EMPLOYMENT TRIBUNALS

Claimant: Miss K Clark

Respondent: Kent & Medway NHS & Social Care Partnership Trust

Heard at: Ashford, Kent **On: 21, 22, 23, 24 & 25 May 2018**

Before: Employment Judge Wallis
Mrs S Dengate
Mr D Clay

Representation
Claimant: Mr F Wildman, consultant
Respondent: Mr S John, counsel

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent;
2. Part of the claim of direct discrimination was successful;
3. The other claims were dismissed upon withdrawal by the Claimant;
4. The remedy hearing will take place on 15 October 2018.

REASONS

1. Pursuant to Rule 63 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the following are the reasons provided by Acting Regional Employment Judge Davies in the absence of Employment Judge Wallis.

   On 25 May 2018 an oral judgment was given and a judgment sent to the parties on the 29 June 2018.

   By email dated the 12 July 2018 the Claimant's representative requested written reasons. A telephone case management discussion was held before

myself on the 28 March 2019 to give directions due to the continued absence of Employment Judge Wallis. Pursuant to that order, the parties have sent in an agreed note of the judgment to assist the Tribunal to provide these reasons.

Reasons

2. We find that the Claimant was unfairly dismissed and that the Respondents directed discriminated against the Claimant in refusing the Claimant an interview for a job that she applied for when the Claimant met the minimum requirements which should, as a disabled person, been automatic.

3. By a claim form received on 9 January 2017 the Claimant claimed discrimination because of disability and/or pregnancy or maternity. The Claimant also claimed unfair dismissal describing it as unfair selection for redundancy in the treatment she received before, during and after.

4. At a case management discussion on 3 April 2017 the Claimant, then unrepresented, was ordered to prepare a schedule of her claims identifying the statutory basis for each of them. She did her best to comply, but the resulting document was extremely lengthy and not easy to understand.

5. There was then a telephone case management discussion on 15 August 2017 at which the bare bones of the claims were identified, and an order made for the Claimant to prepare amendments of her schedule of events to identify which events she relies upon for each of her discrimination claims.

6. The claims were identified as set out below. The Claimant was also directed to indicate in her schedule the statutory basis for each claim. The Claimant's schedule was a narrative of all events rather than an iteration of claims, and although section numbers were added, it was not possible to understand how the requirements of each section related to the narrative, in other words, what claim was being made. In April 2018 the Claimant instructed Mr Wildman to represent her.

7. We began the hearing by trying to clarify the claims, then carried out the reading of statements and documents, and heard some evidence from the Claimant. However, it became increasingly apparent that we could not focus the evidence in the cross-examination without further details of the claims. As Mr John pointed out, there were about 63 allegations to be challenged, many of which were of a historical nature. We therefore adjourned the afternoon session of the first day so Mr Wildman could indicate the most serious and recent matters relied upon in the claims of discrimination, and to send that to Mr John as soon as possible. We suggested around six in number would be proportionate.

8. Accordingly, we were able to streamline the list of issues and focus on the most serious claims. We have set out below the claims identified in the August 2017 case management discussion, and have added in italics the issues identified by Mr Wildman for the Claimant.

Unfair Dismissal

9. What was the reason for the Claimant's dismissal? The Claimant's case is that there was not a genuine redundancy.

10. Was it, as the Respondent asserts, for the potentially fair reason of redundancy? Alternatively, was it, as the Claimant asserts, for the reason that the Claimant is disabled and in need on reasonable adjustments (and/or was pregnant – withdrawn by the Claimant).

11. If the reason was redundancy, was the dismissal reasonable in all the circumstances? In particular, was there consultation with the Claimant; were objective selection criteria fairly applied, and was there reasonable consideration of alternative work? Was the interview process engineered against the Claimant?

Disability

12. Was the Claimant disabled?

13. The Claimant relies on both her spinal problems and her depression/anxiety. The Respondent accepts that the Claimant's spinal problems are a disability. The Respondent does not accept the Claimant is disabled due to depression/anxiety at this stage.

14. The issue of whether the Claimant's son was disabled – was withdrawn by the Claimant.

Direct Discrimination

15. Did the Respondent treat the Claimant less favourably than it treated or would treat others?

16. The comparator is a hypothetical person who need to work at home on occasions for reasons other than disability. (but who did so because they needed to take strong medication which prohibited them from driving)

17. The less favourable treatment relied upon is:

    a) The Respondent originally attempted to use the Absence Management Policy with a view to being able to dismiss the Claimant eventually;

    b) When there was a reorganization the Respondent used that situation to secure the Claimant's dismissal;

    c) The Respondent tried to instruct the Claimant as to what drugs she should take to fit in with what the Respondent thought would be most likely to stop the Claimant from having time off sick;

    d) The Respondent tried to instruct the Claimant as to what medical treatments she should undergo;

    e) The Respondent imposed limitations on how the Claimant would be permitted to use her time off in lieu in an attempt to hamper the

Claimant's efforts at managing her disabilities;

f) The Respondent required the Claimant, and only the Claimant, to complete a time sheet;

g) The Respondent added a complaint about the Claimant's involvement in an 'It's a Knockout' charity event to the issues in an appeal that had nothing to do with it;

h) The Respondent refused the Claimant an interview for a job that she applied for when the Claimant met the minimum requirements which should, as a disabled person have been automatic;

i) The Respondent refused to accept the Claimant's appeal against the grievance outcome as 'out of time' which it was not.

18. Was this because of her disability (or her son's disability – withdrawn by the Claimant)

Discrimination arising from Disability

19. Was the Claimant treated unfavourably by the Respondent because of something arising in consequence of her disability; namely her need for time off?

20. The unfavourable treatment relied upon by the Claimant is:

a) Not conducting the Return to Work interviews soon after the Claimant's return to work when such interviews could have been productive;

b) Moving absence management on to a formal footing as soon as possible;

c) Issuing the Claimant with a First Written Warning without justification;

d) Doing nothing to progress a grievance that the Claimant first raised in April 2016, and later added to, for months which, if progressed, would have resolved many of the problems much sooner and with less physical and mental pain on the Claimant's part;

e) When addressing the grievance, simply ignoring many of the aspects of that grievance;

21. Can the Respondent show the alleged unfavourable treatment was a proportionate means of achieving a legitimate aim?

Duty to make reasonable adjustments

22. Did the Respondent apply a provision, criterion or practice (PCP) in requiring the Claimant to attend her workplace in order to work?

23. If so, did the PCP put the Claimant, as a disabled person, at a substantial disadvantage in comparison with persons who are not disabled? The substantial disadvantage was that the Claimant had to attend the workplace and this exacerbated her conditions;

24. If so, did the Respondent know about the disabilities and the disadvantage, or could they reasonably be expected to know (added by the Tribunal after discussion with the parties);

25. If so did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage? In particular:

    25.1 by allowing the Claimant to work from *home* if and when she suffered a flare up of her disabilities such that she needed to take drugs which would prohibit her from driving so as to attend work and/or meetings outside of her usual place of work. Historically these events had been uncommon during the time that the Claimant had been allowed this adjustment under her previous line manager;

    25.2 by allowing the Claimant time off for appointments.

26. Did a physical feature (the Claimant's work station) put the Claimant at a substantial disadvantage in comparison with person who are not disabled?

27. If so, did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage? In particular by providing the desk and chair as advised by Occupational Health and the provision of an adjustable arm for her computer monitor as recommended by Access to Work?

Pregnancy discrimination – withdrawn by the Claimant

28. Did the Respondent treat the Claimant unfavourably during her pregnancy?

29. Was this because she was pregnant?

Direct Sex Discrimination – withdrawn by the Claimant

30. Prior to the Claimant's pregnancy, did the Respondent treat the Claimant less favourably than it treats or would treat others?

31. Was this because of her sex?

Time Limits

32. Are one or more of the Claimant's discrimination claims out of time? If so, did the Respondent's conduct set out above extend over a period from September 2015 until the Claimant's appeal against the grievance outcome was rejected as out of time; or would it be just and equitable to

extend time?

Documents and Evidence

33. The Claimant complained that the Respondent had not complied with the Tribunal's directions and that when Mr Wildman was instructed he took on the preparation of the bundle. The Respondent said that their solicitor encountered personal difficulties in the month leading up to the hearing. This did not fully explain the delay, as the case management order had ensured that the matter was prepared months in advance of the hearing date. Nevertheless, it appeared that we had all of the documents that the parties wanted us to have, save for the notes of the two interviews during the grievance process, which was never explained. The Respondents produced two additional pages setting out the calculation of the scores, on the fourth day of the hearing. This simply tabulated the evidence we had heard.

34. We had statements from Reece Chapman, Assistant Director for Community Services Care Group, Dr M Gill, Lead for Physiological Practice, Nicola Taylor, Human Resources Advisor, Claire Pinfold, Business and Service Development Lead and the Claimant.

Findings of Fact

35. The Claimant was employed as a Band 5 Area Administration Manager from 24 January 2011 until dismissed by reason of redundancy on 28 October 2016. The Claimant has a Muscular Skeletal spine condition and also suffers with depression/anxiety.

36. The Claimant's manager up to around September 2015 had allowed her to work from home on occasions (page 284 of the bundle) but had concerns about her absence records and had set targets for attendance.

37. When Ms Pinfold became the Claimant's line manager, she was also concerned about the Claimant's absences. Occupational Health (see page 333 of the bundle). The Claimant told them that she felt that she would be able to work more comfortably from home when she was in pain, because she could take pain-killing medication, and they advised that she discuss this with her manager.

38. This was discussed. There was a dispute whether the Claimant said she could not drive while taking the strong medication, or whether she said she need to lie down for half an hour when in pain. Ms Pinfold's letter of 21 December 2015 set out her understanding of the situation, and said that she did not want the Claimant to work when 'the pain was bad'. She explained her decision that home working was not a suitable option, and set further targets for attendance. She noted that assessments had been carried out to obtain suitable equipment for the Claimant to use.

39. There was an issue about time off in lieu. On 26 November 2015 Ms Pinfold had emailed the Claimant to say that time off in lieu should be taken as individual hours (page 307 of the bundle). She told us that nobody else in the team took time off in lieu and she wanted to prevent the Claimant

working excessive hours in order to build up time off in lieu and take off full days, and managing the team. It was not unreasonable although it could be described as strict.

40. There was a delay in the return to work interview November/December 2016.

41. Occupational Health recommended an Access to Work assessment and suggested that home working when the pain was severe 'may improve her attendance' (page 412 of the bundle). We were not shown the Claimant's absence record, but she told Occupational Health on 15 April 2016 that she had worked from home on four occasions in six months.

42. Occupational Health also said that the Claimant had significant and long standing impairments that could be considered to meet the criteria for disability.

43. On 17 March 2016 Ms Pinfold issued the Claimant with a first written warning (page 373). She noted that targets had been breached since 2014 but no warnings had been issued. She suggested that reasonable adjustments had been made to targets and that the Claimant had been allowed to attend medical appointments in work time. She noted that the Claimant had seventeen working days sick on three occasions in the last six months.

44. The Claimant wrote to Ms Pinfold's line manager, Mr Gartshore, on 6 April 2016 raising a grievance about Ms Pinfold (page 402). She set out in detail her treatment and said that she would be prepared to try medication. He replied noting that, and hoped that it would be useful. It was not clear who was to arrange mediation.

45. The Claimant responded on 11 April 2016 asking that the grievance could remain "open until the outcome of the mediation was determined" (page 401).

46. On 29 April 2016 Ms Pinfold requested that the Claimant prepare a time-off in lieu table each week. The usual procedure was to fill in a time-off in lieu sheet and send this to Ms Pinfold who worked at another site. We accept that the Claimant had asked for time off for regular weekly appointments and that the situation was becoming confused. It was not unreasonable for Ms Pinfold to request clear information.

47. The Access to Work assessment took place on 13 May 2016 (page 430).

48. The Claimant appealed the first written warning. The management case was prepared by Ms Pinfold. The Claimant prepared her appeal. Documents were exchanged. The hearing took place on 26 May 2016.

49. The outcome was given on 3 June 2016. The Tribunal found it not unreasonable for the Respondent to consider that all previous issues dealt with by those recommendations even though it was not a grievance hearing.

50. On 9 June 2016 there was a group consultation involving the Claimant and her band 5 area administration manager colleagues. The proposal was to delete all seven band 5 posts and replace them with four band 6 posts which required a higher level of interaction with clinicians (page 543). Ms Pinfold did not envisage redundancies (page 608). Only four band 5 posts were filled at that time; she expected the four, including the Claimant, to be appointed to the new band 6 posts. Selection was to be by competitive interview.

51. On that day Access to Work agreed the equipment for the Claimant (page 548).

52. The Claimant went on sick leave 'anxiety states' on 13 June 2016 (page 552). In evidence the Claimant said this was because the recommendation that interim managers should be appointed had not happened yet.

53. Ms Buxton, a more senior manager, worked in the same location as the Claimant and became her interim manager. She carried out the return to work interview on 4 July 2016.

54. On 8 July 2016 there was individual consultation (page 597).

55. An at-risk letter with an invitation to an interview and a person specification/application form was sent (page 568).

56. On 26 July 2016 there was supervision with Ms Buxton. The Claimant was happy to start a fresh with Ms Pinfold and was not pursuing the grievance. The Claimant disputed this note, but we noted that was a contemporaneous record, although not signed by the Claimant or Ms Buxton. There was no reason suggested as to why Ms Buxton would make it up. It was confirmed that the Claimant had worked with her for a week. We find that this note was accurate.

57. On 1 August 2016 occupational health suggested a DSE assessment (page 578).

58. The Claimant filled in an application form (page 581).

59. The interview is on page 584 and the scores on 639. The Claimant did not raise with the panel any concern about Ms Pinfold on the panel or that she was still recovering ill-health.

60. The Claimant was unsuccessful and feedback was given (page 594).

61. On 15 August 2016 there was a grievance about the interview process (page 604).

62. On 19 August 2016 there was mediation (page 619).

63. On 30 August 2016 there was a DSE assessment regarding home working (page 653).

64. On 9 September 2016 there was a grievance meeting (page 697-710). The Claimant's notes are on page 662.

65. The Claimant confirmed that she has Access to Work equipment (page 668).

66. Ms Pinfold resumed as the Claimant's manager in August.

Dismissal of Claimant

67. On 16 September 2016 the Claimant was sent a dismissal letter (page 694).

68. The Claimant's redeployment form was 25 August 2016 (page 594).

69. There was a referral on 15 September 2016 (page 684). There was no evidence about the delay.

70. On 25 October 2016 the grievance outcome was given (page 727).

71.

72. On 3 November there was an appeal made out of time. The Claimant's evidence was that she knew the deadline was the 3 November for putting an appeal in writing. The Tribunal observes that this was a very tight deadline. The Claimant posted on that day using a second class stamp.

73. On page 716 there is a no to an application for the band 6 but with two ticks met.

74. The redeployment policy is on page 272

The Law

75. The Equality Act refers to protected characteristics and the protected characteristic in this case is disability.

Direct discrimination

76. Section 13 deals with direct discrimination and provides that A discriminates against B if, because of a protected characteristic, A treats B less favourable than A treats or would treat others.

77. Section 23 refers to comparators and says that there must be no material difference between the circumstances relating to each case. The circumstances include a person's abilities if the protected characteristic is disability.

Discrimination arising from Disability

78. Section 15 of the Act provides that A discriminates against a disabled person B if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. This section does not apply if A can show that he did not know and could not reasonably have

been expected to know that B had the disability.

79. Assessing proportionality involves the tribunal in conducting a balancing exercise to evaluate whether the business needs relied upon by the employer are sufficient to outweigh the impact of the measures in question on the protected group generally and on the Claimant in particular. It requires an objective balance between the discriminatory effects of the employer's actions, and the reasonable needs of the employer: Allonby v Accrington & Rossendale College and others [2001].

Reasonable Adjustments

80. Section 20 and Schedule 8(2) make provisions with regard to the duty to make adjustments. Where a provision, criterion or practice puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, the duty is to take such steps as it is reasonable to have to take to avoid the disadvantage.

81. This duty does not arise if the Respondent did not know, and could not reasonably be expected to know, that the person was disabled, or that he would be placed at a substantial disadvantage.

82. In the case of the Environment Agency v Rowan {2008] IRLR 20, the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify:-

    a) the provision, criterion or practice applied by the employer;

    b) the identity of non-disabled comparators where appropriate; and

    c) the nature and extent of the substantial disadvantage suffered by the Claimant.

83. The extent to which an adjustment would remove the disadvantage is a relevant factor. The Tribunal should consider whether there is a 'real prospect' of an adjustment having that impact. There is no requirement that it should be 'completely effective'.

84. Guidance on the Equality Act has been issued in the EHRC Code of Practice on Employment. Paragraph 6.28 lists 'some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take'. These factors include effectiveness, practicability and cost. One of the examples given in paragraph 6.33 is 'altering the disabled worker's hours of work'.

Time Limits

85. Section 123 of the Act provides that proceedings may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable.

86. For the purposes of this section, conduct extending over a period is to be

treated as done at the end of the period.

Burden of Proof

87. The burden of proof in respect of these provisions is contained in section 136. That provides that if there are facts from which the court could decide, in the absence of any other explanation, that A contravened the provision concerned, the court must hold that the contravention occurred. However, it also provides that that provision does not apply if A shows that A did not contravene the provision. It is there for the Claimant to prove facts from which the Tribunal could, apart from the relevant section, conclude in the absence of an adequate explanation that the Respondent has committed a discriminatory act. If the Claimant does that, the Tribunal shall uphold the complaint unless the Respondent proves that he did not commit that act.

88. It is recognized that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in Igen Ltd v Wong and Others [2005] IRLR 258, confirmed in the cases of Madarassy v Nomura International PLC [2007] IRLR 246; Laing v Manchester City Council [2006 IRLR 748; and in Hewage v Grampian Health Board [2012] UKSC 37.

89. According to these cases, at the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis by the Tribunal the outcome will usually depend on what inferences it is proper to draw from the primary facts bound by the Tribunal. The Court of Appeal reminded Tribunals that it was important to note the word “could” in respect of the test to be applied. At this stage, the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. The Tribunal must assume that there is no adequate explanation for those facts. It is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an explanation for the treatment. If the Claimant has done so, the burden of proof moves to the Respondent to show that the conduct complained of had nothing whatsoever to do with the protected characteristic.

90. In Ebobi v Royal Mail Group Ltd (EAT/0203/16) the Employment Appeal Tribunal decided that section 136(2) did not require a Claimant to prove facts, in the way that previous legislation had. It was for the Tribunal to consider all the evidence at the end of the hearing, not just from the Claimant but from other sources, to decide whether or not there are facts from which it could conclude that discrimination has occurred. Where it so concludes, the Respondent bears the burden of proving that it did not discriminate.

91. Accordingly, it appeared that although the burden at the primary stage was neutral, and that a finding that there is a prima facie case of discrimination

will at the point continue to shift the burden onto the Respondent to disprove the claim.

92. However, in Ayodele v Citylink Ltd and anor, EWCA/Civ/2017/1913, the Court of Appeal held that the burden of proof remains on the Claimant, and that section 136 made no substantive change to the law. Efobi was wrongly decided and the decisions in Igen and Hewage were confirmed.

93. With regard to proving claims of discrimination, we noted that unreasonable behaviour alone does not prove the basis for an inference of discrimination. In Igen Limited & Others v Wong & Others [2005] ICR 931, the Court of Appeal cautioned against too readily inferring unlawful discrimination merely from unreasonable conduct. However, it held that it was not an error of law for a Tribunal to draw an inference of discrimination from unexplained unreasonable conduct at the first stage of the two stage burden of proof test. At the second stage, of course, it is for the employer to prove a non-discriminatory reason, and if the evidence as to that is inconclusive, the discrimination claim should be upheld.

94. We noted that an unjustified sense of grievance cannot amount to a detriment for the purpose of less favourable treatment. We noted that the more unreasonable the treatment, the more likely it is that a Tribunal could decide that the employer's explanation is not credible and thus infer discrimination.

95. We further noted that, with regard to stereotypical assumptions, we must be careful not to rely on an unproven assertion of stereotyping as this will amount to an error of law. Discrimination claims must be decided in accordance with the evidence and not by making use, without requiring evidence, of phrases such as "institutional discrimination". There must be evidence from which the Tribunal could properly infer that wrong assumptions were being made about that person's characteristics, and that those assumptions were operative in the detrimental treatment.

96. We noted that there are cases where inept handling of employment matters by the employer does not, by itself, provide sufficient material to raise an inference of discrimination and trigger the shifting of the burden of proof. However, if unreasonable conduct occurs alongside other indications that there might be discrimination on prohibited grounds, that would alter the position, but those indications must relate to the prohibited ground.

97. In the case of Bahl v Law Society [2004] IRLR 799 the Court of Appeal reiterated the House of Lords judgment in Glasgow City Council v Zafar [1998] ICR 120 in respect of a hypothetical reasonable employer. The alleged discriminator may or may not be a reasonable employer. If not a reasonable employer, it may have treated another employee in just the same unsatisfactory way as it treated the Claimant, in which case it would not have treated the Claimant less favourable. However, in Bahl, the Court of Appeal considered that discrimination may be inferred if there is no explanation for unreasonable treatment. They said

"This is not an inference from unreasonable treatment itself but from the

absence of any explanation for it."

98. In Eagle Place Services Ltd v Rudd [2010] IRLR 486, the EAT noted that the employer there accepted that it had acted unreasonably but denied that it was less favourable treatment and sought to defend its position by reference to a hypothetical comparator. The EAT rejected this, holding that:

> "It is simply not open to the Respondent to say that it has not discriminated against the Claimant because it would have behaved unreasonably in dismissing the comparator. It is unreasonable to suppose that it would in fact have dismissed the comparator for what amounts to an irrational reason. It is one thing to find as in Bahl that a named individual has behaved unreasonably to both the Claimant and named comparators; it is quite another to find that a corporate entity … would behave unreasonably to a hypothetical comparator when it had no good reason to do so."

Redundancy

99. An employee is dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that the employer has ceased or intends to cease to carry on the relevant business at all, or business in a particular place where the employee was employed; or because the requirement of the business for the employee to carry out work of a particular kind has ceased or diminished or is expected to do so (section 139 Employment Rights Act 1996)

100. In Safeway Stores plc v Burrell 1997 ICR 523 the Employment Appeal Tribunal set out a three stage test; (i) was the employee dismissed?; (ii) if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished?; (iii) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution? This test was endorsed by the House of Lords in Murray and anor v Foyle Meats Ltd 1999 ICR 827.

101. The case of Williams and others v Compare Maxam Ltd [1982] IRLR 83 sets out guidelines in respect of redundancy selections. The employer must choose his own selection criteria, which must be reasonable. The criteria should be capable of being objectively checked but can be weighted in favour of particular criteria.

102. In addition, the pool from which the employee is to be selected for redundancy needs to be ascertained. The pool which the employer chooses from which to select those to be made redundant must be within the band of reasonable choices for the employer; there may be more than one appropriate pool.

103. There should be meaningful consultation with the individual employee as well as any trade union. In John Brown Engineering Ltd v Brown and Ors 1997 IRLR 90, pointed out that a fair selection process requires that employees have the opportunity to contest their selection, either individually or through their union. This is likely to involve the disclosure of the individual's scores to the individual. There is however no entitlement

to see the scores of others, as this could lead to an 'intolerably protracted and utterly impracticable process'.

104. The employer also has a duty to do what it can so far as is reasonable, if someone is provisionally selected for redundancy, to see whether there is another role which might suit that particular employee, not only with the employer but also with any associated company of the employers. The prospect of moving to a job of lower status or lower wages should be raised with the employee.

105. In Ralph Matindale and Co Ltd v Harris EAT 0166/07 two senior management posts were deleted and a new post created. Two employees applied the new post. One was appointed by reference to a matrix of subjective criteria. The subjectivity of the criteria was one of the reasons why the dismissal was found to be unfair. In Morgan v Welsh Rugby Union 2011 IRLR 376 the EAT noted that, in a similar scenario, where an employer has to appoint to new roles after a reorganization, the employer's decision has to be forward-looking, centering on the ability of the individual to perform the new role. This is likely to involve an interview process. In considering whether the process was fair, a Tribunal has to apply section 98(4). The EAT stressed that a Tribunal is entitled to consider how far an interview was objective, but keep in mind that an employer's assessment of which candidate will best perform the new role is likely to involve a substantial element of judgement. This may involve a deviation from the person specification if a candidate was otherwise considered by the employer to be outstanding.

CONCLUSIONS

106. Having made the findings of fact we returned to the issues in order to draw our conclusions.

107. Issue one; we decided to consider the disability claims first, and assume for the purposes of our deliberations that the Claimant was a disabled person by reference to both conditions upon which she relies. Without going into detail we accept that the mental health impairment is likely to be a disability as her condition had a substantial impact on her day to day activities.

108. Turning to the claim of direct discrimination, we concluded that the in order to identify a hypothetical comparator in similar circumstances, we should adopt a comparator with the characteristics proposed. The Claimant needs to lie down on occasions for thirty minutes and/or cannot drive when taking her medication.

109. We noted the history of the working relationship between the Claimant and Ms Pinfold which was relied upon as background to the specific issues. Ms Pinfold became the Claimant's manager in 2015 and clearly had a more strict approach to the previous manager. We noted that she was based in a different location, and found it difficult to keep a clear record of the Claimant's appointments and time off. The correspondence between the two indicates that on occasions they had a robust exchange of views. It was clear to us from the correspondence and from the way in which the

Claimant gave evidence that she was not cowed by management and felt able to put her points across if she disagreed with an instruction.

110. Did the Respondent attempt to use the Absence Management Policy to dismiss the Claimant? We concluded that Ms Pinfold attempted to encourage the Claimant to improve her attendance by setting targets and ultimately by issuing her first warning. In doing so, she did not follow the policy correctly but her detailed letters to the Claimant about her concerns demonstrate that she wanted to assist the Claimant to improve and was concerned about the Claimant working from home while in pain. We accepted that Ms Pinfold wanted the Claimant in the office because the Claimant managed a team of junior employees so her presence was necessary to do that. We concluded that there was a clear explanation for the steps taken, and that Ms Pinfold would have taken the same approach to any other manager in Claimant's position, whether disabled or not The individual claim was out of time.

111. Did the Respondent use the reorganisation to dismiss the Claimant because of her disability? We concluded that there was no evidence from which we could infer the reason for the reorganisation was the Claimant's disability, nor that the reorganisation was used as a tool to dismiss her. There was a redundancy situation as there was no longer to be any band 5 work. The Claimant had the opportunity to apply for the new post. She had the same interview as the other candidates. She did not tell the panel of any concerns about Ms Pinfold, nor did she request adjustments.

112. Did the Respondent (in particular Ms Pinfold) instruct the Claimant about her drugs? We concluded that there was no evidence of any instruction. There were discussions about medication and changes recommended by the Claimant's GP, at various meetings but nothing that amounted to an instruction. This was out of time as an individual complaint.

113. Did the Respondent (in particular Ms Pinfold) instruct the Claimant about her treatment? We concluded as above. This was out of time.

114. Did the Respondent (in particular Ms Pinfold) impose limitations on time off in lieu? The evidence showed that she did, but we were not shown any evidence that this was in breach of any policy, and we noted that Ms Pinfold had cogent reasons for this, even if it might be thought that her approach was rather draconian. There was nothing to suggest that she would have treated a comparator in the same position as the Claimant any differently. This was out of time as an individual claim.

115. Did the Respondent (in particular Ms Pinfold) require the Claimant to complete a time sheet? This refers to the time off in lieu table that Ms Pinfold asked the Claimant to prepare weekly. There was no challenge to her evidence that no other member of the team completed a form for time off in lieu. None of the others took time off in lieu as far as she knew and she had a clear explanation as to why she need more detailed information from the Claimant, in respect of her time off in lieu, and her medical appointments. We concluded that there was no evidence from which we could infer that this was done because the Claimant was disabled. It was a reasonable management instruction. This was out of time as an

individual complaint.

116. Did the Respondent (Ms Pinfold) add a complaint about the Claimant's involvement in 'It's a Knockout'? This was added to the appeal papers, by HR. We concluded that it was relevant, and clearly the panel thought so as they refer to it in the decision letter. We concluded that there was no evidence from which we could infer or conclude that it was considered by the panel because the Claimant was disabled. It was considered because it had some relevance to her physical condition. This was also out of time.

117. Did the Respondent refuse the Claimant an interview under the two-ticks scheme? Yes, they did and we had not received any evidence from the Respondent about the reason for this. Ms Taylor's evidence was that there was no bar on a person being interviewed for a ring-fenced post within the redundancy process, and then being interviewed for the same post in a public competition. We considered this is evidence that we could conclude that the reason for the refusal was the Claimant's disability. The Claimant had shown that she was not interviewed and the Respondent offered no explanation. The Tribunal must uphold this claim which is in time.

118. Did the Respondent refuse to accept the Claimant's appeal as out of time? Yes, they did. The evidence was clear that it was sent outside the time limit, the Claimant knew when she posted it, but nevertheless she used a second-class stamp. None of the evidence indicates any discrimination.

119. In relation to time and the continuing acts point, we concluded that the conduct of Ms Pinfold as the Claimant's manager referred to above was not discriminatory. It may be described as unreasonable for example not following the policy but this was no unexplained unreasonable conduct. The Tribunal was satisfied why she did it and it was not related to disability. If it had been, it could constitute a continuing act, but it ended when Ms Buxton became the Claimant's interim manager in July 2016, and in any event after mediation, the Claimant said that she was prepared to work with Ms Pinfold, there was no evidence of any discriminatory conduct after that. Therefore, it would have been out of time. The interview for the band 6 post was entirely separate and not part of any continuing act. We could find no evidence to suggest that even if those claims had any merit, it would be just and equitable to allow the historical claims to proceed. Therefore, only one part of the section 13 claim is successful.

Section 15 Claim

120. The unfavourable treatment relied upon in the section 15 claim was considered next.

121. Did the Respondent (in particular Ms Pinfold) fail to conduct return to work interviews soon after the Claimant's return to work? Yes, she did. On occasions there was a significant delay, although Ms Buxton conducted an informal meeting upon the Claimant's return. We find it difficult to characterise that delay as unfavourable treatment. No specific detriment was brought to our attention. It was also difficult to see how the delay was attributable to the 'something arising' namely the Claimant's need for time off.

122. Did the Respondent (in particular Ms Pinfold) move the absence management to a formal footing as soon as possible? Ms Pinfold had conducted informal meetings with the Claimant before moving to a formal warning, which was subsequently overturned. We concluded that there was no evidence to support the claim that she moved to the formal stage because of the Claimant's need for time off per se. Obviously, the Claimant's absences caused the process to begin. If that is what is meant by the claim, we concluded that although Ms Pinfold did not fully follow the procedure, the fact that the warning was overturned on appeal demonstrated that the Respondent had taken a proportionate approach to the legitimate aim of encouraging regular attendance.

123. Did Ms Pinfold issue a first warning without justification? It is right to record that the appeal panel found that Ms Pinfold had not followed due process and did not have enough information from occupational health before issuing the warning. However, we concluded that it could not be said that the warning was not entirely without justification. There had been some difficulties to the Claimant's absences, and informal discussions and occasional targets had been on-going since 2014. A warning would fall within the category of unfavourable treatment but it is not related to time off. As we have said in our conclusion above, by overturning it on appeal, the Respondent has taken a proportionate approach the legitimate aim of encouraging regular attendance.

124. Did the Respondent fail to progress the grievance of 5 April 2016? We concluded that there was no such failure. The Claimant herself had suggested medication and requested that the grievance remained 'open' until after the mediation. That was understood to mean that it should not progress. We concluded that was not an unreasonable assumption. There was delay in arranging mediation but there was no evidence to suggest that any delay was because of 'something arising' namely the Claimant's need for time off. Although the appeal against the warning was not a grievance hearing, we accepted that it was not unreasonable for the Respondent to consider the Claimant's concerns had been addressed particularly as a different interim manager was to be appointed. Once the Claimant resurrected her grievance in August 2016, it received proper attention.

125. Did the Respondent ignore 'many aspects' of the grievance? Dr McGill was not asked about any specific aspects that it was claims that she had ignored, and those aspects were not clarified. She had interviewed the Claimant about the grievance and had agreed with her the matters to be investigated. She interviewed a number of relevant managers. She produced a detailed outcome letter. It was unfortunate that we did not have all the interview notes, but there was no evidence from which we could conclude that Dr McGill has deliberately ignored part of the grievance because of 'something arising' namely the Claimant's need for time off.

126. The section 15 claim is unsuccessful.

Section 20 Claim

127. In order to make a claim of failure to make reasonable adjustments, a Claimant must show there was a provision, criteria or practice. Here the Claimant says there was a PCP. She had to attend the work place in order to work. There was no evidence that the Respondent had such a requirement. Ms Taylor's evidence was that any such request was considered on a case by case basis. It is correct that Ms Pinfold wanted the Claimant to attend the work place to work because she supervised a team. At the appeal, the Respondent agreed that working from home would be assessed by occupational health and subsequently there was a DSE assessment of the Claimant's home. If Ms Pinfold's requirement amounted to a PCP, it was applied early in 2016 and came to an end at the appeal decision on 3 June 2016. The claim was therefore presented out of time and there was no evidence to suggest that it would be just and equitable to extend the time limit.

128. The other part of the claim relates to physical features and the Claimant's need for a specialist chair, desk and monitor arm. These items were obtained, although the wrong arm was sent, with others. We concluded that the requirement that various assessments took place before items were ordered, and the bureaucratic processes of the Respondent caused these delays. On the evidence that we had, we could not conclude that the Respondent had not taken reasonable steps to avoid any disadvantage to the Claimant. Although matters took time, we were satisfied that there was no failure in the duty to make those adjustments by obtaining that equipment. Obviously providing equipment more speedily would be preferable.

Conclusion – Disability Discrimination

129. Only the section 13 claim has been successful in respect of one aspect – (h).

Unfair Dismissal

130. We now turn to the claim of unfair dismissal.

131. What was the reason for dismissal; was there a genuine redundancy situation? We concluded that the reason was redundancy and there was a genuine redundancy situation. There was a reduced need for band 5 posts in the Claimant's work area. There was no evidence from which we could infer that the reason was anything other than redundancy.

132. Was the dismissal reasonable in all the circumstances? The Claimant pointed to consultation; selection criteria; and a reasonable consideration of alternative work. She also suggested that the process was engineered against her and that the application forms should have been scored.

133. On the evidence we were shown, we concluded that there was proper meaningful consultation with the Claimant and her colleagues. It was a fair process; the new band 6 roles were ring-fenced, the four band 5's were invited to apply. They were given all the necessary information to prepare for the interview. Although as the Claimant pointed out the person

specification said that qualifications and experience would be identified from the application form, we were satisfied that this did not mean that the application form would be given a score.

134. We concluded that the membership of the panel was fair. Ms Chapman was a clinician, and the new posts would have to deal directly with clinicians, conveying data to them, so her assessment of the candidates was relevant. Ms French was an unbiased and senior manager; she knew none of the candidates. We concluded that it was important that Ms Pinfold was part of the panel. She was to be the manager of the new team and therefore it was appropriate she took part in the interviews. The Claimant did not raise any concerns with the panel about Ms Pinfold's presence. The Claimant thought HR should be present. It said it in the consultation document but what difference membership of HR on the panel would make? We cannot see any.

135. We listened carefully to the evidence about the scores and we could find no evidence of any bias or inappropriate marking. The scores were agreed by the panel. Ms Pinfold scored the Excel test after the interviews, and it may be better practice to have the panel present for that task, but it made no difference to the outcome. We concluded that there was no evidence that the process was engineered against the Claimant. She was treated the same as the other candidates. She did not request any adjustments.

136. With regard to alternative work, given that this had been an issue since the list prepared at the case management discussion in August 2017, we were surprised that there was no evidence from the Respondent about this. The evidence came from the Claimant, and to some extent from the documents. We were concerned about a number of matters. The consultation letter in July says that an unsuccessful candidate would be placed on the redeployment register. It does not say that a form must be accompanied before this can happen. There was no evidence that the Claimant was told that she would be required to fill in a form before she would be placed on the register. The Respondent knew that the Claimant was in a redeployment situation as soon as she was unsuccessful at the interview. There was no evidence that any searches were done at that stage. There was no evidence that explained the Claimant's status between 5 August and 15 September, a crucial period because it was the Claimant's evidence that a new job was found for Ms Carter in August.

137. In addition, the documents showed a delay between the Claimant completing the redeployment form on 25 August 2016 and the placing of her name on the redeployment register on 15 September 2016. Although it is right to record that she did not send it until 9 September 2016. There was a delay of between that date, the acknowledgement on 12 September, and the referral to the register on 15 September 2016. We do not criticize the Claimant for the delay in submitting her form, because she had not been told that she had to complete the form before she would be placed on the register. The redundancy policy does not say that this is a requirement (page 283). The redundancy policy shows redeployment efforts before redundancy notice is issued.

138. There is no evidence that the Respondent had undertaken all the steps in

the redundancy policy at para 4.1.10 which including approaching other NHS organisations in order to avoid redundancies.

139. We noted that the Claimant had told Dr McGill on 9 September that she had been looking for internal vacancies but there were none at that stage. However, there was no dispute that she did not have access to the vacancies until they became public. The Respondent's evidence was that all vacancies went to the redeployment office for matching with employees awaiting redeployment, and only then were they released for advertisement to the public. It was not the Respondent's practice to send those lists to redeployees. We also noted that the Claimant's evidence was that she had telephoned the redeployment every few days and was told that they were looking at various vacancies, but we concluded that this did not prove what investigation had been carried out into the alternatives.

140. It was apparent that the Claimant had lost some weeks on the redeployment register, and there was no evidence from the Respondent about that period. In addition, the Claimant said in evidence, (and we accept that this was a very late allegation, although we would have expected the Respondent to anticipate this when looking at the issue about alternative employment) that the other person who was not appointed to the band 6 post, found another post and was not made redundant. We had no supporting evidence about that, although we do know from the scores that that person scored much lower than the Claimant in interview. It appeared therefore to be a possibility that the job that she was found could have been suitable for the Claimant, and that perhaps they should have both been matched.

141. We also know that the Claimant was not given an interview when the band 6 post was advertised publicly, despite the evidence that the Respondent guarantees an interview to disabled people who meet the minimum criteria (and presumably she did because she was interviewed previously for the same post). The evidence that there was no bar on interviewing redeployees who had already been interviewed. The refusal letter declined to give any reasons for feedback, which we found unreasonable in the circumstances. There was no evidence from the Respondent to explain this.

142. For those reasons we concluded that the Respondent had not shown that it had taken reasonable steps to find alternative employment and avoid redundancy. The dismissal was unfair on that basis.

Acting Regional Employment Judge Davies

10 December 2019