**EMPLOYMENT TRIBUNALS**

**Claimant:** Mrs Tina Oliver

**Respondent:** Erewash Community Transport Limited

**Heard at:** Nottingham Employment Tribunal

**On**: 9 – 10 March 2020, in chambers 11 March 2020

**Before:** Employment Judge Dyal, Mrs French, Mr Purkis

**Representation:**

Claimant: in person (supported by Maureen Tizard)
Respondent: Mrs M Peckham, Solicitor

## JUDGMENT

1. The Claimant was unfairly dismissed.

2. The Respondent did not discriminate against the Claimant. The complaints of breach of the duty to make reasonable adjustments and discrimination arising from disability fail and are dismissed.

## REASONS

### Introduction

1. By two claim forms presented on 3 September 2018 and 8 January 2019 the Claimant complains of unfair dismissal, breach of the duty to make reasonable adjustments contrary to s.20 – 21 Equality Act 2010 (EA) and discrimination arising from disability contrary to s.15 EA. The claims were consolidated and the issues identified at a Preliminary Hearing before EJ Blackwell. There were some other additional matters but they were withdrawn following the PH. In more detail the issues for the tribunal to decide are as follows.

*Reasonable adjustments*

2. Was the Respondent in breach of the duty to make reasonable adjustments contrary to s.20 Equality Act 2010:

    a. Did the Respondent apply the following provision, criterion or practice ('PCP'): *a requirement to carry out the full range of a driver-attendant's duties, including physical ones such as cleaning and the removal of seats to accommodate wheelchairs*.
    b. If so did this put the Claimant at a Substantial Disadvantage compared to others who are not disabled?
    c. If so did the Respondent fail to take such steps as were reasonable to avoid the disadvantage? Namely:
        i. To remove the physical duties of the driver-attendant role;
        ii. To redeploy the Claimant to the role of passenger assistant.

3. Note that:

    a. The Respondent admits that the Claimant is and was at the relevant times a disabled person by reason of breast cancer and lymphoedema.
    b. The Respondent admits that it had knowledge of the Claimant's disabilities at the relevant times;
    c. It was uncontroversial before the tribunal that if the PCPs placed the Claimant at a substantial disadvantage the Respondent knew that at the material times.

*Discrimination arising from disability*

4. Discrimination arising from disability, contrary to s.15 EA:

    a. Was the Claimant treated unfavourably? The unfavourable treatment relied upon is dismissal.
    b. Was the unfavourable treatment because of something arising in consequence of disability?
    c. Can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

*Unfair dismissal*

5. Unfair dismissal contrary to s.94 and 98 Employment Rights Act 1996 (ERA):

    a. What was the reason for the dismissal?
    b. If the reasons was a potentially fair one, was the dismissal fair or unfair having regard to the test at s.98(4) ERA?

## The hearing

6. At the outset of the hearing the tribunal raised the issue of reasonable adjustments to the hearing itself. It explored with the Claimant what adjustments she may need. In essence she needed (1) regular breaks to use the toilet, (2) for everyone to speak up and (3) assistance with turning pages. The Claimant was regularly advised throughout the hearing to say if she needed a break and if she was unable to hear. During the hearing regular breaks were taken every 20 to 30 minutes and if anyone's voice dropped to a

low volume they were asked to repeat and speak-up. The Claimant was accompanied by a friend who assisted her with turning pages of the bundle, including while giving evidence.

7. The tribunal was presented with an agreed hearing bundle. It heard witness evidence from the Claimant and from the following witnesses for the Respondent: Ms Jackie Hrynczyszyn, Personnel Co-Manager, Mr Frank Phillips, Chairman and Trustee and Mr John Frudd, Volunteer Trustee.

8. The first half of day one of the hearing was assigned to reading. The second half of day one was taken with the Claimant's evidence. At the outset of day two, the Respondent applied to amend the aims it relied for the purposes of the s.15 EA claim. It sought to add the following additional legitimate aim: *to recruit a permanent member of staff into a driver/attendant role and to save cost.* The Claimant opposed the application. The tribunal decided to allow the application for reasons that it gave orally at the time.

9. At the conclusion of the evidence, the parties made closing submissions. Mrs Peckham spoke to the skeleton argument which she handed up. The Claimant made some very short closing remarks. Essentially she repeated some of her evidence and explained how upset she had been about being dismissed.

## Findings of fact

10. The Respondent is a small charity, and small employer, that provides transportation services to children and adults with additional needs. The service users have a wide range of different needs, some are wheelchair users, some are not, some have significant mental health problems and associated behavioural issues others do not. Until October 2017 the Respondent received funding from a local authority but since that time it has been entirely self-funded. At all material times the Respondent's fleet of vehicles comprised mini-buses of varying ages and adaptations which were designed to carry up to 16 passengers. The Respondent had s.19 Transport Act 1985 permits which have the effect of altering some of the qualification and technical requirements that would otherwise apply to a business carrying members of the public.

11. The Claimant's employment began in around September 2000. She was initially employed as a passenger assistant but within a few months became a driver attendant. The Claimant passed her standard driving test on 14 December 1998. That is significant because as from 1 January 1997, the classification of vehicles that drivers became entitled to drive upon passing the standard driving test changed and became less generous. As a result of the date she passed her test the Claimant was not entitled to drive category D1 vehicles in the course of employment not even in circumstances in which her employer had s.19 Transport Act 1985 permits (see reg.4 of *The Section 19 Permit Regulations 2009*).

12. As a driver the Claimant had regular in-house training relating specifically to driving mini-buses of up 16 passengers and the associated attendant duties. The Respondent also checked her license on an approximately annual basis. It ought to have checked the categories of vehicle she was entitled to drive

but, remarkably it did not. And so for a period of over 16 years the Respondent represented to the Claimant that she was entitled to drive its mini-buses, and she did so ably, whilst in fact she was not legally entitled to do so because she was not licensed to drive D1 vehicles in these circumstances.

*Claimant's illness*

13. On 21 October 2016 the Claimant attended an oncology clinic and was diagnosed with right breast cancer.

14. The Claimant continued working until 26 October 2016 whereafter she commenced a period of sick leave from which she never ultimately returned. On 27 October 2016 the Claimant had right a mastectomy. This was followed by axillary node clearance of a significant number of lymph nodes in and around the right arm on 24 November 2016. As a result of the latter operation the Claimant began to suffer from lymphoedema in her right arm (a permanent condition). This has a number of effects including significant pain and some loss of function in the right arm. It is a debilitating condition.

15. Between January and May 2017, the Claimant underwent adjuvant FEC-T chemotherapy. By July 2017 she had also completed a course of radiotherapy. In August 2017 the Claimant started on a trial drug called Palbociclib as part of what was known as the PALLAS trial. This was a two year trial therefore scheduled to end in August 2019. She also began taking Tamoxifen which she would need to continue for 10 years.

16. We have no hesitation in finding that from the commencement of her sick leave to the date of her dismissal on 26 November 2018 that the Claimant, sadly, was unfit for any form of work. In summary we make that finding because:

    a. The Claimant was continuously certified by her GP as being unfit for any work (as distinct for work with adjustments);
    b. Although there is a suggestion in a letter from a GP, dated 11 April 2018, that he anticipated she would soon be fit to return to work, there are obvious limitations in that opinion and in any event we have the benefit of knowledge of events subsequent to it – the prognosis proved to be wrong. The GP when opining had not seen the Claimant since November 2017 and, as he indicates, had not assessed her ability to drive or undertake her usual work duties. It does not appear that the GP had a detailed understanding of the Claimant's role and responsibilities. He did however identify some long-term limitations in that the Claimant would no longer be able to carry out even moderate manual handling.
    c. An occupational health opinion was ultimately obtained on 28 November 2018 and it noted that the Claimant was really very unwell in herself, probably in part because of the trial drug. Her symptoms included:
        i. Bowel problems: needing to open her bowels around 5 – 6 times per day, sometimes urgently;
        ii. Bladder problems: needing to empty her bladder 2 – 3 times per hour;

iii. Sickness and vomiting: daily vomiting, usually in the morning but also at other times of the day;
iv. She felt lethargic and fatigued;
v. She had significant pain in her feet and toes which could be problematic driving a mini-bus;

The Consultant Occupational Health Practitioner's opinion was that the Claimant was not fit to drive a mini-bus or to do any other form of work. We do not defer to that opinion, but we take it into account and form our own view that we agree with it. These problems were of a sort and at a level that precluded driving and being responsible for a cohort of service users for obvious reasons. Including the sheer impracticability of needing the toilet so often (around 12 toilet stops in the course of a 4 – 5 hour working day) when driving and simply being and feeling too unwell to concentrate for several hours a day on driving a mini bus. She would also need to vomit regularly in the course of the day.

d. In her evidence before the tribunal, the Claimant was very candid about her health problems: she agreed that during her sickness absence and up to the time the of dismissal she had been unfit for any form of work. She had simply been too unwell in herself to work. Indeed she agreed that that sad state of affairs persisted to the present.

17. The Claimant was paid 28 weeks of sick pay and thereafter her pay reduced to nil, save for holiday pay.

*The duties of a driver/attendant (unadjusted)*

18. The duties of a driver/attendant (as the job title suggests) involved a good deal more than just driving a mini-bus. The duties included the following:

a. Basic daily safety checks of the minibus such as, checking wheel nuts, tyres and opening the bonnet and checking water and oil;
b. Cleaning the bus inside and out at least weekly;
c. Altering the configuration of seating in the minibus to meet the needs of the type and number of service users, including by removing seats to create space for wheelchairs;
d. Assisting services users on and off the mini bus. For wheelchair users this would involve operating the tail lift. In the event of the mechanical automated system failing, that would require manually pumping the lift up and down which required some strength;
e. Ensure passengers are wearing seatbelts or harnesses and responsibility for securing wheelchairs;
f. Being ultimately responsible for all passengers during carriage;
g. Being responsible for evacuating passengers rapidly in the event of an emergency.

19. On each route the driver/attendant is accompanied by a passenger assistant. The passenger assistant role included:

a. Collecting passengers from their home/school and escorting to the minibus;
b. Helping passengers on and off the bus;
c. Assisting with seatbelts/harnesses;

d. Carrying passengers' bags;
e. Assisting to exit the passengers in the event of emergency;
f. Operating the minibus doors and steps;
g. Supervising the passengers during transit.

20. As the Claimant explained in her witness evidence, the passenger assistant role was quite a manual role: it included lifting (sometimes quite heavy things) and pushing (e.g. of wheelchairs).

21. In practice, the Claimant's role did not involve all of the duties that a driver/attendant might be required to carry out. That was because for the six or seven years leading up to her sickness absence she had been assigned to the Foxwood School route. Although the service users (there were 13) had profound learning disabilities such as autism and associated behavioural and other problems, they were not wheelchair users. So some of the duties, those associated with facilitating the carriage of wheelchair users, did not arise.

*Absence management*

22. There appear to have been little (if any) management of the Claimant's long-term absence until 12 March 2018 when she had an informal welfare meeting with Ms Jackie Hrynczyszyn who was accompanied by Sarah Hayes. We accept that the notes of the meeting are broadly accurate. In summary:

    a. There was a broad discussion of the Claimant's fitness to return to work. She was not fit to return to work at that time.
    b. There was a discussion of the Claimants' medication and symptoms at that time and the Claimant candidly said that she suffered from loss of appetite, diarrhoea and constipation, sweats, frequent urination and an inability to sleep at night, she suffered from significant pain and was unable to raise her right arm fully. That had an impact on normal day to day activities including simple things like getting out the bath.
    c. There was a discussion about future return to work dates; the Claimant was unable to provide one and had not yet spoken about that with her GP.
    d. The Claimant indicated that even in due course there would be permanent restrictions on her abilities: she would not be able to wash the bus or do physical things.
    e. There was a discussion of whether she might accept a passenger assistant role if she proved unable to return as a driver attendant, but the Claimant was not keen on that possibility because she wanted to be a driver.
    f. The Claimant indicated that she would consent to medical advice being obtained from her GP.
    g. There was also a brief discussion of the Claimant's license categories although at that time Ms Hrynczyszyn was keen to keep that issue separate from sickness absence management. In essence Ms Hrynczyszyn said it had recently been discovered that the Claimant did not have right license to drive the Respondent's mini buses.

23. Ms Hrynczyszyn then obtained advice from the Claimant's GP in the letter dated 11 April 2018 (and described above). It was not however received until

around early to mid-May 2018. On 29 May 2018, Ms Hrynczyszyn invited the Claimant to a further welfare meeting.

24. The Claimant wrote to Ms Hrynczyszyn with an update on her health in which she said, among other things that she was feeling weak, sick a lot, not eating well and that she would be happier when she finished the drug trial (in August 2019).

25. The welfare meeting was postponed on account of the Claimant's health and ultimately took place on 19 June 2018. We accept that the notes of the meeting are broadly accurate. In summary:

    a. There was a discussion of the Claimant's health: she continued to be poorly, although not every day was the same. She suffered from diarrhoea, sickness, mouths ulcers, inability to eat properly, problems controlling her bladder (feeling like she needed to urinate all the time), tiredness and fatigue. She indicated that she had the symptoms identified in the GP's letter.
    b. The Claimant was unable to say when her condition would improve.
    c. The Claimant on her own account remained unfit for work.
    d. There was a discussion of reasonable adjustments:
        i. The Claimant raised the possibility of someone accompanying her in the mini-bus in case she was unwell;
        ii. She asked if, when she was well enough to return, she could initially come back for afternoons only, and ask her husband to call in the mornings if she was not feeling well enough.
    e. There was another brief discussion of the Claimant's driving license position. She refused to accept that she lacked entitlement to D1 classification vehicles.

26. A further check was made in relation to the Claimant's driving license on 20 June 2018, and it confirmed that the Claimant did not have D1.

27. By a letter dated 22 June 2018, Ms Hrynczyszyn invited the Claimant to a formal meeting to discuss the license issue.

28. The Claimant was infuriated by the license situation. From her perspective, she had worked without problem or incident as a driver for the Respondent for around 16 years prior to her sickness. She had complied with her training requirements and the Respondent had consistently signed her off as suitable to drive. She could not really believe that it was now suggested she was unqualified to drive.

29. In late June 2018, the Claimant wrote a long letter of complaint to Mr Phillips. The letter canvassed a wide range of issues including historical complaints about Ms Hrynczyszyn and other matters which, though important to the Claimant, are not material to the claims before the tribunal. She did however, complain about the license issue and Ms Hrynczyszyn's management of her sickness.

30. Mr Phillips responded to the Claimant's letter by a letter of 12 July 2018. He had looked into the license issue and satisfied himself that the Claimant was not licensed to drive D1 vehicles and that there had been a series of mistakes

on the Respondent's part in allowing her to do so. He also rejected the complaints against Ms Hrynczyszyn.

31. The Claimant responded by a letter dated 13 July 2018, in which she refused to accept that she did not have the right to drive D1 in the course of her employment.

32. On 18 July 2018, Ms Hrynczyszyn invited the Claimant to a formal meeting with Mr Phillips to discuss the license issue further, to consider whether she could continue in the Respondent's employment as a driver in light of it and if not whether she could be redeployed to the role of passenger assistant.

33. On 23 July 2018, the Claimant attended a formal meeting chaired by Mr Phillips. She was accompanied but a colleague. We again accept that the notes of the meeting are broadly accurate. In summary:

    a. The Claimant still did not really accept that she lacked the right to drive D1 vehicles;
    b. Mr Phillips canvassed the Claimant's view upon her obtaining the relevant license at her own cost. The Claimant responded 'no comment';
    c. He also canvassed the Claimant's view of, in the event of no other solution being found, being redeployed to a passenger assistant role. He set out the full duties of that role. There was no suggestion that the role would or could be adjusted. The Claimant responded, 'no comment'.

34. On 24 July 2018, Ms Hrynczyszyn spoke to an operative at the DVLA and inquired again whether the Claimant was entitled to drive D1 vehicles for the Respondent in the course of her employment. She was not.

35. On 25 July 2018, Mr Phillips wrote to the Claimant asking for a further response to the possibility of deployment to a passenger assistant role and asking for that response to be given by noon on 27 July 2018.

36. On 6 August 2018, Ms Appleby (Co-Manager, Personnel) wrote to the Claimant inviting her to a meeting to discuss whether or not she was prepared to obtain D1 entitlement. That would involve a medical, a minibus test and 35 hours of classroom tuition. She noted that the Respondent had reflected and was now proposing to pay for the Claimant to undergo the training and obtain the license.

37. On 15 August 2018, the Claimant attended the meeting which was chaired by Mr Phillips. She was accompanied by a colleague. The notes of the meeting are broadly accurate. In summary:

    a. Mr Phillips indicated the Respondent would pay for training to obtain D1 licensing entitlement and for one test. If the Claimant failed it would then be for her to fund any further attempt;
    b. The Claimant still did not accept that she did not have the necessary license entitlement;
    c. The Claimant agreed however to undertake training and the test to obtain a D1 license but only after she had finished the treatment at the

end of August 2019. She did not think she would pass the medical before then.

d. Mr Frank then asked the Claimant if she would undertake the training and then "resume full and normal driver attendant duties". The Claimant indicated that she would undertake the training but that she could not do all of the duties a driver attendant might normally be required to do.
e. Mr Frank then listed the duties that would be expected of the Claimant as a driver attendant, including, operating the passenger lift, cleaning the vehicle, moving, seats and carrying out vehicle checks and emergency bus evacuation. The discussion continued as follows. The Claimant said "*I can't clean the bus I have scar tissue on my arm can't move seats can't lift them."* Mr Phillips *"asked [the claimant] if she means she is able to only to drive the bus as we would employ her on the same basis as all driving staff and she would therefore assume the same duties.*" The conversation continued and Mr Phillips said: "*we need to ensure she is able to perform all the required duties if she passes the D1test. He added that we need to be sure that when she returns to full duties, she is able to fulfil the requirements of the role*". However, Mr Phillips went on to say "*The only exception to this would be if a GP made recommendations or amendments, and if we were able to meet such requirements to make reasonable adjustments".* But, later he said "*the provision of this training offer is on the basis that, following your sickness absence, you are able to return to your normal duties as a Driver Attendant; can you confirm that you are able to resume these requires duties? Yes/NO*." The Claimant did not respond.
f. The Claimant, who remained unfit to return to work in any capacity at that time, was asked whether she would consent to the Respondent obtaining further medical evidence from OH. She did not respond to that request. She was asked when she might be able to return to work, and she again made no response. Asked again, she suggested she might be able to return to work after the drug trial in August 2019 and indicated she would not start training for D1 license until that time.

38. The tribunal found the message that was given to the Claimant at this meeting to be less than consistent. On the one hand she was repeatedly told that if she was to return to work as a driver, this would be on the basis that she was fit and able to carry out all of the duties that a driver/attendant may be required to carry out, including physical duties such as manual handling and cleaning the minibus. On the other hand, there is a comment to the effect the Respondent would make adjustments if they were supported by the Claimant's GP and if it could accommodate them. The former message was given far more emphasis and it sandwiched the comment about reasonable adjustment in the sense that it was conveyed both before and after the comment about reasonable adjustments. We are left with the distinct impression, and find, that the comment in relation to making reasonable adjustments was in the way of lip service. The overwhelming impression any employee in the Claimant's position would have been left with at the end of that meeting was that if they were to return they would need to carry out the full duties of a driver/attendant.

39. Mr Phillips wrote to the Claimant on 16 August 2018, summarising matters from his perspective. In summary:

a. He noted that the Claimant had accepted the offer to take the D1 test but could not commence that process until August 2019 at the earliest;
b. She had not responded to the offer of taking up a passenger assistant role;
c. That the Claimant had been absent from work since November 2016 (in fact she had been absent since late October 2016) and would be unable to return until August 2019 at the earliest when the drug trial concluded;
d. He said that the question now was how long the Respondent could wait and since the matter was linked to health he reiterated the request for the Claimant to consent to an OH referral;
e. He warned the Claimant that if she did not consent the Respondent may have to consider the termination of her employment with the information that it had.

40. The Claimant replied by letter of 18 August 2018. In summary:

a. She complained that the Respondent was not facilitating her return to work by being willing to make adjustments to her duties to avoid physical ones. For that reason she would not accept the offer of D1 training and test.
b. She said that she no longer wanted to drive for the Respondent and was making a complaint to the tribunal.

41. Mr Phillips responded by letter on 22 August 2018. The letter set out the history of matters from the Respondent's perspective. It asked the Claimant whether or not her letter of 18 August 2018 had been intended as a letter of resignation (this was not an unfair question, but for the avoidance of doubt the tribunal does not read the Claimant's letter of 18 August 2018 as a resignation, it is certainly not clearly and unambiguously that, and the Respondent has not suggested in these proceedings that it was a resignation letter). It invited the Claimant to respond to the Respondent's offers, by 28 August 2018, of:

a. Paying for D1 mini-bust test;
b. Employment as a passenger assistant;
c. Consent to obtain a medical report.

42. No response from the Claimant was received.

*Dismissal*

43. On 3 September 2018, Mr Phillips wrote to the Claimant giving her notice of dismissal to take effect on 26 November 2018:

a. Mr Phillips set out the duties of a driver/attendant;
b. He set out the history of the dispute in relation to the Claimant's license;
c. He set out the history of her sickness and medical problems and the management of them;

d. He noted that there had been no response to the letter of 22 August 2018 and decided that it was necessary to reach a view about the Claimant's continued employment.
e. He decided to dismiss the Claimant in light of, her past sickness absence, the future absences which would continue until at least August 2019, the uncertainty of prognosis and thus return work even then.
f. He recorded that there was a significant impact upon the business as follows:
    i. The Respondent had been unable to employ a dedicated driver to cover for the Claimant. It was increasingly difficult to cover the Claimant with staff recruited for short periods;
    ii. As a result the Claimant's absence was being covered by relief cover on an almost daily basis, which was problematic because it meant relief was not available when other drivers were sick. That in turn meant the other drivers were having to provide cover and this was a strain on them.
    iii. Continuity of service was very important to the business and it was important to allocate a regular member of staff.
    iv. The Claimant's absence was not sustainable on a longer term basis.

44. The account Mr Phillips gave here of the impact on the Respondent of the Claimant's absence and the way in which the Respondent managed that was in stark contrast to the oral evidence given to the tribunal.

45. Ms Hrynczyszyn's evidence was in summary as follows:

a. The Claimant's absence had never been covered by a relief driver. Rather, it had been covered by a single person who had been employed for that purpose, Mr Mick Beighton.
b. Mr Beighton had been employed initially upon a six month fixed term contract and thereafter when the Claimant's absence protracted his contract was extended to one which was "renewable annually".
c. He was paid the same amount as the Claimant and all other drivers were paid.
d. Upon his initial employment there were some costs, namely:
    i. Uniform and PPE: £120
    ii. Midas training: which was done in-house by an employee whose salary costs the Respondent had to bear in any event.

46. Mr Phillips oral evidence on these matters in summary was as follows:

a. There was uncertainty about the Claimant's return to work date which was no sooner than August 2018;
b. It was important to the Respondent to have continuity in terms of the driver driving particular routes. This was because of the needs of the service users; it was important to them and their parents to know the driver. Chopping and changing drivers was therefore problematic, could lead to complaints and even the loss of contracts and reputation.
c. The Claimant's duties were covered by a single person, Mr Beighton. However, he wanted permanent employment rather than temporary employment;

d. Mr Phillips understood that Mr Beighton might have left if he was not offered permanent employment and that a contract for his services until August 2018 may not have been enough to retain him;
e. It was difficult to recruit and retain good drivers;
f. He could not identify any pecuniary costs of the Claimant's ongoing absence other than the cost of her holiday pay.

47. The tribunal finds that the account of how the Claimant's absence was covered and the impact of her absence on the business is as stated in the oral evidence summarised above rather then, where different, as stated in the letter of dismissal. We think it more likely that oral evidence given under oath to the tribunal reflects the true position.

48. The Claimant appealed against her dismissal by a letter dated 4 September 2018. Among other things:

a. She complained that Mr Phillips had said that there were no special cases and if she returned she would need to be fit for all her duties;
b. That she would accept that Passenger Assistant job when she finished her treatment;
c. She explained that she was still very unwell;
d. She consented to an occupational health referral.

49. An appeal hearing was arranged and took place on 8 November 2018, chaired by Mr Frudd. There was a general discussion of the basis of the Claimant's appeal. After the meeting the process was set in motion for the Claimant to be seen by Occupational Health.

50. The Claimant was seen in Occupational Health on 28 November 2018 and a report was produced as summarised above. Among other things, it concluded that the Claimant was unfit for any work and that a position would persist at the lease until the end of the PALLAS trial in August 2019. However, even at that point, the position would be uncertain and would need to be reassessed.

51. Mr Frudd wrote to the Claimant by letter dated 5 December 2018, dismissing her appeal. He noted that:

a. Although the Claimant was now willing to accept a Passenger Assistant role, she was not currently fit for that role nor would she be fit for it or any role until at least August 2019, but even then the position was very uncertain.
b. He did not think it was reasonable to wait until August 2019 to reassess the Claimant's health with a view to her either training for the D1 license or working as a passenger assistant.

**Law**

*Reasonable adjustments*

52. The key statutory provisions are sections 20 – 21 and schedule 8 Equality Act 2010. They are not set out here purely for economy but have been considered carefully.

53. The reasonableness of adjustments is a matter to be assessed objectively by the tribunal itself (***Smith v Churchills Stairlifts plc*** [2005] EWCA 1220**,** [2006] IRLR 41,).

54. The duty to make adjustments is not concerned with failures of consultation or assessment nor with omissions or shortcoming in the employer's contemporaneous reasoning. What matters is whether or not there were steps that the employer ought reasonably to have taken (see e.g. ***Tarbuck v Sainsbury's Supermarkets Ltd*** [2006] IRLR 664 [71 – 73]).

55. In order for an adjustment to be reasonable there does not need to be any certainty that the adjustment would remove or ameliorate the disadvantage caused by the PCP. It is in principle sufficient that the adjustment has a prospect of doing so (see e.g. ***Leeds Teaching Hospital NHS Trust v Foster*** [2011] EqLR 1075). It does not have to be a good or a real prospect.

*Discrimination arising from disability*

56. The key statutory provision is s.15 Equality Act 2010. We have considered it carefully but have not set it out for economy.

57. In closing submissions, the Respondent rightly accepted that the Claimant was unfavourably treated (by dismissal) and that was because something arising in consequence of disability, namely disability related sickness absence and inability to work (past and future). There is no need then to set out the extensive case-law on those parts of the s.15 test; the case turns on justification.

58. The starting point is to identify what a legitimate aim is. According to the EHRC Employment Code, a legitimate aim is one that is '*legal, should not be discriminatory in itself, and it must represent a real, objective consideration*' (para 4.28). This broadly reflects the guidance in R (Elias) v Secretary of State for Defence [2006] IRLR 934: "…*the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end."*

59. There is a significant body of case-law (in the context of indirect discrimination) as to whether or not saving cost can alone can be a legitimate aim. The EHRC Employment Code: *'The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice. Cost can only be taken into account as part of the employer's justification for the provision, criterion or practice if there are other good reasons for adopting it'* (para 4.32). This broadly reflects the weight of the case-law.

60. In **MacCulloch v ICI** [2008] IRLR 846**,** Elias J (as he was) summarised the proportionality test neatly:

> *(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with*

*a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.*
*(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].*
*(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."*

61. The proportionality test was described as follows in ***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 610, by Baroness Hale:

*20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] IRLR 934, at [151]:*

*'... the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.'*
*He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:*
*'First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?'*
*As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] IRLR 726 [31], [32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.*
*[…]*

*24. Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer…*

*25. To some extent the answer depends upon whether there were non-discriminatory alternatives available....*

62. In a case such as the present where there is an appeal against dismissal, the dismissal is the product of the combination of the original decision and the

failure of the appeal and it is that composite decision that requires to be justified (***O'Brien (appellant) v Bolton St Catherine's Academy*** [2017] IRLR 547 [40]).

*Unfair dismissal*

63. By s.94 Employment Rights Act 1996 ('ERA') there is a right not to be unfairly dismissed. It is for the employer to show the reason for the dismissal (s. 98(1) ERA) and that the reason was a potentially fair one (s.98(2)). If a potentially fair reason is shown the fairness of the dismissal turns on the test identified at s.98(4) ERA (in relation to which the burden of proof is neutral:

> … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b)shall be determined in accordance with equity and the substantial merits of the case.

64. In ***Iceland Frozen Foods v Jones*** [1982] IRLR 439 the EAT made clear that the range of reasonable responses test applies. In ***Sainsburys v Hitt*** [2003] IRLR 23 the Court of Appeal emphasised that that test applies to all aspects of the dismissal including the procedure adopted.

65. In ill-health capability dealing with long-term absence, there are three main questions ***BS v Dundee City Council*** [2014] IRLR 131 [27]:

    1.1. Can the employer be expected to wait longer;
    1.2. There is a need to consult the employee and take his views into account. If the employee does not know when he can return that is a significant factor operating against him.
    1.3. There is a need to take steps to discover the medical position.

66. Although those are the three main questions, they are not necessarily the only questions and general considerations of fairness apply. Thus for example, if an employee is given materially inaccurate information in a letter of dismissal of a sort that therefore curtails her ability to effectively appeal against the decision to dismiss, that could in an appropriate case render a dismissal unfair.

67. In ***Taylor v OCS Group*** [2006] IRLR 213, the Court of Appeal held that not every procedural unfairness will make a dismissal unfair overall and made clear that the fairness of a dismissal must be judged at the end of the internal process. Unfairness can potentially be corrected at the appeal stage that is true whether the appeal is a rehearing or a review.

68. While it is true that, in long-term sickness absence cases, the outcome of the unfair dismissal complaint and the s.15 EA complaint will often be the same, that will not necessarily be so. The invoke different tests and the tribunal should apply each separately (***City of York Council (appellant) v Grosset (respondent)*** [2018] IRLR 746).

## Discussion and conclusions

69. The PCP relied upon is *to carry out the full range of driver's duties, including physical ones such as: cleaning, removal of seats to accommodate wheelchairs.*

70. The tribunal is satisfied based upon the findings of fact above that there was such a requirement, and that it was a PCP. That is in any event uncontroversial.

71. Tribunal is also satisfied that the PCP put the Claimant at a substantial disadvantage compared to other employees, namely other driver attendants, who were not disabled. That is because she, unlike they, was unable to fulfil the duties of the driver attendant role, and so was liable to and in fact was dismissed. The Respondent clearly had actual knowledge of that at all relevant times as well as of the fact that the Claimant was disabled.

*Adjustment 1: removal of the physical tasks associated with the driver attendant role.*

72. The tribunal doubts that the Respondent properly understood the duty to make reasonable adjustments although, see our findings of fact, it paid lip-service to it. However, the duty is not concerned with thought processes but substance. If the adjustments proposed were not, objectively, ones that ought reasonably to have been made, that is what matters for current purposes.

73. The tribunal considers that removal of the physical tasks would not have been a reasonable adjustment because the Claimant was not fit for *any* work at any time following the commencement of her sickness absence up until her dismissal (or, in fact, as it turns out, at any time thereafter up to and including the present). There was thus no prospect of this adjustment enabling her to return to work nor otherwise of doing anything to remove the disadvantage caused by the PCP.

74. Even if the physical aspects of the driver-attendant job had been removed and assigned to other employees, leaving simply driving and nothing more, the Claimant would not have been fit to do that adjusted job. She was not fit for any job at any time from the commencement of her sickness absence to her dismissal or for the foreseeable period (at least until August 2019) thereafter to do that work.

75. In summary (but see the findings of fact for more detail), the Claimant was so unwell that she was just not fit to work:

    (a) *Frequency and urgency of the need to empty her bladder (and bowels)*: this made it impracticable to be a mini-bus driver. It would not have been at all reasonable or practicable to stop the bus say three times an hour to use the toilet particularly not given the additional needs of the vulnerable service users. Further, it is totally unrealistic to think that a toilet would generally be available whenever urgently needed when out and about in the mini-bus. Sometimes a toilet might be proximate but often inevitably it would not.

(b) *Vomiting*: the Claimant was suffering from nausea and vomiting on a daily basis and this in reality was preclusive of safely being in charge of a mini-bus of children. This was particularly problematic in the mornings but also could happen in the afternoons.
(c) *Fatigue and tiredness*: the Claimant was not sleeping well and as a result suffered from significant fatigue and tiredness.
(d) *Weakness*: for protracted periods the Claimant was not able to eat properly and that no doubt contributed to a serious lack of wellbeing.
(e) *Pain*: the Claimant was suffering from significant pain in her feet that would have had some impact on her ability to drive for extended periods.
(f) *Feeling poorly*: the Claimant simply felt too unwell to make work a feasible or reasonably possible. This was her own (truthful) account.
(g) *Significant loss of function in the right arm*: the Claimant is right handed but lost much of her use of her right arm. She is limited by pain.
(h) *Emergencies:* The Claimant would have been unable to assist in evacuating service users from the vehicle in case of an emergency, an important duty. While it is true that the passenger assistant would have been able to do this there are clearly circumstances in which it would have been highly undesirable for the passenger assistant to be the only person capable of doing this.

76. The reality is that even if the role of driver attendant could have been stripped down to driving only, it remained a safety critical role with huge responsibility for the lives and safety of service users and the Claimant was simply not well enough to take on that responsibility at any time after her sick-leave began.

*Adjustment 2: redeploy to passenger assistant*

77. This role involved at its heart going on mini-bus rounds with the specific role of caring for the passengers on it in various ways. We consider that the features of the Claimant's ill-health that in our judgment precluded a driving role also precluded the Claimant from working as a passenger assistant. Thus redeployment was not a reasonable adjustment. There was no prospect of it enabling the Claimant to return to work nor of it otherwise removing any aspect of the substantial disadvantage caused by the PCP.

78. The difficulty was, as above, that the Claimant was not fit for any work. She was particularly unfit to be out and about for extended periods in a vehicle.

79. We would further add that we considered that the passenger assistant role could not have been reasonably adjusted to remove all material physical or non-sedentary duties. There would be very little left of the role if such duties were removed.

**Discrimination arising from disability**

80. The Claimant was dismissed and that was unfavourable treatment. The treatment was because of something arising in consequence of disability. The something was the Claimant's very length sickness absence (over two years by the date of the dismissal), the certainty of a further period of lengthy sickness absence lasting at least ten months (to August 2019) and the uncertainty as to fitness to return to work even in August 2019.

*Justification: (1) duty to safeguard the health and welfare of its staff and service users*

81. The Respondent certainly had a duty to safeguard the health and welfare of its staff and service users. We have no doubt that was a real need and amounts to a legitimate aim.

82. Dismissing the Claimant was rationally connected to this aim. For reasons we have set out in detail above and should be taken as repeating here, we do not think the Claimant was fit to drive a mini-bus or attend passengers. She was simply too unwell to do so. It would have been unsafe for her to drive a mini-bus whilst so unwell. For instance, her incontinence, nausea, vomiting and pain would all have been serious distractions from driving. If she had nonetheless driven that would have been dangerous to the Claimant, the passenger assistant and the service users on board.

83. The real question is whether the means chosen of achieving the aim – dismissal – were no more than were reasonably necessary to achieve the aim.

84. It was certainly literally possible to achieve the aim without dismissing the Claimant. So long as she was not driving whilst unwell the aim could be achieved. Ordinarily this would be achieved either by redeploying the employee or simply allowing the employee to remain on sick leave.

85. As to redeployment, for the reasons given above we do not think that the Claimant could have been redeployed to a passenger assistant role. There was no evidence of any other role before us, but in any event, we have found as a fact that she was unfit for any work.

86. The only real alternative to dismissal, then, was remaining on sick-leave. That state of affairs could, in principle, have gone on indefinitely. If it had, that would have had a less discriminatory impact upon the Claimant than dismissal. Her employment would have continued, she would have continued to receive holiday pay and there would have been a possibility of it becoming safe for her to drive in the future and (subject to obtaining the necessary license) returning to driving or alternatively the possibility of becoming fit for an alternative role such as passenger assistant.

87. However, the question for the tribunal is not just whether it was *possible* to achieve the aim through a less discriminatory means but whether it was *reasonably* possible weighing the needs of the Respondent against the impact upon the Claimant. This is a challenging balancing exercise.

88. The tribunal considers it significant that for two years (late October 2016 to November 2018) the Respondent had allowed the Claimant to remain on sick leave rather than dismiss her. Thus, at the point of decision, it had already waited a *very* long time before moving to dismissal.

89. Even more significantly, it was also the case that the Claimant would need *at least* a further 10 months of sickness absence. At the end of that 10 months of sickness absence there was no more than a *possibility* that she might be fit to return to work in some capacity. But it was highly uncertain. And, even if

she were able to return to work she would not be able to resume driving immediately since she would need training for the D1 test and to pass that test (which she may or may not do on a first or subsequent attempt). There was an alternative, of carrying out the passenger assistant role upon returning to work. However, that alternative suffered from the same timeframe for possible return to work (August 2019) and the same uncertainty as to whether the Claimant would actually be fit enough to do it.

90. Further, the Respondent did have an ongoing need to employ driver-attendants who were capable of actually doing that work. In the Claimant's absence her work had been covered by Mr Beighton on a series of temporary contracts. There was a risk of losing Mr Beighton if he was not offered permanent work and if so there would be a need to recruit someone else. Recruitment and retention of good drivers was difficult.

91. Whilst the Claimant remained employed she continued to accrue holiday pay. She also continued to accrue continuous employment which was of potential relevance to the Respondent's general liabilities. Further, whilst the Claimant remained an employee the Respondent would continue to owe her the duties employers owe employees which in practical terms would have included at the very least continued management of her absence, keeping in touch, reviews, further decision making about sickness absence and the like. If a permanent replacement had been recruited without the Claimant being dismissed there was also the risk of a redundancy situation being created in the event of the Claimant returning to health and being fit for work.

92. We must weigh against those factors the undoubted impact upon the Claimant. Dismissal is a serious matter particularly for somebody with significant disabilities of a sort that mean it may well be significantly more difficult to find fresh employment in due course compared to others who are not disabled/or have less disabling disabilities. That said we must also recognise that, if the Claimant had not been dismissed, whilst she would obviously have remained in employment, there were limits to that benefit. She would have been on nil pay (save for holiday pay) and unable to actually do her job or any job for at least 10 months with uncertain prospects of ever returning.

93. We found the matter a difficult one but ultimately reached the conclusion that dismissal of the Claimant was reasonably necessary in the relevant sense and was a proportionate means of achieving the legitimate aim in all the circumstances.

*Justification (2): to observe statutory restrictions in regard to driving license and legal eligibility to drive its vehicles*

94. A similar analysis applies here. This was clearly a legitimate aim. There was an undoubted real need for the Respondent's drivers to have the necessary license to drive its vehicles.

95. It was, in a literal sense, possible to meet this aim without dismissing the Claimant: it could be met by her simply not driving. The question is whether it was reasonably necessary to dismiss the Claimant. This brings us back to essentially the same balancing exercise already tackled above: if the

Claimant was not driving that left the outstanding issue of what to do with her employment:

a. Redeployment: as to which see above;
b. Remaining on sick leave and wait and see what the future held. See above. We would add that, in relation to this second legitimate aim, there were two barriers. Firstly, the license situation which the Respondent was in principle prepared to address by paying for training and a test. Secondly, the Claimant's ill-health, which precluded training for and being tested and/or precluded her driving in the course of employment for at least a further 10 months (with the uncertainty of position set out above thereafter).
c. Dismissal.

96. For essentially the reasons above we consider that dismissal was proportionate means of achieving this legitimate aim in all the circumstances.

(3) *To recruit a permanent member of staff into a driver/attendant role (and to save cost)*

97. We accept that this was also a legitimate aim. The Claimant had been absent for a long period of time and fixed term contracts had been used hitherto, to cover her absence. It is entirely understandable for employees, such as those in Mr Beighton's position, to want the job security of a permanent contract and the risk of such employees leaving if they do not get one, particularly after serving for a period of time under a fixed term contract, is real. We accept that recruitment and retention of good drivers was challenging. We accept that there was a real business need to recruit a permanent member of staff to fulfil what had been the Claimant's duties.

98. Dismissal of the Claimant was certainly rationally connected to this legitimate aim: it created a vacancy in the workforce for a permanent member of staff.

99. It was of course, in a literal sense, possible to recruit a permanent member of staff into a driver/attendant role without dismissing the Claimant. The question is whether dismissal was *reasonably* necessary to achieve the aim. This involves a balancing exercise.

100. Most (but not all) of the factors relevant to the preceding balancing exercises are also relevant here. For economy we will not repeat them all but the following are particularly relevant:

a. The length of the Claimant's absence;
b. The certainty that she could not return for at least ten months;
c. The uncertainty of whether she could return even after ten months;
d. The need for her duties to be covered in her absence;
e. The pecuniary and non-pecuniary (management time/effort) costs of continued employment;
f. The risk of a redundancy situation being created in the event of the Claimant becoming fit for work in the future in circumstances in which a permanent employee had been recruited to cover her duties;
g. The impact on the Claimant of dismissal and the limitations thereof.

101. All in all, weighing the relevant factors we come to the view that dismissal was a proportionate means of achieving this aim too.

**Unfair dismissal**

*Reason for dismissal*

102. The reason for the Claimant's dismissal was capability (ill-health). In particular the Claimant had been on sick-leave since October 2016, that is a little over two years, by the date of dismissal. Further it was unclear when if at all she would be able to return to work save that it was clear that she would not return in any capacity before August 2019.

*Fairness*

103. We have accepted the Respondent's *oral* evidence as to the impact on the business of the Claimant's sickness absence and the way in which her duties were covered. It follows that the account of this set out in the letter of dismissal letter was seriously misstated.

104. In summary, Mr Phillips said that:

a. The Respondent had been unable to employ a dedicated driver to cover for the Claimant. It was increasingly difficult to cover the Claimant with staff recruited for short periods.
b. As a result the Claimant's absence was being covered by relief cover on an almost daily basis, which was problematic because it meant relief was not available when other drivers were sick. That in turn meant the other drivers were having to provide cover and this was a strain on them.
c. Continuity of service was very important to the business and it was important to allocate a regular member of staff.
d. The Claimant's absence was for those reasons not sustainable on a longer term basis.

105. In truth, the factual position was very different:

a. The Claimant's absence had never been covered by the relief driver(s). Rather, it had always been covered by a single person who had been employed especially for that purpose, Mr Mick Beighton.
b. Mr Beighton had been employed initially upon a six month fixed term contract and thereafter when the Claimant's absence protracted his contract was extended to one which was "*renewable annually*".
c. Mr Beighton was payed the same amount as the Claimant.
d. Mr Beighton wanted permanent employment rather than temporary employment.
e. Mr Beighton might have left if he was not offered permanent employment and that a contract for his services until August 2019 may not have been enough to retain him.
f. Good drivers, of which Mr Beighton was one, were difficult to recruit and retain.

106. The reason for this difference between these accounts is unexplained. If Mr Phillips did not know the true position at the time of the decision to dismiss, he clearly should have: any reasonable employer would have done. The impact on the business of the Claimant's absence was a straightforward elementary matter that would have been understood and assessed in the course of *any reasonable* capability/dismissal procedure.

107. The Claimant was given inaccurate and misleading information in the letter of dismissal. This was obviously unfair, not least because it tainted her ability to fully challenge the rationale for dismissal upon appeal. It may well be the case that this made no difference to the ultimate outcome – but that is another point altogether (a *Polkey* point) rather than a fairness point (on which we express no view at this stage).

108. We recognise that not every piece of procedural unfairness will necessarily make a dismissal unfair overall. However, we consider that the above unfairness was so significant that it did render this dismissal unfair. The unfairness was not corrected upon appeal since the factual inaccuracies in the letter of dismissal were not corrected at the appeal stage.

109. We shall complete our reasoning in respect of the unfair dismissal claim because it is important for the parties to know that our judgment that this dismissal was unfair is based upon the rather narrow but important points above.

110. Is this a case in which any reasonable employer would have waited longer before dismissing the Claimant? Our answer is 'no':

a. The Claimant had been absent on sick leave for a very long time by the date of dismissal, a little over two years. There was a possibility of her returning to work in August 2019, about a further 10 months later. But even that was just a possibility; it was quite possible that the Claimant would not be fit to return in August 2019 or perhaps ever.
b. Claimant's absence had an impact on the business. In direct financial terms it was really just the cost of the Claimant's holiday pay and potential cost of the D1 training and test. The main issue, however, was that there was the risk of Mr Beighton leaving if he was not offered a permanent contract and that could only be done if the Claimant was dismissed, thus creating a vacancy for a permanent job. The Respondent wanted to keep Mr Beighton who had been working on temporary contracts for a long time. We accept that this was a legitimate and genuine business concern: it was not easy to recruit and retain good drivers.

111. Was the Claimant adequately consulted? We are satisfied that through the course of the meetings that took place between March 2018 and the Claimant's dismissal she was adequately consulted. There was extensive discussion of her fitness to work, her symptoms, the medical position then currently and in the future. While it is true that the Claimant always wanted to be in a position to return to work, she never was in fact in a position to offer a return to work date, beyond indicating that she might be better or might not in August 2019. So in truth she did not know when if at all she would be able to return to work. It is shame, and a curiosity, that the communication with the

Claimant in the letter of dismissal was so inaccurate because otherwise significant efforts had been made to communicate with her.

112. Did the Respondent take reasonable steps to discover the Claimants medical position and likely prognosis? Yes. This started with obtaining a detailed letter from the Claimant's GP. The medical evidence was not thereafter updated in advance of the decision to dismiss, but that was not for a lack of trying. The Claimant withheld her consent to the Respondent updating its medical evidence for a period of time (she eventually consented in her letter of appeal against dismissal). Thereafter, the Respondent referred the Claimant to occupational health and obtained a detailed OH report that answered the important questions.

113. The Claimant did have long service with the Respondent and until her breast cancer had a very good attendance record. We are satisfied therefore that she was an employee who wanted to and in principle would get back to work as soon as able to. However, the sad truth was that she would not be able to get back to work until at least August 2019 but even then, however much she might have wanted to return she may not have been able to.

114. Thus, we find that the dismissal was unfair, but only on the limited basis set out above.

**Conclusion**

115. The Claimant was unfairly dismissed on the narrow basis set out above. The complaints otherwise fail. A remedy hearing will be listed, and case management orders preparing the case for that hearing will be made under separate cover. If remedy can be agreed between the parties, however, so much the better.

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Employment Judge Dyal

_____

Date 09.04.2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 14.04.2020

FOR EMPLOYMENT TRIBUNALS