EMPLOYMENT TRIBUNALS

Claimant: Miss J Adshead

Respondent: Tameside & Glossop Integrated Care NHS Foundation Trust

HELD AT: Manchester **ON:** 25-28 November 2019

BEFORE: Employment Judge Slater
Mrs C Bowman
Ms E Cadbury

REPRESENTATION:

Claimant: Mr J Adshead, son of claimant
Respondent: Ms R Levene, counsel

JUDGMENT having been sent to the parties on 12 December 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. The claimant brought complaints of unfair dismissal and disability discrimination (discrimination arising from disability and failure to make reasonable adjustments).

2. The judge discussed and agreed with the parties the issues at the start of the hearing. The judge prepared and gave to the parties a typed list of issues which both parties agreed correctly recorded the issues. These were as follows:

Unfair dismissal

3. There is no dispute that the respondent has shown a potentially fair reason for dismissal, being capability. The claimant accepts that capability was the reason for her dismissal.

4. Did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal in all the circumstances (including the size and administrative resources of the employer's undertaking)?

The tribunal will consider whether the procedure followed and decision to dismiss are within the band of reasonable responses.

The claimant argues that the dismissal was unfair because the respondent did not properly consider alternative employment.

5. If the dismissal was unfair, in a case where such an assessment may be made, what are the chances the claimant would have been fairly dismissed, had a fair procedure been followed? (This is an issue of principle relating to remedy, which can result in a reduction in the compensatory award for unfair dismissal. The parties agree that the tribunal can consider this at the same time as liability, although the tribunal reserves the right to postpone a decision on this issue until the remedy hearing, if appropriate).

Disability discrimination

6. Disability has been conceded – impairment related to left hip.

Discrimination arising from disability – s.15 EQA

7. The respondent has conceded that the claimant was treated unfavourably because of something arising in consequence of her disability by being dismissed.

8. Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

9. Legitimate aims relied upon:

9.1. Maintenance of standards of governance and regulatory compliance.

9.2. Enhancement of employee and/or patient safety.

9.3. Service efficiency and service delivery.

10. The respondent concedes that they knew or could reasonably be expected to have known that the claimant had the disability.

Failure to make reasonable adjustments

11. Did the respondent apply the following provisions, criteria or practices (PCPs)?

11.1. Requirement to continue to carry out heavy lifting.

11.2. Not carrying out a risk assessment.

12. The claimant says that there was a failure by the respondent to make adjustments in relation to the first PCP from about November 2012 up to the date of her dismissal (1 August 2018) and a failure in relation to the second PCP from about September/October 2012 up to and including the date of her dismissal (1 August 2018).

13. Did one or both of these PCPs put the claimant at a substantial disadvantage (more than minor or trivial) in comparison with persons who are not disabled?

14. The respondent concedes that it could reasonably have been expected to know that the claimant had a disability and also that the claimant was likely to be placed at the disadvantage.

15. If the duty to make reasonable adjustments arose, did the respondent fail to take such steps as it would have been reasonable to take to avoid that disadvantage? The claimant argues that the reasonable adjustment in relation to both PCPs would have been removing the requirement to do heavy lifting.

16. Were the claims of failure to make reasonable adjustment presented in time? If not, is it just and equitable in all the circumstances to consider them?

The hearing

17. We heard evidence from the claimant and her trade union representative, Linda Brooks. We also read a statement from Rachel Harper, a former colleague of the claimant, put forward on behalf of the claimant. Ms Harper was unwell and could not attend to give evidence so it was agreed that we would read and give such weight to the statement as we considered appropriate. For the respondent, we heard evidence from Wendy Garside, Team Leader of Theatres, and the claimant's line manager at relevant times, and Alison Brierley, Matron within the General and Women's Outpatient department, who took the decision to dismiss the claimant.

18. After hearing evidence and submissions, the tribunal began its deliberations. During our fact finding, we realised that there were areas of the respondent's evidence relating to the justification defence to the s.15 claim which we considered needed clarification. We, therefore, recalled Ms Garside to give evidence and then heard further submissions before adjourning again for deliberations.

Facts

19. The claimant worked as a nursing auxiliary for the respondent from 3 April 1989 until 1 August 2018 when her employment was terminated. It is agreed that the reason for termination of employment was capability.

20. The claimant worked as a Nursing Auxiliary within the Hartshead Theatres, working 37.5 hours per week. As part of her role, she was required to order surgical implants, medical supplies and instruments. She was also responsible for ensuring

that stock levels were maintained to enable smooth running of the operating theatres. The claimant was good at her job and had a lot of knowledge of the equipment they needed in the theatres. As part of the claimant's role, she put away and got out supplies which had been ordered. Some of the trays of equipment were very heavy.

21. At relevant times, the claimant worked alongside a colleague, Sharon, who also moved supplies.

22. The claimant underwent a procedure to her left hip in 2010. In April 2012, she had a left hip replacement. Due to an error with the original surgery, the claimant had to have revision surgery a week later. The mistake led to a personal injury claim which was settled in 2018.

23. The claimant's line manager at all relevant times was Sister Wendy Garside. The claimant accepts that she had a good working relationship with Ms Garside, who she described as "very caring".

24. Although Ms Garside continued as the claimant's line manager, from 2012, John Bergin managed the claimant's sickness absence, along with absences for other theatre staff, until Ms Garside took over managing the claimant's absences in 2016. We did not hear from Mr Bergin, but Ms Garside informed us that responsibility for ensuring any adjustments recommended by occupational health were made, and for carrying out risk assessments, once the claimant returned to work from sickness absence, was a joint responsibility between her and Mr Bergin.

25. The claimant had a number of absences in the period 2012 to 31 August 2016 because of musculoskeletal problems and other causes.

26. The claimant was absent from work from 11 April 2012 until 17 August 2012 due to musculoskeletal problems.

27. The claimant was absent from work from 18 August 2012 to 28 October 2012 due to musculoskeletal problems. In an occupational health report dated 29 October 2012, the occupational physician recorded that the claimant was still quite restricted in her ability to sustain prolonged sitting/standing/walking and that bending and heavy lifting were difficult activities for her. The physician wrote that they understood that the claimant's usual role involved quite a significant amount of bending and heavy lifting. They expressed concern that the problems mentioned would continue to be a problem, interfering with her fitness for work for some time to come. They advised an open discussion at the earliest opportunity, writing:

> "I think it is important for her manager to advise her whether it will be practical for her to be supported in a restricted capacity and, if so, how long such restrictions can be supported for. If, on discussion, it is decided that such restricted duties cannot be accommodated for the expected length of time, then I would suggest that the only alternative option would be to consider suitable redeployment if available."

28. The claimant took a few days leave at the end of her sickness absence and returned to work on 1 November 2012 with a phased return. On her first day back, she attended a back to work meeting with Mr Bergin, a work colleague and an HR representative. Mr Bergin wrote to the claimant on 1 November 2012 confirming the outcome of the meeting. They discussed the occupational health report of 29 October 2012. They discussed the claimant's long-term health and capacity for manual handling following her hip replacement and the claimant advised them that this would improve. Mr Bergin wrote:

> "I outlined that you would be supported to return to work with reasonable adjustments in place to reduce your manual handling tasks and with an ongoing manual handling risk assessment in place. I confirm that the risk assessment will be reviewed every 2 weeks.
>
> "You agreed and described that you cannot get up from the kneeling position which is necessary to empty the bottom shelf of HSDU Panniers. I advised that this task would be risk assessed and that a possible action will be for you to use only the middle and top shelves of the panniers. This example and others can be looked at on an individual basis and reasonable adjustments can be made."

29. Mr Bergin's letter recorded that they had agreed to meet again in 2 weeks and again after the claimant's four-week phased return to review how she was managing in the role and whether further reasonable adjustments were required. He wrote that they had advised the claimant that, if she was unable to undertake a role effectively with reasonable adjustments, in line with occupational health advice, they would need to consider redeployment on either a temporary or permanent basis. He recorded that the claimant's work colleague had asked about the review of risks. Mr Bergin recorded that he had assured them that each item on the risk assessment would be assessed on an ongoing basis and updated accordingly to reflect any improvement in performing specific tasks.

30. In this meeting, the claimant was told that she would be doing light duties. We accept the evidence of the claimant, which has not been challenged on this point, that, after the HR and work representative left the room, the claimant asked Mr Bergin where she was to go. His reply was "go where you want". It was suggested to the claimant in cross examination that this comment was supportive. The claimant did not agree with this. We accept the claimant's evidence that Mr Bergin's comment upset the claimant. She described herself as feeling lost. Although Ms Harper was unable to attend to give evidence, we accept the evidence in her witness statement, which corroborates the evidence of the claimant, that Ms Harper found the claimant crying in the corridor. The claimant told her that she was upset following a back to work meeting with Mr Bergin and that she had been told by Mr Bergin to work wherever she wanted. She told Ms Harper that she thought the job with light duties would have been sorted for her return to work and she was worried going back to her normal post as it would be too much and heavy. She said there were not any lighter duties within her job role and everything involved lifting heavy loan sets and putting stores away. Ms Harper advised her to speak to Ms Garside. We have heard no evidence as to whether the claimant followed this advice at this time and spoke to Ms Garside. However, the claimant says she was told to ask for help when it came to

lifting heavy equipment; it may have been Ms Garside who told her to ask for help. The claimant said she went to her workplace in the reception area of orthopaedic theatres because she did not know where else to go.

31. We find that, at this time, and at later times, the claimant continued to do a certain amount of heavy lifting, despite occupational health recommendations that she should not do this, when she was unable to get assistance, because she considered the work needed to be done.

32. The claimant did not like to leave lifting to her colleague Sharon because, at times, Sharon suffered from a bad back, on one occasion being accompanied to A & E by the claimant because of this. Ms Garside accepted that the claimant had a conversation with her saying that no one else was available to help and that she could not expect Sharon to do it because she had a bad back. Wendy Garside said that she would get them some support from Operating Department Orderlies ("ODOs") to help with the heavy lifting.

33. We find that Wendy Garside told the claimant to ask ODOs for help and that Ms Garside asked some of the ODOs to help. However, no one was specifically assigned to help at any particular time. There were times when the claimant considered supplies needed moving but no one was available to help and times when the claimant asked ODOs for help but they did not assist. Wendy Garside recalled an occasion when the claimant said ODOs were not helping and Wendy Garside asked what was wrong with her because she appeared angry and the claimant said she was in a lot of pain.

34. We find that the claimant was never put under pressure from managers to do any lifting she was uncomfortable with. The claimant accepted that, as part of her job description, she had a personal responsibility for risk management issues in respect of herself and her colleagues. However, the lack of available help at times, and the claimant's work ethic, understanding that, if she and Sharon did not do the lifting, necessary preparations for surgery would not be made in time and operations would not take place, led the claimant to do lifting which was against occupational health recommendations.

35. We find that, although the claimant did raise the issue about needing help with heavy lifting, on a number of occasions, with Wendy Garside, she did not complain on a frequent basis about lack of help. From the claimant's evidence, when she said, "How do you go to someone and they say they are too busy and start banging around" we infer that the claimant was reluctant to complain often because she knew that Wendy Garside was busy and under pressure.

36. We find that, despite what had been said at the meeting on the claimant's return to work, no risk assessment or reviews every two weeks were carried out as promised. By August 2013, still no risk assessment had been carried out. This finding is supported by the letters from the claimant's orthopaedic surgeon of 6 August 2013.

37. On 6 August 2013, the claimant's consultant orthopaedic surgeon wrote to her GP. Included in his letter, he wrote: "Rather surprisingly I note she has not yet been

risk assessed although her assessment should have been carried out within 12 weeks of returning to work which she did on 1 November." He wrote that he was writing to the managers to remind them that this needed to be done as soon as possible. This he did by a separate letter also dated 6 August 2013. He wrote: "I would be grateful if you could organise for a risk assessment of this lady's work conditions asap. She is still experiencing symptoms in her left hip. As you know she returned to work on 1 November but is yet to be risk assessed."

38. In an occupational health report dated 4 November 2013, it is noted that the claimant told the adviser that she had recently completed a risk assessment herself. Neither party has been able to produce a copy of that risk assessment but we are satisfied, because of the mention of this in the report of 4 November 2013, that the claimant had completed a risk assessment at this time, although the document has subsequently been lost.

39. We have seen no evidence of any other risk assessments being completed until one done in 2016, to which we refer later.

40. The occupational health report of 4 November 2013 recorded that the claimant was finding it difficult to bend down to floor level and to lift and carry heavy objects. They wrote that the claimant was fatigued by the end of her shifts and took precautions with day-to-day activity in general.

41. There was a further occupational health report on 10 December 2013. The consultant occupational physician expressed the opinion that the claimant was fit to continue work with current adjustments and further adjustments as identified on risk assessments. However, as she had ongoing musculoskeletal problems and worked in a physically demanding job, they recorded that they had written to her specialists in order for them to make a complete assessment of her fitness to continue in the role in the long term.

42. The claimant was absent from work from 7 January 2014 until 5 May 2014 due to musculoskeletal problems.

43. In an occupational health report dated 29 April 2014, the consultant occupational physician recorded that the claimant's job involved preparing and sorting surgical trays and prostheses which involves standing and repeated lifting and moving of equipment. The physician recorded that the claimant had been absent from work since the beginning of January due to pain in her left knee. She had told the physician that the pain in her knee had largely subsided but she remained aware of the pain in her left hip. The physician wrote: "her symptoms continue to limit her capacity for sitting and standing for lengthy periods of time. Her mobility is restricted, as is her capacity for physical exertion. She needs to take care with manual handling, particularly if also associated with twisting, bending or squatting." The physician noted that a return to work was planned during the week commencing 5 May. They wrote that she would benefit from a gradual resumption of normal working hours. They recommended "back-office" duties dealing with administrative, desk work initially, at least until further occupational health review. They wrote:

> "A risk assessment is recommended. She will need to continue to take care with tasks involving manual handling. It is recommended that management explore possibilities for task rotation, so that she is not undertaking tasks involving standing and lifting for lengthy periods of time, and limiting activities to preparations for operations with lighter and fewer packs involving less repetition.
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> "Her symptoms can be expected to improve with time. The time frames will be lengthy. Because of her hip replacement care with manual handling tasks and avoidance of crunching or squatting and repeated twisting or turning will remain relevant. She will benefit from working in an environment in which you can easily work within her physical capabilities, with opportunity to delegate or call for assistance if the need is identified. Depending on progress over the next few months, management may find it appropriate to explore options within a different theatre or work area."

44. We have no evidence that any risk assessment was done on her return, or at all in the period from her return until a further period of absence for musculoskeletal problems beginning 1 April 2016. We accept the claimant's evidence that there was no risk assessment during this period.

45. Ms Garside conducted a return to work interview with the claimant on 16 May 2014. Ms Garside recorded on a form that the claimant had resumed work on a phased return over a four-week period on light duties. She wrote that she had advised the claimant that they would support her to stay in work on lighter duties with flexible hours for longer than 4 weeks if required.

46. We find that the claimant went back to her normal duties, except she was told, as before, to ask for help with heavy lifting. Wendy Garside gave no evidence as to specific alternative light duties which were given and we accept the claimant's evidence that, on this occasion, as on every other return from work, the claimant went back to her normal duties. However, for about 4 weeks, the claimant's colleague, Sharon, did any lifting which was required but the claimant did not feel she could leave Sharon to do all of the lifting, so, after this period, the arrangements reverted to normal.

47. The claimant had done very little clinical work since 2000, only occasionally "flooring" in theatre when they were short staffed.

48. As found above, the claimant informed Wendy Garside on at least two occasions that she was having difficulty getting help. However, she did not frequently complain and never raised a grievance about not being given help with heavy lifting. Wendy Garside assumed all was well because the work was being done and the claimant was not telling her frequently that she was having difficulty getting help.

49. In an occupational health report dated 4 June 2014, the occupational physician noted that since last seen, the claimant had undergone a four-week phased return on light duties. They wrote that they understood that, during the phased return, the claimant had been on non-clinical duties. They wrote that the claimant could increase her hours back to normal but she may find it difficult to return to her full

duties due to difficulty with standing for prolonged periods. They recommended that the claimant should continue on adjusted duties in the meantime and would need regular breaks to move between sitting and standing and should avoid any activities involving squatting or repeated twisting and turning.

50. There was a further occupational health report on 25 July 2014. The report recorded that the claimant had difficulty lifting, bending and twisting and could lose her balance easily. The claimant told the consultant occupational physician that she had recently fallen at work. The physician wrote that the claimant remained fit for work but adjustments consequent to her health condition were required to help her maintain work attendance for managing her underlying condition. They wrote:

> "It is recommended that a risk assessment for each regular task and area of work is undertaken. Care regarding lifting and carrying and manual handling is particularly required. She can lift manageable items from table height to table height but needs to avoid repeated twisting, turning, bending or crouching, particularly in association with any manual handling task."

51. The physician wrote that the claimant had been reminded of the importance of undertaking a mental risk assessment for each and every task. They wrote that she would need an opportunity to delegate or call for assistance if the need was identified.

52. The claimant was absent from work for 7 days from 15 June 2015 to 21 June 2015 for causes unrelated to musculoskeletal problems.

53. The claimant was next absent from work from 1 April 2016 until 31 August 2016, this time due to musculoskeletal problems.

54. An occupational health report of 18 August 2016 recorded that, despite current symptoms, the claimant was eager to commence her phased return to work. The report recommended that the phased return should be over a four-week period with regular reviews. A detailed risk assessment was recommended and that the claimant should avoid bending and the lifting/pushing/pulling of heavy loads. The report recorded that the claimant had discussed with Ms Garside the possibility of using a perching stool when sitting to complete administration tasks.

55. Wendy Garside had taken over management of the claimant's sickness absence in 2016.

56. Ms Garside conducted a return to work interview with the claimant on 5 September 2016. Ms Garside recorded on the form that the claimant had resumed work on a four-week phased return. She recorded that a detailed risk assessment would be completed, the claimant be supported in a role and as recommended by occupational health regarding manual handling manoeuvres. The claimant signed this form.

57. The claimant accepted in cross examination that she was being given permission to work only in the way recommended by occupational health. However, she questioned how she could do this when she was put on the same work as Sharon,

who had problems of her own. We find that the situation continued where the claimant could not always obtain help from ODOs when required. The claimant did not raise a grievance. She said in cross examination that she did not have to; Wendy Garside knew that she was in pain. We find that, sometimes Wendy Garside would come to the claimant and comment that she looked awful and send her home.

58. A risk assessment was carried out on 13 or 14 September 2016 with the claimant, John Bergin and Andrea Barnes, manual handling lead, present. The claimant was asked to describe her job to Andrea Barnes. They looked at different tasks she performed. It was suggested that a perching stool might help with the computer work. It was noted she could not kneel down and a suggestion was made that nothing should be on the bottom shelf and that, when the claimant asked for help, she should get it.

59. A letter to the claimant dated 14 September 2016 recorded that they agreed that the claimant could perform all aspects of her role with minimal discomfort. The letter continued:

> "1. You cannot kneel down any more. You used to do this to retrieve items on the bottom shelf of the panniers. We discussed that there was enough staff who could assist you if necessary.
>
> "2. You cannot maintain any position standing or sitting for long periods of time but your role does not require you to do this. However when ordering stock etc at the computer you could sit for longer with the aid of a perching stool and this has been ordered.
>
> "3. I have observed you mobilising and it is apparent that there is discomfort at times but you are now aware your limitations in this role."

60. A perching stool was duly purchased with Ms Garside's agreement.

61. The claimant had no absences for nearly a year after 31 August 2016 until her absence for hip surgery in July 2017.

62. Some time prior to the claimant's absence beginning in July 2017, the respondent employed two housekeepers in Theatres. This was partly in response to a CQC report which indicated that some areas were not as clean as they should be. By July 2017, in addition to other duties, these housekeepers had taken over the non-procurement aspects of the claimant and Sharon's roles: stocking up of theatres in the morning with gowns and gloves and decanting of sterilised equipment coming from the sterilising department.

63. In anticipation of the claimant's planned absence for hip surgery, Helen Farrell, a senior support worker, was taken out of her normal role and trained up to cover the claimant's absence, for several months before the claimant went off work. Ms Farrell's normal role was backfilled by agency workers (NHS staff working at overtime rates). Ms Farrell covered the claimant's role until some time into the autumn of 2017.

64. The last day the claimant attended work was 5 July 2017. The claimant had surgery on her left hip on 6 July 2017. Initially, she took leave to cover her absence. She then began certified sick leave from 20 July 2017 which continued until her dismissal which took effect on 1 August 2018.

65. In August 2017, the claimant was sent a letter informing her that the Trust was proposing to incorporate the theatre stores team into the wider procurement stores team. The claimant attended a meeting as part of the consultation about this proposal on 24 October 2017. The claimant was unhappy about the proposal that she should be moved into the Trust's central procurement team because her current job title as a nursing auxiliary meant that she was able to retire at 55 years old and she wanted to maintain this status. The management team agreed with her expressed wish to be excused from the consultation, agreeing that they would prioritise her for an alternative role within the Theatre and Anaesthetics Directorate and the wider Trust which would enable her to maintain her pension status. Jesse James, Directorate Manager, Endoscopy, wrote to her on 16 November 2017 to confirm the outcome of the meeting and to confirm that they were able to honour the agreement made and had excluded her from the consultation process as requested. The claimant signed a copy of the letter on 23 November 2017 to confirm that she would like to be excluded from the theatre purchasing consultation process.

66. At some point around this time, Matron Carmo raised the possibility of an alternative role making tea and toast for patients. This was not the offer of a particular role and, at that time, the claimant was not fit to return to work.

67. Sharon transferred to the central procurement department at least some months prior to the claimant's dismissal, possibly around the end of 2017. After the procurement function transferred to the central procurement department, there was no function which the claimant had done immediately prior to going on sick leave which needed to be covered in Theatres. The budget for the claimant's role remained with Theatres, being held back for when the claimant returned to work, when a suitable role would be found for her.

68. An occupational health report dated 20 November 2017 expressed the opinion that the claimant remained unfit to return to her role, or any alternative work, for several weeks further at least. Dr Sen, the consultant occupational physician, wrote that he would be writing to her specialist for further information and he would see the claimant again when information had been received from her orthopaedic specialist and would provide further guidance and advice.

69. Wendy Garside had a meeting with the claimant on 23 November 2017, held under the attendance management policy to discuss her absence from work and to see whether they could offer her any further support in order to facilitate a return to work. The claimant was accompanied at the meeting by Linda Brooks, a Unison union representative. They discussed the occupational health report. The claimant mentioned that she had a GP appointment on 27 November 2017 where hopefully more information would be provided.

70. On 1 December 2017, the claimant had a meeting with Karen James, the Chief Executive Officer of Thameside hospital. It appears that the meeting was arranged in

relation to the claimant's personal injury claim about the error in surgery in 2012. However, the meeting included some discussion about what the claimant's job role would be when she returned to work, because of the consultation. The claimant said that the only reason she didn't want to go under the procurement banner was because of her pension status and her age; her status was important to her, especially with her condition. Karen James said that, when the occupational health physician had had a chat with her consultant, he would guide them when she was able to return as to what she was able to do or not able to do and then they would look at suitable alternative employment.

71. The claimant's entitlement to sick pay on full pay was due to end on 7 December 2017. The respondent wrote to the claimant on 12 December 2017, informing her that they had decided to extend her full sick pay for a further 4 weeks. Subsequently, full pay was extended for another 4 weeks.

72. On 18 January 2018, the claimant had a meeting with Wendy Garside under the attendance management policy. Again, the claimant was accompanied by her union representative, Linda Brooks. It was noted that an email had been sent to Dr Sen to follow up the request for guidance from the claimant's orthopaedic specialist. They arranged a further meeting for 28 February.

73. The meeting went ahead on 28 February 2018. At that time, the claimant was due to attend an occupational health appointment on 5 March. When writing to the claimant on 6 March 2018 to confirm the outcome of the meeting, Wendy Garside recorded that her current GP fit note was valid until 9 March and her full pay had been extended. She noted that they had advised the claimant to speak to her consultant, GP and occupational health regarding her timeline of returning and, if she was fit to return, whether there were any recommendations, reasonable adjustments to enable her to fulfil her role or suitable alternative role to support a return to work. They arranged a further meeting for 26 March 2018.

74. Dr Sen wrote a further occupational health report on 5 March 2018. He wrote that some information had been received from the claimant's treating specialist (who was Mr Gambhir). Dr Sen wrote that the treating specialist had advised that the claimant had had slow progress following her operation in July 2017. She was to be seen again in clinic in a further 6 months' time and further investigations or treatments were planned. Dr Sen advised that the claimant currently remained unfit to return to her role, or any alternative work, and although she was slowly improving and, although difficult to predict, he thought it unlikely that she would be returning to work for several weeks potentially still. He asked that the claimant be referred back when progress had been made with her case.

75. The next meeting under the attendance management process was postponed until 5 April 2018, because of the unavailability of the claimant's trade union representative. At the meeting on 5 April 2018, the claimant was accompanied again by Linda Brooks. In a letter dated 20 April 2018, Wendy Garside recorded that the claimant had explained that her pelvis hurts when she walked and because of that she needed to rest a lot because of the pain. She had had to sell her car because she could not get into it. They noted that the occupational health advisor had written that the claimant was not fit to return to work. The claimant was awaiting an

appointment with Mr Gambhir which was due in April but was now expected to be in May. The claimant agreed that she would discuss with Mr Gambhir and occupational health a timeline for her to return to work, or any suitable roles that she might be able to fulfil. Wendy Garside wrote that, if there were no suitable alternative roles for the claimant, or there was no timeline for her to return to work, this may lead to an attendance management hearing where the outcome could be termination of contract.

76. There was a further meeting under the attendance management policy on 4 June 2018. The claimant was again accompanied by her representative, Linda Brooks. Wendy Garside wrote to the claimant on 5 June 2018 to confirm the outcome of the meeting. The claimant confirmed that she had a GP fit note until 21 August 2018, stating that she remained unfit for her current role. They discussed undertaking suitable alternative roles. However, the claimant said she was unable to carry out administrative duties, due to being unable to sit for long periods and she had no timeline of return to work. The respondent offered to arrange a further occupational health appointment. The claimant declined this. However, Wendy Garside wrote that, upon reflection of the meeting, they had decided to arrange an appointment for her to ensure that they had offered all the support available. The claimant was informed that, as she had been absent since July 2017, and there was no timeline of return to work to her role or a suitable alternative role, her absence was being escalated to an attendance management hearing, where the outcome could potentially be the termination of her contract. The process was explained. In her letter, Wendy Garside asked that, if anything changed in the meantime, the claimant should let herself or Sue Booth (HR) know so that they could offer the appropriate support.

77. The final occupational health report, prior to the termination of the claimant's employment, was obtained on 10 July 2018. The claimant explained to Dr Sen that she had seen her orthopaedic specialist the previous month. She informed Dr Sen that Mr Gambhir was happy with her progress and planned to review her in 12 months' time. No further operation was planned. She explained to Dr Sen that Mr Gambhir was supportive of ill-health retirement. This indicates that, contrary to a submission made by Mr Adshead, the claimant was aware of the possibility of ill health retirement prior to her dismissal.

78. Dr Sen wrote:

> "I discussed work with Jacqueline. From her perspective she feels unable to do a nursing auxiliary role as she would be on her feet a lot and she is worried this will aggravate her symptoms. Furthermore, she feels unable to do more sedentary office work, for example, as she finds it difficult to get comfortable when sat, and she also has tiredness and concentration problems during the day due to her broken sleep overnight from her pain. She continues with regular painkillers.
>
> "She explained that she is looking at applying for ill-health retirement."

79. Dr Sen expressed the opinion that, from what the claimant had reported to him, she remained unfit to return to her role or any alternative work. He wrote:

> "It is very difficult to predict regarding the future. She feels that no adjustments would currently help her.
>
> "She would like to apply for ill-health retirement. I have advised her that ultimately this is a decision for the pensions medical adviser who would need to be satisfied that she were permanently incapacitated until the normal age of retirement, and a range of reasonable treatments and adjustments had been tried."

80. Dr Sen wrote that he had taken the claimant's consent to write to her orthopaedic specialist for further information and would see the claimant when information had been received.

81. The claimant said in cross examination that she considered that ill health retirement was the only option she had.

82. By letter dated 13 July 2018, the claimant was invited to attend a formal hearing under the attendance management policy on 1 August 2018, to be chaired by Alison Brierley, Matron Outpatients. The claimant was advised that she was entitled to bring a trade union representative or workplace colleague with her. The purpose of the meeting was stated to be to review her ongoing absence from work from her substantive post in line with the trust attendance management policy. It noted that the claimant had been absent from the post since 24 July 2017 following elective surgery and that she remained unfit to return to her post or any alternative post. The management statement of case was enclosed with the letter. The claimant was asked that, if she wanted to submit any information she felt would be relevant, she do so by no later than 27 July 2018. The claimant was warned that, should the meeting conclude that all possible support had been offered by the Trust and she remained unfit to return to work to her substantive post or any alternative post, the possible outcome may include the termination of her contract of employment on the grounds of incapability due to ill-health.

83. The management statement of case was prepared by Wendy Garside. This noted that the claimant had had elective surgery on 24 July 2017 when she underwent a total prosthetic replacement of hip joint and OS. In fact, it appears the date of the surgery was 6 July 2017. The report noted that the claimant had been absent since this date due to pain she experienced in her pelvis and the fact that she was deemed not fit by her GP or by occupational health to return to her role or alternative roles. The report set out the claimant's absence history from 2012. The report noted that the most recent period of absence began on 24 July 2017 and that, over the course of the 13 months, GP fit notes submitted by the claimant advised that the claimant was not fit for work, with the most recent GP fit note received on 24 May 2018 valid for 3 months. The conclusion of the report was that the claimant, her consultant and GP had confirmed that there was no timeline of a return to work. The claimant remained unfit to return to work or for any alternative role. The report noted that the claimant and her union support agreed with the escalation to an attendance hearing with insight that the outcome may be termination of contract on the grounds of capability.

84. By an email dated 26 July 2018, the claimant sent information which she considered relevant for the forthcoming hearing. The claimant began her background information with the error in surgery in 2012. She wrote that she had returned to work on 1 November 2012 with a phased return and that, at a meeting on that morning, with John Bergin and HR, she was informed by John Bergin that she would be doing light duties. After HR and her work colleague had left the meeting, the claimant wrote that she had asked John Bergin where he wanted her to go and his reply was "go where you want". The claimant wrote that she was quite tearful as she came out of the meeting; she had been absent from work for 6 months and felt lost. She wrote:

> "Unfortunately in this situation I felt as though I had to rejoin my colleague in the job I had always done for theatres. I felt it was the only place I would be supported.
>
> "So here I was on a phased return doing the same job as I had done before my surgery in April 2012.
>
> "I was emptying panniers with no risk assessment being carried out."

85. The claimant questioned how she could be offered an administrative role when she had been removed from an administrative role. She also questioned how an administrative role could be offered when it stated in correspondence from occupational health about her inability to sit or stand for long periods. She referred to an adjustment being made that she received a perching stool that she requested. She wrote that she did not agree that her duties were restricted and reasonable adjustments made. She did agree that she had had phased returns to work. The claimant referred to a letter dated 1 November 2012 from John Bergin stating that there would be a manual handling risk assessment which would be reviewed every 2 weeks. She wrote that no risk assessment ever took place and there was no review every 2 weeks. She referred to emptying a pannier in July 2013, having a fall while doing so and being taken to A and E. She wrote that the incident was documented but still no risk assessment was carried out.

86. The claimant referred to a discussion about manual handling in 2016.

87. The claimant referred to her treatment by the surgeon who had made the error in 2012 when he visited theatres. She referred to the situation having a deep impact on her mental health.

88. The claimant referred to the consultation about her post when she was absent from work following surgery in July 2017. She wrote that she had chosen to stay under the nursing umbrella to protect her pension. She wrote that "technically I have had no post since this meeting in October 2017".

89. The claimant wrote that, if the surgery in 2012 had gone according to plan, she would not be in the position that she was now in with regards to her working life.

90. The claimant did not suggest that it was not appropriate to be holding a final review meeting under the Attendance Management Procedure at this point or that

she was fit to return to work in any sort of role. The claimant agreed in cross examination that the point had been reached where termination of her employment had to be considered. She agreed that, on medical advice and the claimant's input, no one was saying that she could go back to work. She accepted that the respondent had to be guided by medical advice and could not suggest any role until they had medical advice suggesting she would be fit for this, otherwise they could be putting her at risk.

91. The claimant accepted in cross examination that the Attendance Management Procedure had been properly followed in her case.

92. The claimant accepted in cross examination that managing absence takes up management time at a cost to the Trust.

93. The formal hearing under the attendance management policy took place on 1 August 2018. The claimant was accompanied by Linda Brooks. The meeting was conducted by Alison Brierley, with assistance from a member of HR. Wendy Garside presented the management case. The claimant did not suggest she was fit to return to work in any sort of role or ask that the respondent wait longer before making a decision as to her continued employment.

94. After an adjournment, Alison Brierley informed the claimant of her decision to terminate the claimant's contract due to the inability to fulfil her substantive role. Alison Brierley noted that the claimant remained unfit for work in her substantive role or any other role within the trust. She advised the claimant of her right of appeal.

95. Alison Brierley confirmed her decision by letter dated 3 August 2018. She wrote:

> "The hearing had been convened following a sickness review meeting on 4 June where it was confirmed that there was no timeline of a return to work agreed. Today you have been absent since 24 July 2017 due to having a total prosthetic replacement of the hip joint. This surgery was performed due to ongoing problems you have had with your hip following surgery in 2012. This was discussed at length during the hearing. Occupational health, your GP and you agree that you remain unfit to return to work in any capacity. I was satisfied that redeployment although considered was not an option due to the significance of your hip problem and you agreed that this was the case during the hearing."

96. The claimant was dismissed with 12 weeks' pay in lieu of notice. The letter confirmed the claimant's right to appeal the decision.

97. The claimant did not appeal the decision to dismiss her. She told us that this was on union advice. She was unable to tell us why she had wanted to appeal. The claimant agreed, in cross examination, that, if she had thought the decision to terminate her employment was unfair, she would have appealed but subsequently, in cross examination, said she did not agree that the decision to dismiss was a difficult, but a fair and reasonable, decision.

98. After the claimant's dismissal, the respondent used the money which had been held in the Theatres budget for the claimant's post, partly on giving a permanent post to a third housekeeper; someone who had previously been an apprentice with the respondent.

99. The claimant applied for ill-health retirement. This was granted in March 2019. The letter dated 13 March 2019, informing the claimant of acceptance of her application, advised her that they had concluded that the tier 1 condition was met. This was that there was a physical or mental infirmity which gave rise to permanent incapacity for the efficient discharge of the duties of the NHS employment. They concluded that tier 2 was not satisfied. Tier 2 required a decision that there was a physical or mental infirmity giving rise to permanent incapacity for regular employment of like duration. The letter included the following:

> "On fine balance, it is considered that the evidence indicates, on balance, that this applicant is currently incapable of her NHS job (theatre nursing auxiliary). This is because of the interaction between her residual hip symptoms and psychological factors such as: the workplace issues relating to role change, lack of confidence in her employer's will to support her and residual dissatisfaction that the "offending" surgeon has not apologised in person."

100. In or around November 2018, the claimant's personal injury claim relating to the surgical error in 2012 was settled. By letter of 16 November 2018, from the claimant's solicitors, the claimant was paid the balance of damages due to her from a negotiated £30,000 settlement agreement on her behalf.

101. On 29 October 2018, the claimant notified ACAS under the early conciliation procedure. The ACAS certificate was issued on 30 October 2018.

102. The claimant began these tribunal proceedings on 7 November 2018.

103. Although the time limit issue in relation to the complaints of failure to make reasonable adjustments was flagged up at the case management preliminary hearing, the claimant provided no explanation in her witness statement for not bringing a tribunal claim in respect of these complaints earlier. When the judge asked the claimant to explain why she had not presented her claim about failure to make reasonable adjustments earlier, the claimant said she had not thought about it before. She said that matters had come to a head with the consultation, when the respondent was trying to put her into another role. She said she thought this was wrong and she needed to do something. The claimant was unable to explain to the tribunal the link between the earlier alleged failures to make reasonable adjustments and the consultation. The claimant said she would have to look back at her notes. The claimant confirmed that she had been receiving advice from her trade union throughout this period.

Submissions

104. Ms Levene and Mr Adshead both produced written submissions which they supplemented with oral submissions. They made additional oral submissions after we had recalled Ms Garside to give evidence.

The Law

Unfair dismissal

105. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by their employer. The fairness or unfairness of the dismissal is determined by application of Section 98 of the 1996 Act. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Capability is one of these potentially fair reasons for dismissal.

106. Section 98(4) provides that 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, depends on whether, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and this is to be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the decision to dismiss were within the band of reasonable responses. The burden of proof is neutral in deciding on reasonableness.

Discrimination arising from disability

107. Section 15 Equality Act 2010 ("EQA") provides:

> **"(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

108. The relevant part of the definition for this case is the defence set out in s.15(1)(b).

109. The respondent will successfully defend the claim if it can prove that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

110. This is the same test as for indirect discrimination – whether the respondent can show the treatment was a proportionate means of achieving a legitimate aim.

111. Consideration of whether the defence is made out involves an objective balancing exercise between the reasonable needs of the respondent and the discriminatory effect on the claimant: a test established in the context of indirect discrimination in **Hampson v Department of Education and Science [1989] ICR 179 CA**.

Failure to make reasonable adjustments

112. Section 20 EQA and Schedule 8 contain the relevant provisions relating to the duty to make adjustments. Schedule 8 imposes the duty on employers in relation to employees. Section 20(3) imposes a duty comprising "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."

113. "Substantial" in this context means more than minor or trivial.

114. Paragraph 20 of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

115. What is a PCP is to be broadly construed.

116. There is no formal requirement that the PCP actually be applied to the disabled claimant. The EAT said in **Roberts v North West Ambulance Service UKEAT/0085/11** that a PCP (in this case, hot desking) applied to others might still put the claimant at a substantial disadvantage.

Time limits

117. Section 123 EQA provides that proceedings may not be brought after the end of the period of 3 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.

118. Section 123(3) EQA provides that conduct extending over a period is to be treated as done at the end of the period.

119. A failure to make a reasonable adjustment is generally discrimination by omission. Section 123(3)(b) EQA provides that a failure to do something is to be treated as occurring when the person in question decided on it. If an employer positively decides not to make a reasonable adjustment time will run from that point: **Humphries v Chevler Packaging Ltd EAT 0224/06**.

120. In **Hull City Council v Matuszowicz [2009] ICR 1170,** where there was no clear moment in time where the employer consciously decided not to make the adjustment in question, two alternatives were identified as to when time starts to run:

120.1. when the person does an act inconsistent with making the adjustment; or

120.2. at the end of the period in which the person might reasonably have been expected to have made the adjustment.

121. However, there have been cases where the obligation to make an adjustment was found to be a "continuing state of affairs" meaning that the duty was breached every day – see for example **Secretary of State for Work and Pensions (Jobcentre Plus) v Jamil UKEAT/0097/13.**

Conclusions

Unfair dismissal

122. During closing submissions, for the first time, the claimant raised the argument that she should have been allowed "disability leave". We consider it would be unfair to the respondent to allow the claimant to introduce a completely new argument relating to the fairness of the dismissal at this stage. This was not raised at the preliminary hearing or at the start of this hearing when the claimant confirmed that the only basis of her argument that the dismissal was unfair was because the respondent did not properly consider alternative employment. No questions were asked of witnesses about the possibility of "disability leave". We, therefore, do not consider it in the interests of justice to allow the claimant to rely on this new argument as to why the dismissal was unfair. However, even if we had allowed the claimant to pursue the argument, it was not an argument pursued by the claimant at the time of dismissal so we do not think failure to consider this could make the procedure followed or the decision to dismiss unfair.

123. The claimant accepted that the respondent's process was correctly followed. We conclude that the respondent followed a fair process leading to dismissal which was well within band of reasonable responses. We accept all the points made at paragraph 9 in Ms Levene's written submissions as matters which support this conclusion. These are:

123.1. There was full and proper consultation with the claimant that took into account the medical picture throughout her absence.

123.2. The collation of up to date OH advice before making the final decision reinforces that the respondent gained a full and reasonable medical picture.

123.3. The claimant was given the chance to state her case before the final hearing, which she did.

123.4. The respondent ensured that the claimant had consistent union support at all relevant meetings. Various meetings were moved to ensure that relevant persons could attend.

123.5. The claimant was given a right of appeal, which she did not exercise.

124. We conclude that the decision to dismiss was within the band of reasonable responses. The respondent obtained up to date medical advice before making the decision. Medical advice from all sources and the claimant's own position was consistent in the view that she was not fit for any work and there was no time identified by which she might be fit for work. The claimant was indicating that she wanted to apply for ill health retirement.

125. Given that the advice was that the claimant was not fit for any work with the respondent, nothing could reasonably be done to find alternative work at the stage dismissal was considered. The evidence was that, after the move of the procurement function, which had been done by the claimant and her colleague, from Theatres to the central procurement team, had the claimant been fit for work, the respondent would have looked for some suitable alternative position.

126. Although there were no practical problems in covering for the claimant by the time she was dismissed, because her job functions had been moved to procurement, management and HR time would continue to have been needed to manage ongoing absence, and the respondent would have incurred the cost of further OH reports. Dismissal of the claimant freed up the budget related to the claimant's employment which then enabled the respondent to use the money for a permanent post.

127. In all the circumstances, we conclude that the dismissal was fair.

<u>Discrimination arising from disability</u>

128. The only live issue for us to determine was whether dismissal was a proportionate means of achieving a legitimate aim.

129. We accept all three aims put forward as being legitimate aims. These were:

129.1. Maintenance of standards of governance and regulatory compliance;
129.2. Enhancement of employee and/or patient safety;
129.3. Service efficiency and service delivery**.**

130. We are required to conduct a balancing exercise between the reasonable needs of the respondent and the discriminatory effect on the claimant.

131. There was no prospect of the claimant returning to work with the respondent, in any role, in the foreseeable future.

132. If the respondent did not dismiss the claimant, they would incur ongoing costs in managing her absence: managers (clinical staff) would be taken away from their other duties, HR time would be used and the cost of further OH reports incurred.

133. Whilst the claimant remained employed, the respondent could not use the budget for her post to employ another permanent member of staff.

134. Dismissing the claimant enabled the respondent not to incur the ongoing costs of managing absence, including freeing up the clinical managers for other duties, and to employ another permanent housekeeper. These savings and the additional permanent post all assist the respondent to achieve the aim of service efficiency and service delivery.

135. We do not think that dismissal achieved anything to safeguard the claimant's safety, since the alternative to dismissal would not have been the claimant's return to work whilst unfit but just continued sickness absence. However, freeing up clinical managers' time and the new housekeeper post would contribute to patient safety and also to maintaining standards of governance and regulatory compliance. For example, the CQC had noted that cleanliness standards were not as they should be. Two housekeepers had already been recruited with the aim, in part, of addressing this aspect of governance. The recruitment of a further housekeeper would further enhance the respondent's ability to meet required standards. Reduction of other costs (HR time and OH reports), would allow the respondent to spend the amount saved on other needs of the service, enhancing service efficiency and service delivery.

136. We have to weigh this against the discriminatory effect of the dismissal on the claimant. There was no prospect of her returning to work in the foreseeable future. At some point in the near future, she would be absent with no pay. The claimant had expressed the wish to take ill health retirement if her application was granted. The claimant did not appeal against her dismissal, which is indicative of not feeling a sense of grievance about it at the time. The claimant's view at the time of dismissal was consistent with the medical evidence; that she was not fit to return to the respondent in any capacity. These matters make us conclude that the discriminatory effect on the claimant of the dismissal was very little, if anything.

137. We conclude that the act of dismissal was a proportionate means of achieving the identified legitimate aims. The complaint of s.15 discrimination is, therefore, not well founded.

Failure to make reasonable adjustments

Time limits

138. We considered whether these complaints were presented in time, assuming (without deciding) that there were continuing acts of discrimination to the last possible date. There would be arguments, which it was not necessary for us to consider, that the acts were not continuous.

139. We conclude that this is a case where there was a continuing state of affairs, the last day of which was the claimant's last day at work, 5 July 2017. We reject the argument that it was a few months after her return to work. We conclude that the respondent cannot be said to be failing to make reasonable adjustments in a period

when the claimant was not at work. On this basis, the primary time limit expired on 4 October 2017. The claim was presented on 7 November 2018. This was well over a year out of time.

140. The explanation given by the claimant for the delay in presenting a claim about the failure to make reasonable adjustments was that the consultation about moving the procurement function to the central team had some impact on her decision. However, the claimant was excluded from the consultation in November 2017 at her own request. The claimant did not then put in her claim for a further year.

141. The claimant has not given us any real explanation for the delay in presenting her claim. The claimant has given us no basis on which we could conclude that it was just and equitable to extend time to present the complaints of failure to make reasonable adjustments. We do not, therefore, have jurisdiction to consider these complaints.

142. Although this means that the complaints of failure to make reasonable adjustments fail, we went on to consider what we would have found if we had had jurisdiction.

The merits of the complaints of failure to make reasonable adjustments

143. We conclude that heavy lifting was a PCP. We apply the approach in **Roberts v North West Ambulance Service**. Even if the claimant was exempted from carrying out heavy lifting, being told that she should ask others to carry this out for her, we conclude that it was a requirement of role and could have substantial adverse effect on her. This PCP was applied throughout the times she was at work. As mentioned in relation to time limits, this ended with her last day at work, 5 July 2017.

144. We conclude that there was a PCP of not carrying out a risk assessment for lengthy periods, although not throughout whole of the relevant time. From 1 November 2012 until around end October/early November 2013, no risk assessment was done. We note in the OH report of November 2013 that it recorded that the claimant had recently done a risk assessment.

145. The claimant returned to work on 5 May 2014. She worked without absence for musculoskeletal problems until a further absence beginning on 1 April 2016. There is no evidence of a risk assessment in the period May 2014 to April 2016, although OH had recommended carrying out a risk assessment.

146. The claimant returned to work on 31 August 2016 and a risk assessment took place in September 2016.

147. We conclude that the PCP of not carrying out a risk assessment was applied in the periods November 2012 to November 2013 and 5 May 2014 to 1 April 2016.

148. We conclude that the claimant was placed at a substantial disadvantage by application of the PCP relating to heavy lifting. The respondent conceded that, if a heavy lifting PCP was applied, this put the claimant at a substantial disadvantage. The medical evidence was that the claimant should not be doing heavy lifting. We

infer from this that doing this lifting would have had an adverse impact which was more than minor or trivial on the claimant.

149. The claimant has not satisfied us she has suffered any disadvantage because of failure to carry out risk assessment. OH reports had already recommended that she should not carry out heavy lifting. We cannot know what the risk assessment would have recommended. The claimant did not articulate the disadvantage to her of failure to carry out a risk assessment, or give evidence about this, other than as it related to heavy lifting. The only reasonable adjustment suggested by the claimant was that she should not be required to carry out heavy lifting.

150. Did the respondent fail to take reasonable steps to avoid the disadvantage from PCP1? Although the letters and return to work interviews said the claimant should avoid heavy lifting and the claimant was told she would have help, we conclude that the respondent did not take effective steps to alleviate the disadvantage. The claimant was unable to get help in practice when she needed it. Her complaints (although not frequent) did not result in effective arrangements. No one was allocated to assist at particular times; they were just to fit in assistance around their other tasks. The claimant often found that they were not available e.g. when they were in theatre. Some were not willing to assist. We would have concluded, had we had jurisdiction to consider the complaints, that the respondent did not take reasonable steps to avoid the disadvantage and was, therefore, in breach of the duty to make reasonable adjustments.

_____

Employment Judge Slater

_____

Date: 18 December 2019

REASONS SENT TO THE PARTIES ON

23 December 2019

FOR THE TRIBUNAL OFFICE