claimant was making relating to her reasonable adjustments claim (and which is referred to in the factual background in the claimant's claim form). Ms Jennings therefore provided oral submissions. It was dealt with in evidence.

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

Discrimination time limits

(o) Were the claimant's disability discrimination complaints presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA")? Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred, whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures and whether time should be extended on a "*just and equitable*" basis.

(p) It is not in dispute that the claimant's unfair dismissal claim was presented in time.

Submissions

107. We received written and oral submissions from the respondent's counsel. We received oral submissions from the claimant. We have taken these submissions into account.

Discussion and Decision

Unfair dismissal

Was there a dismissal?

108. The Tribunal was satisfied that there was a dismissal when the claimant received and read the letter of 11 May 2017 (so on or around 13 May 2017) which gave notice that her employment would be terminated with effect from 19 May 2017.

109. The Tribunal accepts it is likely that the respondent's attempt to stop the automatic write off of the claimant as an employee failed and therefore the letter of 11 May 2017 (and P45) were automatically generated by the respondent's systems. The Tribunal accepts that the letter of 11 May 2017 (or P45) was not sent with Ms Eagle's knowledge and that it was automatically generated in her name. The respondent's intentions are not, however, determinative of whether there was a dismissal.

110. The Tribunal considers that the wording used in the letter of 11 May 2017 is unambiguous words of dismissal. It says: "We appreciate you may not have maintained contact for a variety of reasons, but in line with our policy we hereby give you notice that your employment will be terminated with effect from 19/05/2017." The Tribunal also finds that those words were understood by the claimant as dismissing her. As such the letter dismissed the claimant and terminated the contract of employment. The Tribunal is not satisfied that on the facts here there are grounds for a special circumstance exception to the general rule that unambiguous words are to be taken to mean what they say. The Tribunal considers that any reasonable recipient of that letter would read it as a letter of dismissal and that the claimant, applying the principles in *Willoughby,* was entitled to regard the letter as a conscious, rational decision by the respondent to dismiss her. Further, whilst the respondent seeks to argue that there was a retraction of the dismissal by the date the ET3 was presented in September 2017 that was some 4 months later. The Tribunal does not accept that, even if it could be taken to amount to a purported retraction, is one made in a timeous manner.

111. Further, even if the wording of the letter of 11 May 2017 were considered to be ambiguous the Tribunal is of the view that, taking into account the what the claimant knew about all the circumstances, a reasonable recipient would still have considered it to be a termination of the claimant's employment. The claimant did not know that the write off request had been made. She was in receipt of the respondent's standard terms and conditions. She had been told by Ms Eagle on 28 March 2019 that she was still employed by Brook Street and they would do "everything we can to find her another assignment" and on 29 March again that they would prioritise seeking alternative assignments for the claimant. Assignments were then offered on 4 April and 11 April which the claimant subsequently rejected as not appropriate. There was then no further contact from the respondent to the claimant about assignments until the claimant received the letter of 11 May a month later. In view of the absence of contact about assignments and given the wording of the letter of 11 May 2017, the Tribunal considers that a reasonable recipient of the letter, taking into account what the claimant knew, would have considered that this was a letter of termination and therefore that the claimant was being dismissed.

Reason for dismissal

112. As the claimant was dismissed the next question for the Tribunal is whether there was a potentially fair reason for dismissal. As a result of the permitted amendment to the claimant's claim the respondent relies on dismissal in accordance with the claimant's terms and conditions of employment, specifically clause 7.5 as being "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held." The claimant submits that the reason for her dismissal was capability, through ill health (albeit also arguing that dismissal for that reason was unfair and discriminatory).

113. The Tribunal is satisfied that the reason for the claimant's dismissal was that due to some form of administrative or technical mistake, the direction given to stop the automatic "write off" of the claimant as an employee failed. As a result, under the respondent's systems, the claimant was automatically sent the letter and her P45. The Tribunal does not find there is sufficient evidence to demonstrate that the failure to stop the write off request was done as a deliberate act or as a conscious decision by any individual within the respondent. The Tribunal therefore does not find that the reason for the claimant's dismissal was a conscious decision by a decision maker that related to her health, capability or disability.

114. The question for the Tribunal is therefore whether this is a substantial reason of a kind such as to justify the dismissal of an employee holding the position of agency worker that the claimant held. The respondent argues

that the automatic write off operated in accordance with their terms and conditions. They argue that bearing in mind the respondent is an agency business with nationally thousands of staff going on and off their books every year, their automatic termination procedures are a sensible system to have in place and it is not practicable to meet or have individual discussions with every single employee.

115. Here, however, the claimant's dismissal did not happen by the simple application of the respondent's automated systems. Instead, the respondent tried to stop them and due to a mistake that attempt failed. That was the reason for the claimant's dismissal. The Tribunal therefore does not find that termination due to a mistake in the respondent's systems which failed to stop an automatic termination letter being sent amounts to a substantial reason of a kind that would justify the dismissal of an agency worker such as the claimant. It is not a substantial reason that justifies dismissal.

Fairness of the dismissal

116. In any event, even were the Tribunal to accept that the circumstances could amount to a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held, the Tribunal would find the claimant's dismissal unfair under section 98(4).

117. Nationally the respondent is a large organisation and the operation of their write off procedures are dealt with centrally. The claimant, in her particular circumstances, had been given a clear commitment that the respondent would do "everything we can to find her another assignment". Subsequent to that commitment the respondent attempted to stop their automatic write off process but that attempt failed. The Tribunal considers that any reasonable employer in the respondent's position and with the respondent's resources would have ensured that the request to stop the automatic termination of the claimant's employment succeeded so that she stayed "on the books". There is no evidence before the Tribunal that the email to payroll of 4 April 2017 was followed up on despite Ms McKrill asking for confirmation in her email that it had been actioned.

118. Further, any reasonable employer, given the claimant's particular circumstances and the commitment made to the claimant, would have taken steps to periodically review where they were with finding or offering assignments to the claimant and act proactively in trying to find a suitable position for the claimant. Any reasonable employer would have done more than Ms Eagle did who, whilst accepting in evidence that the responsibility

for managing the claimant's situation lay with her (until she herself left the organisation), just let matters rest once she had notified the claimant of the two public sector positions and having made the internal referral to the private sector team. Any reasonable employer, in the particular circumstances of the claimant's situation, would have, as already said, regularly reviewed what was happening and would have followed up both with the claimant and with the private sector team about what was happening, and would have continued to consider and discuss with the claimant what there was or was not available in the public sector side of the business. It was not reasonable to simply leave matters in the hands of the claimant. Whilst the respondent relies on the fact that the claimant was told she could apply for assignments via the website she was not directed that she had to do that. The email of 29 March 2017 simply says: "you are welcome to apply for suitable roles that you find on our website."

119. The Tribunal has borne in mind that under section 98(4) the Tribunal must not substitute its own decision for that of the respondent and that what must be considered is whether the respondent acted within a range of reasonable responses open to an employer. The Tribunal also acknowledges the respondent's argument that it may well be the case that not every dismissal of an employee by an agency due to the operation of automatic termination procedures that are provided for in the terms and conditions of employment would be unfair. However, each case has to be assessed on its own particular facts. Here on the particular circumstances of the claimant's situation as set out above, and taking into account the size and administrative resources of the respondent, the respondent acted outside the range of reasonable responses in treating the reason as a sufficient reason for dismissing the claimant.

Discrimination arising from disability

120. The respondent knew that the claimant was disabled.

121. The unfavourable treatment complained about in the claimant's claim form is the termination of her contract of employment. The Tribunal has found as a matter of fact that the claimant's contract was terminated due to an administrative or technical mistake by the respondent in failing to stop the automatic write off process for agency employees. The unfavourable treatment complained about was because of that mistake. The mistake did not arise in consequence of the claimant's disability. The test of causation is not a "but for" test. It is therefore not sufficient for the claimant to say that the automatic write off process happened because she was not working because of her disability[1]. The complaint of section 15 discrimination arising from disability is therefore not well founded and does not succeed.

[1] See for example *Ishola v Transport for London* EAT/0184/18 and *Dunn v Secretary of State for Justice and another* [2019] IRLR 298 CA.

Failure to make reasonable adjustments

122. The respondent knew that the claimant was a person with a disability.

123. The Tribunal has to consider whether there was a "provision, criterion or practice" in place that "All employees on assignment at SSCL were required to deal with SSCL Management themselves, communicating any personal information regarding their ill health and requesting any adjustment to their working conditions themselves."

124. The Tribunal is satisfied on the evidence available that there was such a practice in place. The evidence of Ms Eagle supported this. For example, she said in evidence:

- that the respondent does not assess government buildings;
- any desk assessment is carried out by the client end user;
- first aiders in the client end user are beyond the respondent's control;
- the respondent does not undertake pregnancy risk assessments;
- What SSCL disseminated to team leaders and what the team leaders did in relation to the claimant were outside of the respondent's control;
- The respondent could not breach confidentiality owed to agency employees by passing on health related information to employees at SCCL.

125. It is also supported by the claimant's own experiences that the Tribunal has made findings of fact about. This includes that the claimant had been told by her previous team leader, HL, and also by Ms Eagle herself that the respondent did not need to undertake a risk assessment when the claimant was pregnant and it was undertaken directly by HL at SSCL (but not on the instruction of or at the request of the respondent).

126. The Tribunal is therefore satisfied that in general terms the respondent did have a "hands off" practice such that agency employees placed at SSCL did have to deal or liaise directly with SSCL management themselves about health issues and/or adjustments needed to working conditions.

126. The next question is whether that provision, criterion or practice placed that the claimant at substantial disadvantage in comparison with persons who are not disabled. Part of the substantial disadvantage the claimant states she faced is that as a result of her disability she needed additional assistance in the workplace and had looked to the respondent to provide this. She states that without this support to deal with SSCL and her general working conditions in their offices she was unable to remain in work.

127. The Tribunal is satisfied that as a result of her epilepsy the claimant did need additional support in the workplace to maximise the prospects of her being safe and well. In particular, the provision of a fan and also the education of her team and other individuals working close to her so that they understood (a) the nature of the different types of the claimant's seizures and (b) what to do/ not to do if the claimant had a particular type of seizure. The tribunal accepts that the claimant did not feel safe in work without such provision.

128. The Tribunal accepts that the respondent's practice did place the claimant at a substantial disadvantage compared with persons who are not disabled. The respondent's practice of leaving day to day matters between the claimant and SSCL meant that the claimant had to deal directly with her team leader, JB, and try to describe her condition and seizures to him and try to get him to understand the importance of educating those around her. She was unsuccessful in doing so and was left feeling unsafe. It also left her without her own fan because SSCL would not give the claimant her own one as an agency worker. The Tribunal finds that the lack of support or direction or responsibility exercised by the respondent, as employer, and in leaving it to the claimant to deal directly with SSCL herself, did therefore place the claimant at a substantial disadvantage in her general working conditions when on placement at SSCL as she had, in effect, no one to enforce or provide what she needed.

129. The Tribunal next has to consider whether the respondent knew or reasonably could have been expected to know that the claimant was likely to be placed at such disadvantage. The Tribunal has found as a matter of fact that on a date after 16 February 2017 Ms Eagle became aware that the claimant was saying she needed her own fan and that she became aware it was an issue of importance to the claimant.

130. On the issue of educating colleagues in the workplace the Tribunal does not find that the respondent had the requisite knowledge. The Tribunal has found that the claimant did not tell the respondent the details of the plan that her previous team leader, HL, had put in place when the claimant was pregnant. The Tribunal has also found that on the claimant's return to work in February 2017 the respondent did not know that the claimant's condition was no longer controlled by medication. When the claimant informed the respondent that her condition was not stable on 15 February 2017 Ms Eagle spoke to JB on the 16 February 2017 and was told "they have made her colleagues aware of the situation and they will all "keep an eye" on her." The Tribunal has also found that when the claimant spoke with Ms Eagle about lone working she did not tell Ms Eagle that she was concerned because of the potential risk were she to have a seizure and that when the claimant was working at SSCL neither she nor anyone at SSCL told Ms

Eagle about the claimant's concerns about the need to educate those around her. The claimant did make Ms Eagle aware in her email of 28 March 2017 but that was the day that the claimant's assignment at SSCL came to an end. The Tribunal therefore does not find that the respondent knew or could reasonably have been expected to know that the claimant was placed at that particular disadvantage. There was therefore no duty on the respondent to take reasonable steps to avoid the disadvantage that the claimant faced in relation to the education of her colleagues at SSCL.

131. Turning to the question of taking reasonable steps to avoid the disadvantage of the claimant not having her own fan, the Tribunal is satisfied that the respondent was in breach of the duty. Ms Eagle's evidence was that she wanted the GP report before buying a fan and when asked why the fan could not just be bought without the report she said that she did not want to approach dealing with any particular needs of the claimant in a piecemeal fashion. A fan is an inexpensive, easily purchased piece of equipment. The Tribunal considers it would have been reasonable for the respondent to have purchased a fan for the claimant without waiting for the GP report. The respondent clearly understood the urgency given the claimant's mother's visit to their offices and her offer to buy one herself. The respondent did not need to approach adjustments on the basis of providing them all together at the same time.

132. As the respondent's counsel accepted that whilst it may not be a linear analysis the claimant's complaint about the provision of a fan could, in theory, fall within her pleaded provision, criterion or practice the Tribunal did not address the issue of a potential amendment to the claimant's claim to plead in the alternative the failure to provide an auxiliary aid. However, the Tribunal, on the same reasoning, would have found that the claimant was put at a substantial disadvantage without the provision of auxiliary aid (a fan) and that it would have been reasonable for the respondent to take steps to provide that auxiliary aid.

133. On the issue of lone working the Tribunal found as a matter of fact that the claimant was not likely to be subject to lone working and therefore the provision, criterion or practice would not place the claimant at a substantial disadvantage in that regard. Further, as already set out above, the respondent did not know and could not reasonably have been expected to know of that particular disadvantage as it related to the claimant's disability.

134. The claimant's complaints about a failure to undertake risk assessments or to refer her to occupational health cannot of themselves, on the law as summarised above, be a failure to make a reasonable adjustment.

Time limits for discrimination claim

135. When might the respondent have reasonably been expected to provide the claimant with a fan? This is a difficult question as there is no clear evidence, due to the passage of time, as to when Ms Eagle became aware the claimant did not have her own fan. The claimant in her email of 28 March 2017 said: "this was requested over 3 weeks ago." The Tribunal is therefore of the view that the fan should reasonably have been provided by the respondent some time around the 7 March 2017. As such Acas conciliation would need to be entered into by 6 June 2017 and it was not commenced until 4 July 2017.

136. The Tribunal, however, extends time on the basis that it is just and equitable to do so. By the time the limitation date came around the claimant had been dismissed and it is understandable that her primary focus, and of those advising her at the CAB was on challenging the dismissal (which was brought within time). Identifying the time limit in reasonable adjustments case is a difficult task and the delay is short and the respondent did not identify any prejudice.

Conclusion

137. In conclusion:

(a) the complaint of unfair dismissal is well founded and is upheld;
(b) the complaint of failure to make reasonable adjustments in relation to provision of a fan is well founded and is upheld;
(c) the complaint of discrimination arising from disability (section 15 of the Equality Act) is not well founded and is dismissed.

138. The matter must proceed to a remedy hearing unless the parties are able to agree a resolution between themselves. A telephone case management hearing will be listed before Employment Judge Harfield to discuss what directions are needed to get the case ready for a remedy hearing and to set a date. It would be helpful if the respondent, as the legally represented party, could send to the Tribunal and the claimant at least 2 clear days before the telephone hearing their views on evidence/directions needed to get the case ready for a remedy hearing.

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Employment Judge Harfield
Dated: 29 November 2019

JUDGMENT SENT TO THE PARTIES ON

……1 December 2019…….

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS