Case Number: 1600285/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Martin**

Respondent: **City and County of Swansea**

Heard at: **Cardiff** **On: 26, 27, 28 February and 2, 3 March 2020**
Chambers: 4 March 2020

Before: **Employment Judge S Davies**
Mr P Charles
Ms J Southall

Representation
Claimant: **In person**
Respondent: **Mr J Allsop, counsel**

RESERVED JUDGMENT

1. It is the unanimous decision of the Employment Tribunal that the following claims are not well founded and are dismissed:

    a. Unfair dismissal (ordinary s 98 Employment Rights Act 1996 (ERA) and automatic s 103A ERA);

    b. Disability discrimination (failure to make reasonable adjustments - s 21 Equality Act 2010 (EqA) and arising from disability - s 15 EqA);

    c. 'whistleblowing' detriments (s 47B ERA).

REASONS

Claims

2. The Claimant brought a claim on 16 February 2018, following a period of ACAS Early Conciliation between 7 December 2017 and 7 January 2018.

3. The Claimant claims 'ordinary' and automatic unfair dismissal, 'whistleblowing' detriment and disability discrimination (section 15 EqA in respect of her dismissal and section 21 EqA in respect of failure to appoint her to various redeployment roles).

Issues

4. The following issues were agreed with the parties at the start of the hearing, based on the issues identified in Mr Allsop's skeleton argument (paragraph 5).

Unfair Dismissal

a) What was the reason for dismissal? (The Respondent contends that the dismissal was on the grounds of capability, alternatively some other substantial reason; the Claimant asserts automatically unfair dismissal and / or disability discrimination)

b) Did the Respondent hold genuine belief that the Claimant was incapable of returning to work in her contractual role, or a suitable alternative role in a reasonable period of time?

c) Was this belief reached after a reasonable investigation?

d) Did the Respondent have reasonable grounds on which to conclude as it did?

e) Was it fair to deal with the situation by terminating her employment?

f) Was the Claimant's dismissal procedurally fair? The Claimant asserts that the Respondent failed to properly deal with her grievance, the outcome of which was not before the dismissing officer at the final absence review meeting on 17 October 2017.

Disability Discrimination

Arising from disability - s.15 EqA

g) Was the Claimant's dismissal because of something arising from her disability? The Claimant relies upon absence as 'something' arising from disability.

h) If so, can the Respondent show that the Claimant's dismissal was a proportionate means of achieving a legitimate aim? The Respondent relies upon the legitimate aim of the management of the absence of its employees so as to (1) ensure that the Respondent is able to operate efficiently as an organisation, using public funds, in order to deliver its services to the public, (2) ensure that its employees are deployed in roles that are appropriate to their capability, skills and / or experience, and (3) to protect and promote the health and safety of its employees, including the Claimant.

Failure to make adjustments s. 20 / 21 EqA

i) Did the Respondent apply a provision, criterion or practice (PCP) of:

   a. 'Requirement for Claimant to be fully fit for her substantive role-attendance management policy'?; or

   b. the Management of Absence Policy

j) If so, did it place the Claimant at a substantial disadvantage in comparison to persons who are not disabled? The Claimant asserted this was her increased risk of dismissal, once her absence was being managed under the Management of Absence Policy.

k) Did the Respondent know or ought reasonably be expected to know that the Claimant had a disability, and that the Claimant was likely to be placed at the substantial disadvantage?

l) When did the Respondent become aware of the Claimant's disability (or deemed to have knowledge)?

m) If the Claimant was placed at a substantial disadvantage by the PCP, and it had the requisite knowledge at a material time, was the Respondent in breach of its duty to make reasonable adjustments, as set out in the Claimant's Further and Better Particulars of Disability Discrimination Claims [85-98]?

Whistleblowing

n) Was the Claimant's email of 11th March 2016 [241-242] a protected disclosure under s 43B(1)(b) or (f) ERA?

o) If so, did the Respondent subject the Claimant to detriments on the grounds of having made the protected disclosure?

Limitation

p) Are the allegations of discrimination and/or detriment that relate to matters occurring prior to 7 September 2017 out of time, such that the Employment Tribunal does not have jurisdiction to consider them?

q) If so, in relation to the allegations of discrimination, would it be just and equitable to extend time?

r) If so, in relation to the allegations of detriment, was it not reasonably practicable for the Claimant to have presented her claim in time?

s) Was there a continuing act of discrimination / detriment, ending on or after 7 September 2017?

Disability and adjustments

5. Barrett's Oesophagus, as a result of Gastroesophageal Reflux Disease, was conceded as a disability by the Respondent on 7 August 2018.

6. No adjustments were requested by either party for the hearing. Regular breaks in the hearing were taken; in the morning and afternoon and upon request.

7. With the agreement of Mr Allsop, the Claimant was permitted a pen and paper to take notes whilst she was under cross examination.

Hearing

8. The hearing was originally listed to be heard over 7 days but was shortened to 6 days because of the Employment Judge's unavailability on 25 February 2020. In light of the reduced length of the hearing, this judgment was reserved.

9. The parties cooperated to produce a proposed timetable for the hearing and the Tribunal is grateful to the parties for adhering to that timetable.

Witnesses

10. The Tribunal heard from the Claimant and from the following witnesses on behalf the Respondent: Mr Mark Wade, Head of Housing and Public Health, Mr Martin Nicholls, Director of Place, Mr Wyn Mathews, Principal HR and OD Business Partner, Ms Alison Summers, HR and OD Adviser, Mr Elliott Williams, External Funding Manager, Mr Jamie Rewbridge, Strategic Manager for Leisure, Partnerships, Health and Well-being, Ms Karen Fulcher, HR and OD Adviser and Mr Lee Wenham, Head of Communications and Marketing.

Bundle

11. The parties presented an agreed bundle of almost 1000 pages.

12. It was noted that an audit report [408-420] was adduced in redacted form. Enquiries were made of the parties as to whether redaction had been agreed when the Claimant was represented by solicitors; it was confirmed they were. The Claimant confirmed that she raised no issue with regard to the redactions.

Submissions

13. Mr Allsop provided a written skeleton argument on Day 1 of the hearing.

14. Both parties gave oral submissions during the afternoon of Day 5, following a 90 minute break after the conclusion of cross examination of the Claimant.

Amendment applications

15. The Tribunal dealt with amendment applications made by both parties on Day 1 and, for the reasons given orally at the hearing, both were granted. The Claimant's amendment is at (f) and the Respondent's amendment is at (h) in the list of issues above.

16. The Claimant made a further amendment application in respect of "whistleblowing" detriments on Day 3. For the reasons given orally at the hearing this application was refused.

Summary

17. The Claimant worked for the Respondent from 7 January 2014 to 17 October 2017 in various roles. Due to a combination of internal restructures and the Claimant's requests for medical redeployment, the Claimant went through the Respondent's redeployment process on three occasions. The Claimant asserts that she made a protected disclosure by email on 11 March 2016, which action led to an internal audit of the housing department. The Claimant asserts that she was subject to detriment and ultimately dismissal because of being a 'whistleblower'. The Claimant also asserts that she should have been redeployed into alternative roles and the failure to do so in each case was a failure to make an adjustment in respect of a disability. The Claimant asserts her dismissal was unfair, discriminatory and as a result of whistleblowing.

18. Page numbers in the bundle appear in square brackets and reference to witness statements are in round brackets with the initials of the witness in question.

Facts

19. The Claimant initially worked for the Respondent as an Equality Engagement Officer from 7 January 2014. When this post was made redundant she was redeployed, from 1 April 2015, to a grade 8 role as Senior Renewals and Adaptation Support Officer in the housing department.

Senior Renewals and Adaptation Support Officer

20. The Claimant's role was managing a team of staff dealing with the administration of home improvement loans and grants [job description 180]. Her role involved contact with the legal department internally and dealing with queries and complaints from homeowners and their representatives.

21. The Claimant contacted her line manager, Mr Wade, on 27 October 2015 [213] with reference to an ongoing restructuring process, suggesting that he should consider making her post redundant.

22. On 26 November 2015, the Claimant and her colleagues moved offices to the Civic Centre. Around the time of the office move, the Claimant and a colleague from another team, Dave Evans, had a disagreement about seating. Additionally the Claimant complained about Mr Evans' use of bad language in the open plan office.

23. Following this disagreement the Claimant reported sick for work on 30 November 2015, returning on 11 December 2015. Mr Wade conducted a return to work meeting with her on 14 December 2015 and during this meeting, the Claimant disclosed her Barrett's Oesophagus condition for the first time [217]. The Claimant indicated that her regular medication had been increased in order to get her symptoms under control but that medication had returned to normal levels by the time of the return to work meeting.

24. The following day, a stress risk assessment was carried out by Mr Wade and the Claimant [222]. Preventative measures identified included regular one-to-one meetings with Mr Wade, who would also attend team meetings on a quarterly basis and meet with the Claimant and other team leaders to discuss team relationships.

25. The Claimant believed that Mr Evans had told colleagues that she was absent with stress. However the Claimant did not make a formal complaint about this [235].

26. Mr Wade and the Claimant met on a monthly basis for one-to-ones and a follow-up absence review meeting was held on 8 January 2016 [228]. The Claimant indicated that her gastric condition was affected by stress but that her symptoms were now under control and would be monitored.

27. Mr Wade arranged for Mr Evans's line manager to speak with him about his use of language and the Claimant confirmed improvement in that regard, in her email of 24 December 2015 [226]. However, the Claimant complained again about Mr Evans' use of bad language, reported to her by members of her team (email to Mr Wade on 26 February 2016 [233]). When Mr Evans' line manager raised the matter with him, Mr Evans emailed Mr Wade on 1 March 2016, alleging that the Claimant was singling him out, suggesting it amounted to workplace bullying [237e].

28. On 4 March 2016, the Claimant confirmed by email to Mr Wade that she would be working from a different office to allow "the staff to bond with Dai" (Mr Evans). The Claimant then emailed again later that day and requested to be redeployed on health grounds, saying she had experienced an increase in symptoms [236]. The Claimant followed this with an email on 7 March 2016 to Mr Wade [237b] asking he set aside time to consider her request for redeployment citing not only Mr Evans' behaviour but also, that her office

space was an issue as she could not hear what was said to her on the phone and that loans were “a mess”.

29. Mr Wade wrote to the Claimant and Mr Evans separately by email on 9 March 2016 [231 and 237d]. Mr Wade informed Mr Evans that he would not accept or defend the use of bad language and that he had tried to facilitate a meeting between all parties but that Mr Evans had not agreed to it. Mr Wade also wrote to the Claimant to confirm the steps taken with Mr Evans but that he now considered the matter closed. Mr Wade indicated concerns about the impact on workplace relationships and asked the Claimant to cease raising issues about historic matters that the Claimant’s predecessor informed her of. He said: “of course if there are any serious concerns you want to evidence and take further, then I will consider these. If not, I must ask that this stops, we look forward not backwards and focus instead on the team and our customers.” Mr Wade concluded by informing the Claimant that she would be referred to Occupational Health in light of her medical redeployment request.

30. On or around her return to work in December 2015, the Claimant attended a meeting with a solicitor who complained about the administration of a loan. The Claimant met the solicitor again in/around February 2016. The Claimant felt unsupported in her dealings with this solicitor. The colleague (PH) who originally administered the loan subject of complaint, had moved to a different department and the Claimant dealt with the complaints without his assistance. The solicitor in question was assertive and raised concerns that the file had been ‘edited or sanitised’ [215].

31. The Respondent’s in house legal team convened meeting on 10 March 2019 which the Claimant attended alone, when she had understood that Mr Wade and Mr Williams, team leader, would also attend. The Claimant asserts she discovered a template letter drafted by her predecessor [461] seeking authority from homeowners for her predecessor to act on their behalf. The Claimant asserts that she showed this template letter to Mr Wade prior to the meeting with legal and that he told her not to show it to the legal team. Mr Wade denies this allegation. We do not consider it necessary to resolve this factual dispute to determine the issues in the case. In any event the Claimant showed the letter [461] to the legal team at the meeting.

Sickness absence

32. We find that the Claimant reported sick from 10 March 2016; there was some confusion in the Claimant’s evidence about this date (paragraph 23 Claimant’s witness statement suggest that sickness started on 12 March 2016, which she initially conceded in evidence was an error but later retracted that concession). Taking into account the date recorded in the referral to Occupational Health was 10 March 2016 [239] and the Claimant’s own email of 11 March 2016 states “I am currently off with stress since yesterday”, we conclude that her sickness absence started on 10 March 2016.

Alleged protected disclosure

33. The Claimant sent an email to Mr Arran, director of legal on 11 March 2016 [241]. The passages (with first names of non witnesses removed) relied upon as amounting to a protected disclosure are as follows:

> "*A meeting was held Wednesday this week to resolve issues … the team leader should have gone but I was instructed to go and told in no circumstances do I discuss anything I shouldn't. Ms Shoemark, Ms Richards and Ms Williams were present and I must admit are a credit to you. I asked Mark Wade and Mr Williams if you would know about the meeting they laughed and said I hope not or we will be in trouble.*
> *…*
> *The National Home Improvement Loan is just getting off the ground and is a shambles there has already been a complaint from an MP as the survey was changed by Mr Williams unknown to myself or Mark Wade who rang me on my day off to find out what was happening as he had to respond. My name was then put against this complaint and I have also had to endure the abruptness face-to-face off a solicitor Mr Jones relating to another maladministration as they won't face him. Mr Jones asked me who is running this monkey show and on this occasion I understand his frustration, I'm no legal expert but I could clearly see it as a mess.*
>
> *Honestly Mr Arran these issues can be resolved and standardised but your staff will update you this is a battle when the service manager is backing the team leader and making it up as they go along to spend their budget, we are dealing with people's own money and Ms Richards will update you they are not getting this, spend their budget at all costs*."

Occupational Health report

34. An Occupational Health report was produced on 17 March 2016 [243] which refers to an exacerbation of the Claimant's 'health condition' which can be affected by stress. The report does not detail the nature of her medical condition or offer any opinion on whether it would amount to a disability under section 6 EqA. The report recommends medical redeployment.

35. The Claimant did not return to the housing team.

Redeployment – 2016

36. The redeployment process is normally conducted over a 12 week period but was extended to 19 weeks for the Claimant in 2016. During the redeployment period, redeployees are able to carry out work trials to test suitability of a role; these trials are usually for 4 weeks. Redeployees are given a point of contact in HR and access to a list of vacancies. They have priority when it comes to consideration for vacancies. If there are no other redeployees expressing interest, the redeployee will have a 'prior consideration' interview for the

vacancy. If more than one redeployee is interested in a vacancy, there will be a competitive interview process.

37. The Claimant was supported during her redeployment period, commencing on 13 April 2016, by Alison Summers of HR. HR officers act as a conduit between the redeployee and managers with vacancies; forwarding on the redeployee's expressions of interest for consideration and passing on feedback from managers.

38. The Claimant indicated that she did not have 'significant health problem/disability' in a redeployment checklist that was completed in April 2016 [276a].

39. In April 2016 the Claimant applied for a Stress Management Counsellor post but opted not to pursue this option, as she was required to complete a certificate of proficiency and had concerns about the time that this would take [248-255]. Also in April 2016, the Claimant applied for the position of Community Education Development Officer but was informed that she did not meet the criteria for the post [271-74].

40. The Claimant contacted Ms Summers on 19 April 2016 to enquire about bespoke training courses and indicating a willingness to participate outside work hours [277].

41. The Claimant attended an absence review meeting with Mr Wade, HR and trade union representative on 16 April 2016 and agreement was reached about how her team would be informed of her absence [292].

42. The Claimant attended a prior consideration interview for Assistant Manager at Birchgrove on 12 May 2016. The Claimant was considered unsuitable for post due to her inexperience of work with the service users in question [324], who had significant care requirements.

43. The Claimant was shortlisted for interview for the role of Local Area Coordinator but withdrew her interest on 16 May 2016 in light of the extensive preparation required for a three day selection process.

44. During the redeployment process the Claimant undertook work in a supernumerary placement in Employee Services from 28 July 2016.

Contract Monitoring Officer

45. The Claimant started a work trial for the post of Contract Monitoring Officer on 23 May 2016. The trial was extended to 1 July 2016. During her time in the role, Mr Wade and the Claimant crossed paths on one occasion. The Claimant then informed her manager that she would not be able to continue in the role of Contract Monitoring Officer due to potentially encountering Mr Wade. The Claimant asserted that this was because of ongoing investigation into her allegations of maladministration within the housing department. The

Claimant says she was signed off sick again to avoid contact with Mr Wade [334].

Workways+ Mentor

46. On 5 September 2016 the Claimant was redeployed for a work trial as a Mentor on the European funded 'Workways + Project'. The Claimant was confirmed in post by letter of 17 October 2016 [392]. The role was at a lower grade (7) than the Claimant's position in the housing team. To ameliorate this, the Claimant was afforded salary protection at grade 8 until 30 September 2017.

47. The Claimant's line manager was Elliott Williams. It was recognised that the role was a step backwards for the Claimant and she may benefit from a more senior role in future [390]; the Claimant's position in this regard was recorded in the trial period documentation signed by the Claimant [391] and Mr Williams.

48. The Claimant expressed her view that the position was going 'back to basics' in an email on 20 October 2016 [395] and enquired about access to the redeployment list to Ms Summers on 31 October 2016 [394]. The Claimant expressed her desire to attend a redeployment day and Ms Summers advised her to speak to her line manager to agree paid time to attend, subject to business need.

49. The Claimant applied for more senior roles within the Workways + Project; she applied on 9 December 2016 for External Funding Programme Officer (grade 9) and was shortlisted for interview. However, the Claimant informed Mr Williams by email of 16 December 2016 that she would not attend the interview [404]; she did not provide a reason.

50. On 22 January 2017 the Claimant reported absent due to sickness to Mr Williams [405]. Mr Williams notified the head of services' personal assistant, as they dealt with absence. On 24 January 2017 the Claimant provided a fit note citing work-related stress.

51. During her period of sickness absence the Claimant remained unable to work in her substantive post as Workways+ Mentor; she continued to be paid from Mr Williams' team budget and her post could not be filled by someone else and the team could not obtain additional cover due to the way it was funded. We accept Mr Williams' evidence given in re-examination that members of his team enquired when the team would get additional cover for her absence, as the Claimant's work was being covered by the remaining members of the team.

Outcome of concerns raised in Claimant's email of 11 March 2016

52. Mr Nicholls wrote to the Claimant on 30 January 2017 [406], following the conclusion of the audit enquiry, and regarding the concerns she raised about administration of loans in her email of 11 March 2016 to Mr Arran. Mr Nicholls

concluded “having reviewed the findings and full audit report and discussed there (sic) with the Head of Housing. I can advise you that the matter has been satisfactory concluded”

Occupational Health referral

53. The Claimant was referred to Occupational Health on 13 February 2017 [434]. The Claimant informed Mr Williams of continued absence on 20 February 2017 indicating she was on the waiting list for a stress counsellor; she had been referred to ‘helping hands’ (peer support) and was receiving support from the GP [446].

54. Occupational Health produced a report on 14 March 2017 [447] which indicated that the Claimant suffered from a “chronic medical condition” (unspecified), offering the view that it would come under the protection of the Equality Act 2010. The report records the Claimant said she experienced work-related stress related to “members of the team not getting on creating a very negative working environment”. The report supported medical redeployment. Mr Williams acknowledged that the team was relatively new and, faced with an external audit, some had taken feedback quite personally but denied the atmosphere was ‘toxic’.

Redeployment – 2017

55. At her absence review meeting on 23 March 2017, the Claimant suggested there was a ‘toxic’ environment in the Workways+ Project. The Tribunal accepts the evidence of Mr Williams (paragraph 18 and 20 EW) that there was some unhappiness within the team with external partners in the project. These were not internal team disagreements.

56. It was determined to place the Claimant on the redeployment list again and it was agreed that the Claimant should attend a “Selling You” course to assist in securing redeployment. The Respondent arranged for external stress counselling for the Claimant. During this redeployment process the Claimant’s point of contact in HR was Karen Fulcher.

57. The Claimant was placed in a supernumerary position within Employee Services from 10 April 2017.

58. A summary of the outcome in respect of posts, the Claimant expressed an interest in or were referred to her for consideration, during redeployment was included in the appeal outcome letter [673]. The Claimant agreed with the accuracy of this summary, which indicated that: the Claimant did not meet the essential criteria for six posts, one post was removed due to restructure, the Claimant lacked relevant recent experience for one post, the Claimant declined two offers, the Claimant felt that she did not meet the criteria for three posts, the Claimant was unsuccessful at interview for one post, two posts were already filled by the time she expressed an interest and two posts were declined due to the costs of ‘bumping’.

59. The Claimant expressed interest in the role of Management Support Officer but was informed via Ms Fulcher of the manager's feedback which was that she did not meet the criteria: "a good educational background including either higher or further education qualifications". The Claimant raised this as an issue with Mr Nicholls who in turn spoke with Mr Matthews, who took up the matter with the manager concerned. Consequently the manager reviewed her decision and agreed to offer the Claimant an interview for the post but the Claimant withdrew her application.

60. The Claimant also raised concerns with regard to the length of time it took to inform her of the outcome of a competitive interview for Domestic Abuse Advocate role, which fell outside her expectation terms of timeliness (feedback came within a few days, via a call from her trade union representative, rather than direct immediately following the interview).

61. The Claimant complained that the redeployment list was inaccurate as it included vacancies which were no longer available. This resulted in wasted effort making applications for roles that were unavailable. The Respondent concedes the list was not always up to date, which arose as a feature of the list being a 'live' document which was updated as positions on it were filled by others on redeployment. The Tribunal notes that whilst it would be frustrating to apply for a job only to find it was no longer available, the Claimant's supernumerary position in Employee Services meant she was well placed to check availability of posts prior to expressing interest. Employee Services maintained the redeployment list.

62. The Claimant had not secured redeployment at the end of the 12 week redeployment period and a follow-up absence management meeting was held on 19 June 2017 with Mr Williams, HR and trade union representative. Mr Williams made a further referral to Occupational Health and it was agreed that the Claimant remain on the redeployment list.

63. Occupational Health recommended, due to the complex nature of the Claimant's condition, that she should be reviewed by a physician (report of 11 July 2017 [585]). The report of the Occupational Health physician dated 20 July 2017 [590] dealt with the Claimant's work-related stress, which was not considered to be a disability under the Equality Act 2010. Occupational Health recommended that the Claimant was medically fit to return to work immediately if provided with support and her long-term prognosis was excellent. The physician's view was that there was not a medical solution to the situation and was optimistic that if provided with support into a new role that the Claimant's competence would restore, further psychological symptoms would be minimised and this would likely have a beneficial effect on her gastrointestinal symptoms [591].

64. A further welfare meeting was held on 16 August 2017. The Claimant agreed with the contents of the Occupational Health report of 20 July 2017 and that she was unfit to return to her role in Workways +. The Claimant was informed that she would be referred to final absence review meeting.

65. The Claimant was informed on 18 August 2017 that her supernumerary role would come to an end the following week. The Claimant provided a sicknote on 21 August 2017 [623] to certify absence from work. The redeployment period was extended to 29 weeks (from 12 weeks). The Claimant accepts that towards the end of the extended redeployment period she stopped applying for jobs as she had in effect given up on the process as she felt 'knocked back'.

Involvement of Mr Nicholls/Mr Matthews

66. Mr Nicholls became aware of issues raised by the Claimant when Councilor Fitzgerald intervened on her behalf, by writing to the Respondent's chief executive in July 2016.

67. Mr Nicholls liaised with Mr Matthews to confirm when the audit report regarding the Housing department was due to be completed. Mr Nicholls informed the Claimant of the outcome in January 2017. The Claimant wrote directly to Mr Nicholls in response in emails of 1 February 2017 [421-424], setting out the history of her concerns and indicating that she had been redeployed into a job she did not want and was due to lose salary protection in September 2017.

68. On 5 February 2017 the Claimant emailed Mr Nicholls again on two occasions to raise concerns about her role and suggesting she had not received support or counselling [428-9]. Mr Nicholls advised that she would be referred to Occupational Health. The Claimant also received support via external counselling sessions provided by the Respondent during 2017.

69. On 14 March 2017 (the same day as her Occupational Health report was produced) the Claimant emailed Mr Nicholls again to inform him she been placed on medical redeployment and seeking his support, albeit the nature of the support was unspecified [450-456]. The Claimant emailed Mr Nicholls again on 24 March 2017, raising concerns about her salary and temporary position and requesting support [451-455]. Mr Nicholls responded on 27 March 2017 indicating that he would raise the matter with Mr Matthews. The Claimant applied the same day indicating she was advised to accept health capability dismissal and take the matter to Tribunal.

70. On 20 April 2017 the Claimant forwarded Mr Nicholls an email exchange between her and Ms Fulcher regarding feedback received from Ms Reed, the manager who had rejected the Claimant's expression of interest in the post of Management Support Officer. The Claimant suggested to Mr Nicholls that 'barriers' to employment were being put up and Mr Nicholls agreed to raise the matter with Mr Matthews [524-527].

71. Mr Nicholls and Mr Matthews attended a meeting with the Claimant and trade union representative on 15 May 2017, to discuss her absence and the concerns she had raised about the redeployment process [536]. The Claimant raised concerns about the redeployment process, in particular Ms Reed's

comments about the Management Support Officer post and the delay in the outcome on the Domestic Violence Advocate post.

72. Mr Matthews suggested that in future the Claimant could identify potentially suitable vacancies to either him or Ms Fulcher directly (thus giving the Claimant an additional point of contact in the HR team for redeployment).

73. The Claimant raised further concerns after the meeting by email of 19 May 2017 [538].

74. The Claimant continued to contact Mr Nicholls over the following months; copying him in on correspondence with Mr Steve Rees, Head of HR with regard to a grievance in August 2017 [625] and contacting him on 9 September 2017 indicating that she expected to be dismissed at the forthcoming final absence review meeting and requesting that her departure from the authority was not delayed [627]. Mr Nicholls corresponded directly with the Claimant throughout the period.

Grievance

75. In June 2017, with the support of her trade union, the Claimant contacted Mr Matthews suggesting an "exit strategy". Mr Matthews enquired whether the Claimant was raising a grievance [541 and 579]. The Claimant confirmed that she would raise a formal grievance on 10 July 2017 [577], Mr Matthews acknowledged the Claimant's intention to do so on 11 July 2017 [577]. The Claimant confirmed that she would pass the grievance directly to the investigation officer upon appointment. The Claimant submitted an undated written grievance with attachments [543], received in the HR Department on 9 August 2017.

76. Mr Rees, Head of HR, considered the Claimant's grievance and responded in writing on 16 August 2017 [603-607] indicating that he considered that the Claimant's complaint did not amount to a grievance in accordance with paragraph 12.2 of the Grievance Policy. Mr Rees's letter concluded "there is therefore no further recourse for you to pursue. However, as you will be aware, a final absence review hearing will be convened in due course and I would suggest that you raise the redeployment issues at this meeting."

77. Paragraph 12.2 of the grievance policy states:

> "When a grievance is received human resources will undertake a case review of the complaint. If it is decided that the reasons for the complaint do not amount to a grievance, the employee will be informed of this in writing by human resources, outlining the reasons why and informing them that there is no further recourse for them to pursue."

78. Mr Rees's letter of 16 August 2017 does not indicate why he concluded the Claimant's complaint was not a grievance, however he attached a document headed "Alex Martin: Grievance" listing her complaints and providing a response to each.

79. The Claimant replied to Mr Rees on 25 August 2017 [626, 565-569] indicating that she would raise the issues with regard to redeployment at the final absence review meeting.

Final absence review meeting

80. The Claimant was invited to attend the final absence review meeting by letter of 27 September 2017 [629], in which she was warned of the possibility of dismissal on grounds of health capability.

81. Mr Rewbridge was appointed as responsible officer for the final absence review meeting held on 17 October 2017. Mr Rewbridge had no prior involvement with the Claimant at this time. Also in attendance at the meeting, were Ms Reid and Ms Fulcher from HR and Mr Williams who had prepared an absence report [643-49], with the assistance of Ms Fulcher. The Claimant attended with her trade union representative [638-42]. The Claimant accepted that the minutes of the meeting in the bundle, although not verbatim, were accurate.

82. Ms Fulcher assisted with the compilation of the pack of documents (final absence review pack) for Mr Rewbridge to consider at the final absence review meeting. The pack did not include the grievance outcome letter from Mr Rees of 16 August 2017 but did include the Claimant's response of 25 August 2017 to Mr Rees [626] at appendix 29. The pack of documents was provided to the Claimant and her trade union representatives by email on 27 September 2017 [635], 3 weeks prior to the meeting. Neither the Claimant nor her representatives, raised any issue about the pack's content nor did they ask for Mr Rees's letter to be included.

83. Mr Rewbridge alighted on the correspondence at appendix 29 (the Claimant's response of 25 August 2017) and questioned the Claimant about it during the meeting [638] noting it: "doesn't fit with the flow of information". In response the Claimant said words to the effect "yes to be fair lots of background information that MN and SR has, you wouldn't have any of that information".

84. The Claimant was asked about bespoke training during the final absence review meeting and confirmed that she had not asked HR or her line manager for bespoke training [641].

85. Mr Rewbridge communicated the reasons for dismissal in a three-page letter dated 23 October 2017 [653-656] citing health capability. The Claimant did not dispute the content of the Occupational Health reports and that she was unable to return to work in her previous role as a Workways+ Mentor, she had been unsuccessful in an extended redeployment period and had ceased to engage in the process in circumstances where she accepted there were vacancies on the redeployment list which she could have applied for. Mr Rewbridge concluded that the issues the Claimant raised with regard to the redeployment vacancy list being out of date did not prevent her from viewing all available vacancies (it was accepted there was an issue with some

unavailable vacancies still appearing on the list). Mr Rewbridge concluded that training had been offered ('Selling you' course), appropriate support had been provided and that the Claimant's absence was dealt with properly under the Management of Absence Policy.

Appeal

86. The Claimant appealed her dismissal by letter of 26 October 2017 [656-658]. An appeal meeting was arranged by letter of 13 December 2017 [662] and held on 18 January 2018. The appeal was chaired by Lee Wenham, who had no knowledge of the Claimant prior to becoming appeal officer. Also in attendance at the appeal meeting were Carolyn Thorne, HR, Councillor Lewis (Observer), Mr Williams, Nick Huffer, in-house legal, Mr Rewbridge, the Claimant and her trade union representative. The appeal meeting was recorded by agreement and the transcript is at [662a-du].

87. Mr Wenham considered the available medical evidence to discern whether the Claimant may have a disability but found the OH reports to be contradictory and that the latest report indicated that her condition (stress) would not be long-term and would not amount to a disability (paragraph 11 LW).

88. Mr Wenham provided a detailed appeal outcome letter dated 1 February 2018 [669-674] addressing the Claimant's complaints of a lack of support and training and issues with redeployment process, including the redeployment list and essential criteria for posts. The Claimant acknowledged that all matters of concern were discussed at the appeal meeting, which was lengthy (as demonstrated by the length of the transcript).

89. Mr Wenham concluded that the Claimant was supported with referrals to Occupational Health, stress counselling and training in accordance with the Management of Absence Policy. Mr Wenham concluded that with regard to training it was reasonable to decline to offer the Claimant specialist training on GIS mapping (for Property Resource Manager role) and that other training (Selling You) was appropriate and in line with the redeployment policy. Mr Wenham was satisfied that with regard to redeployment, the Claimant did not suffer prejudice due to the redeployment list issue, although it was provided via her trade union she was provided feedback with regard to the Domestic Abuse Advocate role and finally where the Claimant raised concerns over essential criteria, HR had appropriately challenged a manager on her behalf.

90. We accept the unchallenged evidence of both Mr Rewbridge and Mr Wenham that they were unaware that the Claimant asserted that she had made a protected disclosure in her email to Mr Arran.

Law

91. The Tribunal referred to the following legislation in respect of:

- Unfair dismissal - sections 98 (ordinary) and 103A (automatic) ERA 1996;

- 'Whistleblowing' and detriments - section 43B and 47B ERA 1996;

- Failure to make reasonable adjustments - s.20, 21 and Sch 8 EqA;

- Discrimination arising from disability - s.15 EqA;

- Time limits – s123 EqA and s48 ERA

92. The Tribunal is grateful to counsel for comprehensive submissions on the law; we do not include reference to all authorities referred to but note only those of key importance and necessary in light of our factual findings.

Ordinary unfair dismissal

93. In deciding whether a dismissal is fair, the Tribunal considers two stages. First, the Respondent must establish a potentially fair reason for the dismissal. Second, the Tribunal must be satisfied, in the circumstances, the Respondent acted reasonably in treating the reason as a sufficient ground for dismissing the employee.

94. In this case the Respondent relies upon capability s.98(2)(a) ERA (and in the alternative 'some other substantial reason'). We must be satisfied that the decision maker held a genuine belief that the Claimant was unable to return to work and whether dismissal was a reasonable outcome. The test is a variant of that in **Burchell**, so we must be satisfied there was a reasonable investigation of the situation and reasonable grounds for dismissal.

95. In cases of ill health capability dismissal, we consider the question of whether a reasonable employer would have waited longer to dismiss and if so, how much longer (**BS v Dundee City Council [2014] IRLR 131**). This question must be addressed in all the circumstances particular to the case including whether medical evidence has been obtained and considered and whether the Claimant has been consulted and her views considered.

96. We must be satisfied that the Respondent's decision and the process in reaching that decision fell within the band of reasonable responses open to the reasonable employer (**Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**).

Whistleblowing – qualifying and protected disclosures

97. We must consider the elements of a 'qualifying disclosure'; there must be 'disclosure of information' by the Claimant, which, in her 'reasonable belief' is made in the 'public interest' and tends to show one of the relevant failures in section 43B(1) ERA.

98. **Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416** confirms the approach to adopt when considering whether there has been a protected disclosure:

> (a) identify each disclosure by reference to date and content; (b) identify the employer's alleged or likely failure to comply with a legal obligation and/or the matter giving rise to the endangering of an individual's health and safety; (c) address the basis upon which the disclosure was said to be protected and qualifying; (d) separately identify each failure; (e) identify and verify the source of the obligation by reference to statute or regulation. It was not enough for the Tribunal to lump together a number of complaints, some of which might not show breaches of legal obligations; (f) determine whether the Claimant had the necessary reasonable belief; (g) where a detriment short of dismissal was alleged, identify the detriment and the date of the act or deliberate failure to act; (h) determine whether the disclosure was made in the public interest (para.98)

99. In order for there to be a qualifying disclosure pursuant to s.43B(1) ERA, there must be a disclosure of information. The assertion of an allegation will not suffice, although information may be conveyed or 'intertwined' in an allegation. The key is that information must be conveyed, see **Kilraine v London Borough of Wandsworth [2018] IRLR 846**:

    a. *"35… In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in sub-s (1). The statements in the solicitors' letter in Cavendish Munro did not meet that standard.*

    b. *36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case. …"*

100. The Claimant needs to show that she held a reasonable belief that her disclosure was made in the public interest (not that it necessarily was in the public interest).

101. The Claimant, as a whistleblower, does not need to be correct about what she contends regarding the relevant failure. A belief may be reasonably held, even if it is wrong (**Babula v Waltham Forest College [2007] ICR 1045**).

102. The statutory test of belief is subjective; there must be a reasonable belief of the worker making the disclosure. The individual characteristics of the Claimant need to be taken into account including her particular field of expertise and knowledge (**Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4** - paragraphs 61 & 62)

103. The Claimant relies on a disclosure made to her employer and as such, if we find that she made a qualifying disclosure, it would automatically amount to protected disclosure (section 43C(1)(a) ERA).

Detriment

104. As to 'whistleblowing' detriment it was held in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** that detriment is established if a reasonable worker would or might take the view that they have been disadvantaged (or in other words a justified sense of grievance).

105. There must be a causal link between the protected disclosure and the detriment in question. In **Fecitt v NHS Manchester [2012] IRLR 64 CA** it was held that liability will be established for detriment if the Respondent was influenced or materially influenced by the fact of disclosure.

Discrimination arising from disability

106. As for the correct approach when determining section 15 claims we refer to **Pnaiser v NHS England and others UKEAT/0137/15/LA** at paragraph 31. The relevant steps to follow are summarised as follows:

a) the Tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;

b) the Tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the "something" must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;

c) motive is irrelevant when considering the reason for treatment;

d) the Tribunal must determine whether the reason is "something arising in consequence of disability"; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;

e) the more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;

f) this stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;

g) knowledge is required of the disability only, section 15 (2) does not extend to requirement of knowledge that the "something" leading to unfavourable treatment is a consequence of disability;

h) it does not matter precisely which order these questions are addressed. Depending on the facts the Tribunal might ask why the Respondent treated the Claimant in an unfavourable way in order to answer the question whether it was because of "something arising consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to "something" that caused the unfavourable treatment.

107. As to the justification defence, the Tribunal must consider whether the Respondent has a legitimate aim which it seeks to achieve by proportionate means. Cost saving on its own cannot amount to a legitimate aim

108. When considering proportionality, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business/organisational needs of the Respondent. The Respondent referred us to **Birtenshaw v Oldfield [2019] IRLR 946**, the EAT emphasised the difference in the analysis required in considering justification in a section 15 EqA 2010 claim as opposed to the reasonableness of adjustments in a section 20 EqA 2010 claim. The EAT noted that the Tribunal should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim, provided it has acted rationally and responsibly.

Failure to make reasonable adjustments

109. The guidance given in **Environment Agency v Rowan [2008] IRLR 20** provides that there must be identification of:

(a) the provision, criteria or practice (PCP) applied by or on behalf of an employer;

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

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

110. A like-for-like comparison is not required in complaints of reasonable adjustments. The duty to make reasonable adjustments allows an employer to take positive steps to the advantage of disabled employees.

111. A 'substantial disadvantage' means something which is "more than minor or trivial"; a relatively low threshold.

112. The purpose of making adjustments is to avoid substantial disadvantage, with a view to maintaining or accessing employment. If the duty to make adjustments arises, the Tribunal must consider what adjustments would have been reasonable. If the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment.

113. The Respondent referred us to **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216** (paragraph 46) on the question of substantial disadvantage where the PCP is the application of an absence management policy. **Griffiths** is authority for the position that no substantial disadvantage arises where the policy allows for discretion in its application.

Knowledge of the disability

114. The Respondent can avoid liability under, and under s.21 EqA (by Schedule 8 EqA) if it did not know, and could not reasonably be expected to know, that the Claimant had a disability and did not know that the Claimant was likely to be placed at substantial disadvantage. The issue is what should the employer have reasonably been expected to know.

Conclusions

Whistleblowing

115. We considered first, the issue of whether the Claimant made a protected disclosure in her email of 11 March 2016.

116. In the Claimant's particulars of claim, at paragraph 6 [15], she refers to her disclosure being "about malpractice and sabotage of files along with housing loans not been legally executed". The particulars of claim were drafted by the Claimant's solicitors, who remained on the record when the Claimant was ordered to clarify the legal basis of the whistleblowing claim by Employment Judge P Davies at a telephone preliminary hearing held on 6 June 2018 (direction 3 [69b]).

117. The Claimant's solicitors emailed the Respondent's solicitors on 20 July 2018 [75a] to confirm that the Claimant relied upon section 43B(1)(b) (failure to comply with a legal obligation) and (f) (information is being or is likely to be deliberately concealed).

118. The Claimant's solicitors provided further and better particulars in respect of whistleblowing on 26 July 2018 [82-83], which asserted the failures to comply with legal obligations were:

a. Between 1 April 2015 and 12 March 2016 contracts and other legal documents re charges on some properties were not executed properly resulting in second charges being put on properties without authorisation of holder of the first charge. The legal obligation in question being the Law of Property Act 1925;

b. In 2013 residents had not executed health and safety documents – 'Hafod Renewal are Regeneration project'. The legal obligation in question being health and safety legislation;

c. On 11 February 2016 changes were made to work schedules produced by surveyors to include additional works to increase the value of loan.

The legal obligation in question being criminal law (fraud) and health and safety legislation;

d. On 4 March 2016 requesting a surveyor to sign off work which had not been carried out by contractor. The legal obligation in question being criminal law (fraud) and health and safety legislation.

119. The basis for the allegation that legal failures had been concealed was that in November 2015 a colleague (PH) removed papers from files and a whole file was concealed from a solicitor acting for a resident. That PH refused to meet with the solicitor and the issue was left to the Claimant deal with. Additionally, that Mr Wade and Mr D Williams refused to attend meeting with the in-house legal department. Mr Wade told the Claimant not to discuss or show to the legal department anything to do with letters being sent to residents to obtain authority for the second charges meaning the legal department could be bypassed [83].

120. The Claimant relied solely upon the wording of her email as amounting to the disclosure of information; we were not referred to any contextual evidence that would have provided Mr Arran with a broader understanding of what she wrote in her email. It is clear from the content of the Claimant's email that she had never met Mr Arran previously (from the first paragraph of her email). Mr Arran did not give evidence to the Tribunal.

121. On the question of context, we have taken into account the Claimant's evidence about the content of the meeting with Mr Arran's colleagues from in-house legal on 10 March 2019 (paragraph 17 AM) during which the Claimant showed a copy of the letter [461] issued by the Claimant's predecessor with regard to Homefix loans. There was no evidence before us about what information was actually conveyed to Mr Arran by his colleagues following the meeting. Even assuming Mr Arran was made aware of the content of the letter [461], we do not consider the fact of the letter's existence together with the email of 11 March 2016 was sufficient to convey that 'contracts and other legal documents re charges on some properties were not executed properly resulting in second charges being put on properties without authorisation of holder of the first charge'.

122. We considered the wording of the 11 March 2016 email to determine whether its content is sufficiently specific to amount to a disclosure of information. Although the Claimant relies specifically on 3 paragraphs, we took the email as a whole to construe its meaning. The Claimant refers to the "mess of renewals and adaptations loan processing" and complaints being raised by an MP and a solicitor, however the content of the email does not disclose information of the four specific concerns set out in the Claimant's further and better particulars, save as referred to below. The email does not refer to concerns about breaches of the various legal obligations specified in the further particulars, even in lay terms.

123. There is reference to a survey being changed by Mr Williams (paragraph 5 of the email of 11 March 2016) but the Claimant does not give

more information than that. There is no suggestion that the survey was changed as a fraud to inflate the value of the loan.

124. As for concealment, the Claimant says: "a meeting was held Wednesday this week to resolve issues Mr Williams the team leader should have gone but I was instructed to go and told in no circumstances do I discuss anything I shouldn't" (paragraph 3 of the email of 11 March 2016). The Claimant does not identify, in the email, who told her not to discuss anything. The Claimant does not suggest that Mr Wade should have attended the meeting and there is no reference in her email to the colleague PH at all.

125. Finally we note that the Claimant says (paragraph 7 of the email of 11 March 2016): '*I will be taking the advice off the union by either going down the whistleblowing policy route or…*' (our emphasis). This indicates to us that the Claimant was thinking of making a disclosure in the future rather than making a protected disclosure by sending the email.

126. Having considered the wording of email and the context of which the Respondent would have been aware, we are not satisfied that the Claimant made a disclosure of information of the kind asserted. The allegations made by the Claimant in the email were general in nature and lacked sufficient specifics to amount to a protected disclosure of information (even when taking into account that an allegation can also convey information). It was not apparent from the email that the Claimant was asserting a breach of an identifiable legal obligation; rather she referred to a 'mess'. We do not doubt that the Claimant believed processes required improvement but her evidence is not sufficient to support her contention that she had a reasonable belief that a legal obligation had been breached. The nature of alleged concealment was not apparent either.

127. We find that the email of 11 March 2016 did not amount to a protected disclosure. The detriment complaints were not particularised (paragraph 25 of particulars of claim [21]). It follows that the claims of automatic unfair dismissal (s103A ERA) and whistleblowing detriment (s 47B ERA) are not well founded and are dismissed.

Unfair Dismissal

128. We find that the Claimant was dismissed for the potentially fair reason of capability on health grounds.

129. Mr Rewbridge was an independent dismissing officer, who formed the view that the Claimant was incapable of returning to work in her substantive role of Workways+ Mentor, or a suitable alternative role in a reasonable period of time (paragraph 17-18 JR). We take into account the reasons given in the detailed dismissal letter [653-655] and accept that these views were genuinely held by Mr Rewbridge.

130. We conclude that there was a reasonable investigation of the Claimant's situation prior to dismissal. Mr Rewbridge took into account the following information (paragraph 5 JR):

a. Occupational Health reports, including a recent report from an Occupational Health Physician dated 20 July 2017 [590-592];

b. The final absence review meeting pack, 'Report to the Responsible Officer' [643-649] setting out the key background facts of the case, and minutes of the meetings with the Claimant under the Management of Absence Policy [462-463], [481], [574], [602], and information as to roles the Claimant unsuccessfully applied for and those she declined to apply for [650]

c. The accounts of the Claimant's line manager, Mr Williams and Ms Fulcher, who provided HR support to the Claimant in the redeployment process (paragraph 28-30 EW), (paragraph 35 KF).

d. The Claimant's account at the final absence review meeting [638-642] (paragraphs 10, 12-15 JR).

131. The information before Mr Rewbridge at the final absence review meeting, was the product of an investigation falling within the range of reasonable investigations. We find it was reasonable for Mr Rewbridge to conclude that the Claimant was incapable of carrying out her substantive role as a Workways+ Mentor and, despite attempts to redeploy, there were no suitable alternative roles available for her.

132. There was no evidence before Mr Rewbridge to suggest that a further extension to the redeployment period would have had a real prospect of resulting in successful redeployment. The Claimant accepted that she had disengaged from the redeployment process as she felt 'knocked back' [642]. The period of redeployment had been extended from the usual 12 weeks to 29 weeks. By the end of that period the Claimant expressed a desire to depart from her employment 'it's pointless prolonging my departure… please ask Steve Rees do not delay procedures in view of me leaving' [627, 540]

133. In the circumstances there would have been little point in the Respondent waiting longer before dismissal; there was no basis on which to find that a further period of time would have avoided dismissal. The extended redeployment period had not been successful despite the Claimant working in a supernumerary position for most of that period within the Employment Services team, where she was well placed to access HR support. The Claimant sought an 'exit strategy' and expressed a wish to leave; she gave no indication as to when she might be able to return to work.

134. As to whether the Claimant's dismissal was procedurally fair, the sole issue raised was that the Respondent failed to properly deal with her

grievance, the outcome of which (Mr Rees's letter of 16 August 2017) was not provided in the pack of documents for Mr Rewbridge.

135. As to whether the Respondent properly dealt with the grievance; Mr Matthews originally invited the Claimant to confirm whether she was raising a grievance [579] and acknowledged her intention to do so on 11 July 2017 [577]. In the circumstances it seems perhaps incongruous that Mr Rees determined that the Claimant's complaint was not a grievance. Mr Rees conducted a case review and provided responses to the complaints raised by the Claimant in a four-page document [604-607] headed 'grievance'. Mr Rees concluded his letter by inviting the Claimant to raise redeployment issues that the final absence review meeting.

136. Mr Rees has left the Respondent's employment so, unfortunately, we were unable to ask him why he adopted the approach he did to the Claimant's grievance. We considered paragraph 12.2 of the Grievance Policy, which Mr Rees invoked but we are not clear why Mr Rees "decided that the reasons for the complaint do not amount to a grievance". Mr Rees' letter to the Claimant does not, on its face, "outlin(e) the reasons why". This amounts to a procedural defect in response.

137. However the Claimant was represented throughout by her trade union and Mr Rees' approach was not challenged directly by the Claimant [626], to Mr Nicholls [627], at the final absence review meeting or on appeal.

138. Mr Rees's letter of 16 August 2018 was not included in the final absence review meeting pack. Whilst it would seem appropriate to have included the letter, we do not think it's omission affected fairness for the following reasons.

139. The Claimant and her trade union representatives had sight of the pack of documents 3 weeks prior to the meeting yet did not raise any issue about the pack's content nor did they ask for Mr Rees's letter to be included.

140. The pack did include the Claimant's response of 25 August 2017 to Mr Rees at appendix 29. In the Claimant's letter she indicated her intention to raise the redeployment issues at the final absence review meeting and confirmed in evidence that she did so. Mr Rewbridge alighted on the correspondence at appendix 29 and questioned the Claimant about it during the meeting [638], who in response confirmed that Mr Rewbridge 'wouldn't have that information'. The Claimant chose not to share with Mr Rewbridge the matters referred to, when specifically prompted to explain the document. We are satisfied that the Claimant had full opportunity to air matters of concern to her from the grievance at the meeting.

141. Despite the procedural defect identified, we are satisfied that the Claimant's case was fully considered, including all issues raised in the grievance by Mr Wenham at the appeal hearing. We are satisfied that the substance of the Claimant's complaint was properly address and the procedural issue cured at appeal.

142. In the circumstances we find that the decision to terminate the Claimant's employment was fair and within the range of reasonable responses.

Section 15 EqA Discrimination arising from disability

143. The Claimant's dismissal amounts to unfavourable treatment. The Claimant relied upon her absence from work as being the 'something' arising from disability (paragraph 18 particulars of claim [19]).

144. The reason for dismissal was the Claimant's capability; that she could not return to work in her substantive role or a suitable alternative within reasonable time. The Claimant was able to sustain some work; she demonstrated this by attending work in the supernumerary role she requested. As such, absence of itself was not the issue that led to dismissal, rather it was absence from her particular role. We construe the Claimant's case widely by taking 'absence' as meaning 'absence from particular work'.

145. The inability to return to her substantive role appeared to be due to the Claimant's reaction to her perception of events. From her own evidence, it seems likely that the Claimant experienced increased stress due to being placed in a role that she viewed as going 'back to basics' at a lower grade than she previously held. Although the Claimant did not raise it before she went off sick, she also says that her reaction was due to the 'toxic' workplace environment.

146. Stress in itself was not the disability relied upon. However increased stress could trigger a worsening of symptoms of her disability, as indicated by her GP and by OH reports. The Claimant's reaction to being confirmed in the Workways+ Mentor role and her perception of the working environment triggered a stress reaction and increase in her Barrett's Oesophagus symptoms.

147. As in this case, there may be more than one reason for dismissal. There were various reasons for her failure to obtain redeployment (as agreed by the Claimant at [673]) which were unrelated to her disability. We must consider whether the "something" arising from disability had a significant or more than trivial influence on dismissal, so as to amount to an effective reason for dismissal. There can be more than one link in the chain of causation between the 'something' and disability. We conclude that the Claimant's inability to return to the Workways+ Mentor role was an effective reason for dismissal and this was connected to her disability, albeit with a series of links in the chain. Whatever the reason for her increased stress, Occupational Health were persuaded of the impact on the Claimant, so as to recommend medical redeployment out of the Mentor role. We do not consider the reasons for her reaction impact our conclusions. This in turn prevented the Claimant from returning to her substantive post and so we conclude that part of the reason for dismissal was something arising from disability.

148. We now turn to the Respondent's justification defence. The Respondent concedes knowledge of disability in respect of this complaint.

149. No challenge was made in respect of the legitimate aims relied upon: 'the management of the absence of employees so as to (1) ensure that the Respondent is able to operate efficiently as an organisation, using public funds, in order to deliver its services to the public, (2) ensure that its employees are deployed in roles that are appropriate to their capability, skills and / or experience, and (3) to protect and promote the health and safety of its employees, including the Claimant.'

150. It appears to us that such aims are self-evidently legitimate, with appropriate focus on the needs of council's employees as well as that of the organisation.

151. We turn our focus on the proportionality part of the justification test. We must weigh the discriminatory impact of the dismissal on the Claimant against the organisational needs of the Respondent to make our assessment of proportionality.

152. We consider that the decision by Mr Rewbridge to dismiss the Claimant was a proportionate means of achieving the legitimate aims. Steps were taken to support the Claimant to avoid dismissal. The redeployment period was extended from 12 weeks to 29 weeks. The Claimant received support from two HR professionals (Mr Matthews, Ms Fulcher) and also from senior management (Mr Nicholls) with regard to the redeployment process. The Claimant remained connected to the workplace through most of the redeployment period as she was placed in a supernumerary role in Employee Services from 10 April 2017 to 21 August 2017 (from which time she was absent due to sickness until her dismissal). Unfortunately, the Claimant was unable to achieve redeployment in any of the 18 roles identified to her or that she had expressed an interest.

153. Mr Williams' team were unable to place someone into the Claimant's role whilst she was absent (almost the whole of 2017). We find that placed pressure on the remaining team over an extended period, as evidenced by the enquiries they made to Mr Williams about her replacement.

154. We also take into account that the Claimant attended the 'Selling you' course to boost her changes of successful redeployment and was referred for assistance in completing her redeployment form (paragraph 9 KF). The Claimant did not request specific training during the 2017 redeployment period (save for GIS, which was deemed too specialist to be a reasonable step).

155. The Claimant accepts that by the end of the redeployment process, around the end of August 2017, she had disengaged and had not applied for some suitable roles.

156. It is self-evident that a supernumerary post was a temporary measure. There were undisputed and valid reasons for the Claimant's failure to attain redeployment. There was no real prospect of the Claimant reverting to her substantive role on medical grounds, due to her stress reaction. Nor could she be redeployed into an alternative role within a reasonable time, particularly since she had disengaged. In all the circumstances, dismissal was a reasonably necessary means of attaining the legitimate aims; the alternatives to dismissal had been exhausted. The complaint is dismissed.

Disability Discrimination – s21 EqA failure to make reasonable adjustments

157. The Respondent did not apply the pleaded PCP of a 'requirement for Claimant to be fully fit for her substantive role- attendance management policy' (further and better particulars [77]). This is evident from the fact that she was entitled to sick leave, placed in a supernumerary role and redeployed on medical grounds on more than one occasion.

158. The Respondent acknowledged that it applied its Management of Absence Policy and that its application is a PCP. The Tribunal considered the Claimant's claim on that basis, as it was originally pleaded in paragraph 20a of the particulars of claim [20].

159. The Claimant did not plead the "substantial disadvantage" she experienced arising from the PCP in either the particulars of claim or the further and better particulars. Following questions from the Tribunal, based on the original pleading at paragraph 20 a [20] , the Claimant confirmed that she relied upon the increased risk of dismissal once the PCP was applied to her.

160. The Respondent submitted that the Claimant was not placed at a substantial disadvantage by the application of this policy, by analogy with the position described in paragraph 46 of **Griffiths**.

161. We note that there is flexibility and discretion built into the drafting of the Management of Absence Policy to accommodate disadvantages that might be faced by employees with disabilities:

a. Disability Related Absence - paragraph 9.2.5 [135] provides:

"The act places a duty on employees to make reasonable adjustments the staff to help them overcome disadvantage resulting from an impairment… As part of the absence review process, managers should consider whether any adjustments can be made to enable employees to attend and carry out their work. Where appropriate, guidance should be sought from Occupational Health and well-being unit"

b. Long-term absence protocol – paragraph 29.10 [155] provides:

"The purpose of absence review meetings is to: … Discuss any reasonable adjustments in light of advice from Occupational Health

consider any alternative work or other options of the service may be able to offer"

162. Following **Griffiths** we conclude that the application of the Management of Absence Policy, as a PCP, does not place the Claimant at a substantial disadvantage in comparison with non-disabled persons. As such no duty to make adjustments in respect of its application arises and the complaints of failure to make adjustment are not well founded and are dismissed.

163. We touch briefly on the remaining issues and what our conclusions would have been in any event.

Knowledge

164. On the question of knowledge of disability and disadvantage, the Claimant submitted that the Respondent had knowledge of her disability at all material times. By contrast the Respondent asserts that knowledge did not crystallise for the purposes of reasonable adjustments until 27 March 2017 upon receipt of a fit note which referred to the Claimant's disability being linked to stress [470].

165. We note that the Claimant first made reference to having Barrett's Oesophagus during a return to work meeting with Mr Wade on 14 December 2015 [217]. During that meeting the Claimant described increasing her medication to deal with increased symptoms but that they had returned to normal and she was due to start stress management via her GP in February 2016. The Claimant was referred by Mr Wade to Occupational Health [220]. During a meeting with Mr Wade on 8 January 2016, the Claimant confirmed that her gastric problems react to stress but were under control [230]. The Claimant raised her Barrett's Oesophagus again to Mr Wade in an email of 4 March 2016 [236] in the context of requesting medical redeployment. Occupational Health provided a report on 17 March 2016 [243] which refers to an unspecified "health condition" and recommends medical redeployment; no opinion is ventured with regard to whether the condition would amount to disability.

166. The Claimant herself indicated that she did not have significant health problem/disability that needed to be considered as part of redeployment process (checklist of April 2016 [276a]).

167. In light of the record of exchanges between the Claimant and Mr Wade in the relevant period, the content of the Occupational Health report and the Claimant's own position, we conclude there was no basis for actual or constructive knowledge of disability during the period the Claimant was managed by Mr Wade.

168. We find that the date upon which the Respondent became aware of the Claimant's disability was 14 March 2017 in the Occupational Health report [447-449]. Prior to that point in time, the information available to the

Respondent did not lead to constructive knowledge of the Claimant's condition being a disability.

169. The Respondent submits that it was not until receipt of a Fit Note dated 27 March 2017 [470], which refers to the disability and its linkage to stress in the workplace, that the Respondent had knowledge of the possibility of the Claimant being placed at a substantial disadvantage in the workplace. We reject this submission in light of the comments made by the Claimant linking her disability with stress in conversations with her previous line manager Mr Wade which were recorded. We conclude that the Respondent had actual knowledge of disability and constructive knowledge of possible disadvantage by 14 March 2017. The disadvantage of possible dismissal could be inferred from the circumstances.

Roles

170. In accordance with our finding on knowledge, the complaints of failure to place the Claimant into roles arising prior to 14 March 2017 would fail (roles in further and better particulars [89-92]).

171. As for the remaining complaints of failure to place in 6 roles in the period from 19 June 2017 to 3 August 2017 [93-97]; considering the reasonableness of any adjustment is an objective test to be judged against the Respondent's circumstances. The Tribunal may consider whether the steps taken as a whole by the Respondent have discharged the duty placed upon it.

172. The Claimant was supported financially with protected pay, at grade 8, in her redeployed position as a Workways+ Mentor role until the end of her employment. The redeployment period was extended from 12 weeks to 29 weeks. The Claimant was placed in a supernumerary position in Employee Services where she had access to assistance in identifying alternative roles and applying for them. The Claimant attending the 'Selling You' course to assist in securing an alternative role in the redeployment period. The Claimant was afforded an additional point of contact in HR and support from Mr Nicholls.

173. Finally the Claimant did not dispute the reasons put forward by the Respondent for her being unsuccessful in obtaining the roles in question. Notably the reasons included roles no longer being available [96], the Claimant withdrawing her interest [96] and declining to attend selection process [93].

Limitation

174. Had the complaints been well founded, the allegations of discrimination and detriment relating to matters occurring prior to 7 September 2017 were brought out of time, and the Tribunal does not have jurisdiction to consider them.

175. The Claimant did not adduce evidence as to why the Tribunal should extend jurisdiction to consider complaints brought outside the usual time limits.

176. There was no continuing act of discrimination / detriment, ending on or after 7 September 2017.

177. In summary all complaints are dismissed.

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Employment Judge S Davies
Dated: 9 April 2020

JUDGMENT SENT TO THE PARTIES ON

……14 April 2020……

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS