Case Number: 2201384/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS K DENT**
MS S BOYCE

BETWEEN:

Ms V Judd

Claimant

AND

Cabinet Office

Respondent

ON: **2, 3, 4, 5 and 6 March 2020**

Appearances
For the claimant: **Ms T O'Halloran, counsel**
For the respondent: **Ms L Robinson, counsel**

RESERVED JUDGMENT

(REDACTED VERSION PURSUANT TO RULE 50 ORDER)

The unanimous Judgment of the Tribunal is that the claims fail and are dismissed.

REASONS

1. By a claim presented on 15 April 2019 the claimant Ms Victoria Judd brought a claim for disability discrimination.

2. The claimant works in the Department for Transport and she remains in the respondent's employment. The claim arises out of her application for a post on a short-term basis working in Montenegro. The respondent defended the claim.

Issues

3. The issues were identified at a preliminary hearing for case management

before Employment Judge Elliott on 12 August 2019 and the agreed issues were confirmed with the parties at the outset of this hearing as follows:

4. Disability was admitted by the respondent on 11 October 2019 and is no longer in issue. The disability is **REDACTED**.

Discrimination arising from disability

5. Did the respondent treat the claimant unfavourably by the withdrawal of an offer of a secondment in Montenegro on 14 November 2018?

6. Was any such unfavourable treatment because of something arising in consequence of the claimant's disability? The claimant says that the something arising is the potential need for medical treatment and support.

7. Was any such unfavourable treatment a proportionate means of achieving a legitimate aim? The respondent says that the legitimate aim is health and safety and well-being of its secondment ease when working abroad.

Failure to make reasonable adjustments

8. Did the respondent apply the provision, criterion or practice (PCP) of:

    a. The requirement to be seconded for three out of four full weeks abroad or 75% of her working days abroad; The respondent admits applying this PCP.
    b. The secondment to be in a country with sub-optimal health care; The respondent admits applying this PCP.
    c. The requirement of liaison with the UK doctor / occupational health and a local doctor. The respondent does not admit applying this PCP. In submissions the claimant accepted that it was not a PCP.
    d. The requirement for medical clearance from Healix to be seconded abroad (introduced by way of amendment on day 1 of the hearing). The respondent admits applying this PCP.

9. Did any such PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled? The substantial disadvantage is that she did not secure the position. The substantial disadvantage is admitted in relation to the PCPs that are admitted.

10. Was it a reasonable adjustment to:

    a. Vary the terms of the secondment to 2 weeks in abroad in Montenegro and two weeks in the UK;
    b. Consider seconding the claimant to another country with optimal health care;
    c. Consider offering shorter secondments ranging from a few days or a few weeks.
    d. Those adjustments set out in the OH report of 9 November 2018

(page 167).

11. Did the respondent failed to make any such reasonable adjustments contended for?

Time limits

12. Did the claimant bring her claim in time?

13. If not, is it just and equitable to extend time?

14. Does the tribunal have jurisdiction to hear the claim?

Witnesses and documents

15. The tribunal heard from the claimant. There was a witness statement from her union representative Mr John Moloney. This evidence was not challenged by the respondent so the evidence in his statement stood and he was not called.

16. For the respondent the tribunal heard from 6 witnesses Ms Wendy Lawrence from Healix, and who is an Intensive Care Nurse, Ms Beverley Hoskin, Head of ER, Pay and Reward; Mr Dominic Studman, HR Business Partner; Ms Diane Taylor, Head of Resourcing and Recruitment; Ms Charlotte Jeanroy, Senior People & Operations Manager and Mr Gerald Mullally, a Deputy Director in Communications who leads a team working across 28 countries.

17. There was a witness statement from Mr James Ballantyne, Head of Strategic Communications, who at the date of this hearing was overseas and the respondent had made a decision not to call him. Mr Ballantyne would have been the claimant's line manager had she taken up the role in Montenegro. The parties were aware that the tribunal could only give limited weight to this witness statement.

18. There was a bundle of documents of about 550 pages.

19. We had written submissions from both counsel to which they spoke. They are not replicated here. All submissions were fully considered together with any authorities relied upon, whether or not they are expressly referred to below.

Findings of fact

20. The claimant works in the Department for Transport and she remains in the respondent's employment. The claim arises out of her application for a seconded post on a short-term basis working in Montenegro.

21. Montenegro is a country with a limited UK presence. The UK Embassy was small and the relevant team in this situation has two UK staff made

up of the manager, who at the time was Mr James Ballantyne and one other person who would have been the appointee on the secondment for which the claimant applied.

Background medical matters

22. The disability relied upon is **REDACTED**. We had the claimant's medical records in the bundle. At page 77 we saw a letter dated 5 January 2018 from the claimant's consultant ……Dr … P….. This said: *"she felt she would like someone that she could call and speak to…….* **REDACTED**." It said that she experienced ……. **REDACTED** at work and "*seeks reassurance from her manage*r".

23. The claimant had an employment support worker provided through the charity Remploy. The letter said that the claimant was due to have an assessment at the ……..Service. The claimant told Dr P……. that she would find it very difficult if the assessment did not go as she hoped. Dr P……. said: "*we recognised that in such an eventuality she would be at a….* **REDACTED** *….and I encouraged her to plan around this contingency in advance*".

24. At page 79 of the bundle we saw a letter from Dr P…. to the claimant's GP explaining that the claimant had "*no further* **REDACTED***"* but kept a "**REDACTED***, but is not thinking about it much*". The letter also stated that the claimant *"recognises the…* **REDACTED** *…trying to seek a new job*".

25. In July 2018 the claimant was very unfortunately seriously assaulted and this understandably had a negative effect on her well-being. On 2 August 2018 she was seen [remainder of paragraph **REDACTED]**.

26. Arrangements were made for the claimant to go **REDACTED** but ultimately she decided not to go there.

27. On 14 August 2018 GP notes show that her GP was concerned for her because she was **REDACTED** and was asking for care coordination. It was agreed that they would bring forward her next assessment with Dr P….

28. On the evening of 18 August 2018 the claimant again attended **REDACTED**. She had been taken to [remainder of paragraph **REDACTED]**.

29. The claimant attended **REDACTED** on 20 August 2018. The **REDACTED** took the view that it would be helpful for the claimant to have more **REDACTED**.

30. It is also relevant for us to find based on the claimant's oral evidence that she admits that she is not fully forthcoming when taking out travel insurance. The claimant does not disclose to travel insurers the condition upon which she relies in these proceedings. Her reason for this was that

she chooses to travel when she is feeling well and feels that she "*wouldn't need to call on it*". She took the view that if she travelled when feeling well, she would never need to.

The application for the secondment

31. In August 2018 the claimant made an application for the seconded post of Strategic Communications Manager. The job specification was at page 81 and the job application was at page 86 of the bundle. The job specification gave a possible working pattern of full-time, part-time, part-time/job share, part time term time. The job specification did not say in which country the post-holder would be working and it did not say that medical clearance was necessary for the role.

32. On 21 August 2018 the claimant was invited for interview and on 11 September 2018 she received a phone call from Deputy Director Mr Harris MacLeod telling her that she had been successful. This was confirmed in an email of 11 September 2018 from Ms Charlotte Jeanroy, People and Communications Manager (page 97d). The claimant understood that the posting would be to Montenegro. It was initially a proposed as a two-year secondment but claimant sought a shorter period. Six months was agreed and the claimant would be able to revert to her substantive role at the end of the secondment. The claimant later asked for this to be extended to 12 months (email page 120AA 19 October 2018).

33. The claimant was told that she would be in London for work for at least one week per month. The respondent admits applying a requirement of the secondment being for three out of four weeks abroad or 75% of her working days abroad. An apartment was reserved for her in Montenegro. The claimant was excited about the secondment and it meant a lot to her both personally and professionally.

34. On 16 September 2018 the claimant enquired by email to Ms Jeanroy, about health care in Montenegro and how her prescriptions would be dealt with (page 97a-97b). In an email on 17 September 2018 the claimant expressed concern about **REDACTED** she said: "*Worried it might be difficult* **REDACTED** *during the week I'm back in London."* (page 97a).

35. Ms Jeanroy replied telling the claimant: "*All staff are covered by Healix Healthline insurance, the same provider for FCO staff. Before going out to country you would need to apply for this cover. They would be able to advise more specifically for your individual needs, but we would always advise taking your medication to country with you. Should you require access to medical facilities in country this would be covered by the insurance."* (page 97a). She was asked to discuss this with Mr MacLeod.

36. On 13 September 2018 the claimant questioned whether there was any flexibility on the country. She had a concern that the team in Montenegro was really small and she was keen to work in a larger team so that she could develop bigger friendships and social life in the country (page 97c).

The team in Montenegro was to consist of only herself and her manager Mr Ballantyne.

37. On 17 September 2018 the claimant attended a **REDACTED** at which she discussed the secondment to Montenegro. Based on the medical records we find that the claimant told the **REDACTED** that she was "*concerned as to whether this was the best choice for her*" (page 507). It also meant that she may have to end **REDACTED** earlier than intended.

38. On 18 September 2018 the claimant received the letter offering her the appointment. The letter was from Mr Gerald Mullally a Deputy Director in the GCS Knowledge and Capability Unit. The letter said that during the appointment there was an expectation that the claimant would spend 75% of her working days overseas (letter at page 98). The claimant was invited to a three-day induction from 24 to 26 September 2018. The induction took place in London.

39. In an email on 19 September 2018 the claimant said to Ms Jeanroy: "*I wanted to let you know that the medication I take is for* **REDACTED***. It's therefore important to me to know that there is good medical help I can access in Montenegro, should I need it. I'll obviously stay registered with my GP in London and can see them when I'm back but want to check what is available in Montenegro and if this is something that Healix will be able to help with or whether this will be an issue in getting medical insurance with Healix?"* (page 98b).

Healix

40. Medical clearance was briefly discussed on day 2 of the induction. The claimant understood that Healix was the healthcare provider for British Government employees overseas. We find that Healix does not provide healthcare or treat Government employees. Amongst other things it provides medical clearance assessment prior to overseas postings, as set out in paragraph 1 of the statement of Ms Lawrence who is the contract manager.

41. The claimant filled in an online medical form for Healix which we saw at page 101 – 102 of the bundle. The claimant disclosed her condition on that form. It was completed on 26 September 2018. On 27 September 2018 Healix asked for some additional information about her condition. They asked her to give them a call which took place on 28 September 2018. The claimant was asked in that call whether she had had a **REDACTED** in the last year. The note recorded by Healix said: "*mbr [member ie the claimant] , unsure possibly yes, but cannot remember exactly."*

42. We find that the claimant was not forthcoming during this phone call as she did not mention to Healix that she had been **REDACTED**. In evidence the claimant said on more than one occasion that the reason she did not tell Healix about **REDACTED** was because she was not expressly asked.

We find that the question as to whether she had had any **REDACTED** in the last year clearly required her to give this information.

43. On 1 October 2018 the claimant had another call with Healix. She told them that she was having a difficult time because of the assault in July and that at the beginning of August she had **REDACTED**. This was a new description of the **REDACTED**. She said she had been treated in **REDACTED**. She did not say she had been **REDACTED**. The claimant asked for an OH assessment.

44. The claimant asked her consultant **REDACTED** Dr P…. to write to Healix. That letter was dated 2 October 2018 at page 105. He said "quotation **REDACTED***."*

45. The claimant met with Dr P…… on 3 October 2018, this appointment having been brought forward because of the two **REDACTED**. Dr P…..'s report to the GP was at page 106. Dr P…..said: "quotation **REDACTED**." On 17 October 2018 the claimant sent that letter to Healix.

46. On 18 October 2018 Healix asked about the medication the claimant took and for the location of the travel or posting.

47. On 22 October 2018 the claimant attended a **REDACTED** appointment as part of her treatment regime. She had received an update from the police about the assault and she anticipated that news that the prosecution could not go forward or such similar setback would lead her **REDACTED**. The **REDACTED** noted concerns **REDACTED***."* (page 506).

48. Healix asked further questions of the claimant as they wished to gauge the risks to her. She acknowledged that if there was to be a development in the police investigation she would want to be present in the UK to hear any such news.

49. On 24 October 2018 Dr Anna Rom, who is a GP at Healix, expressed concern as she was not sure about the **REDACTED** facilities in Montenegro if there was a **REDACTED** and they wanted to support the claimant in any way they could but they would have to make sure that the posting was safe for her given these issues (page 472). Also on 24 October 2018 Dr Rom recorded: "quotation **REDACTED** …*"*.

50. Also on 24 October 2018 Nurse Jane Brett at Healix told the claimant she had emailed Mr Ballantyne as line manager for an OH referral. Ms Brett said that the claimant was not obliged to divulge any medical information at this point – but need only say that she was required to have an OH assessment before they would give her clearance (page 472).

51. By 29 October 2018 Dr Rom had seen the claimant's **REDACTED**. She noted her main concerns (page 466-467) as:

    - Lengthy quotation **REDACTED**

- .

52. This recommendation that it may be best to reconsider overseas work after **REDACTED** and when the police case relating to the assault was resolved was made by Dr Rom on the part on Healix on 29 October 2018. Dr Rom did not recommend a permanent prohibition on overseas secondments but said that this issue should be reconsidered after a period of time.

53. Based on the evidence of Ms Wendy Lawrence who is an experienced Intensive Care Nurse and who leads a department at Healix, we find that Dr Rom made the recommendation in conjunction with others at Healix. Ms Lawrence was present at the meeting where the matter was discussed.

54. On 29 October at 14:03 Ms Lawrence advised Ms Beverley Hoskin, Head of ER, Pay and Reward that the claimant was considered high risk and "*at this time it would not be appropriate for [the claimant] to travel*" (page 121). Ms Lawrence's evidence to the tribunal was that in terms of healthcare, Montenegro was classified by the FCO as "*informed choice/non confinement*". This meant that women on postings there should not give birth in that country and that in other respects it was "*informed choice*" to receive healthcare there. Healthcare in Montenegro is suboptimal compared to the UK.

55. Ms Lawrence also told the tribunal and we find that when the contract was set up with the Government in 2010 Healix were asked to classify as low risk, medium risk and high risk and that the Government generally will not send people overseas if they are high risk. The definitions of these categories were not written down. Ms Lawrence told the tribunal that each case was dealt with on its own individual merits.

56. Ms Lawrence mentioned in that email that this was their first "high risk" case with the Cabinet Office. This was confirmed by Ms Taylor at paragraph 16 of her statement and we find it was their first high risk case. This was "*new territory*" for Ms Hoskin, as she described it in her oral evidence. Ms Hoskin was the key contact for the Healix assessments and on her evidence the contract was discussed from time to time in quarterly performance meetings. She said they trusted Healix as the experts with whom the FCO had placed the contract. Healix was also known as FCO Healthline. Ms Lawrence's unchallenged evidence (paragraph 4 of her statement) was that since 2017 Healix have reviewed nearly 30,000 clearances and fewer than 20 have been deemed high risk.

57. The claimant agreed in cross-examination that if she were to present in **REDACTED** in the same situation in Montenegro where she does not speak the language, then, she expressly used the word "*potentially*", she could be at risk or in danger.

58. On 31 October 2018 she emailed Mr Ballantyne telling him that there was the potential that Healix might refuse to clear her (page 129). Mr

Ballantyne had worked with the claimant previously and he had been happy with the quality of her work. He was keen to make sure that decisions were made on the best evidence.

The OH referral

59. On 10 October 2018 the claimant had been informed that her first trip out to Montenegro would be 5 November 2018 (page 120). On 27 September 2018 she began receiving emails from Healix in relation to her medical condition. Healix viewed the claimant as high-risk in that she was accessing NHS services and was likely to do so for the medium term which meant, on Ms Lawrence's evidence, at least a year.

60. The claimant became increasingly frustrated with the process and told Healix so (page 457). She told Dr Nicky Gee at Healix that her **REDACTED** was a "*one-off*" but this was not correct because she had been **REDACTED** as set out above.

61. By 29 October Ms Lawrence had informed Ms Hoskin that the claimant was high risk and it was not appropriate for her to travel.

62. The claimant wanted an OH referral as she thought this might help and we saw reference to this in an email at page 134 on 2 November 2018 and in the Healix records at page 462. She contacted Mr Trevor Hopper at Healix, who is an experienced primary care nurse who has worked with the military. He told Mr Ballantyne and Ms Hoskin that Healix could supply to OH whatever information they required, with the claimant's consent. We find on a balance of probabilities that the claimant did not give her consent to OH receiving all the information held by Healix, because OH did not know all the background details of the **REDACTED**.

63. On 5 November 2018 Ms Lawrence sent an email (page 134) to Ms Hoskin and Mr Ballantyne confirming that travel for the claimant was "*high risk at current time and possibly for the medium term no matter the OH opinion*" (our underlining).

64. Ms Lawrence's evidence was and we find, that Healix and OH come from different perspectives in terms of the assessment they make and their role. Healix give advice about health and travel overseas by giving a medical risk assessment, they do not assess the individual's ability to perform the role or suggest reasonable adjustments in order to assist the individual in performing the role. OH give occupational health advice about the work related matters and any adjustments that might be needed. We find these are separate matters although all based on medical evidence and the reports in this case were all provided by qualified and experienced clinicians. Our finding on this is supported by an email from Healix to Ms Hoskin on 1 February 2019 page 285 saying "*Our risk assessment is medical rather than occupational…"*

65. On 6 November 2018 Ms Lawrence sent an email to Ms Hoskin saying:

"*Could I reiterate that the risk is high for her at this time, and therefore the risk is high for the Government department she is employed by……Our advice is that she should not travel overseas for at least the next year or so. The risk is high for following reasons: [The claimant] is currently accessing UK NHS services and is likely to need to do so for the medium (at least a year) term. Whilst she is accessing NHS care she should not travel somewhere where care is not equivalent and not as capable at managing any potential medical need*" (page 154).

66. On 7 November 2018 Ms Hoskin sent an email to Ms Georgina Conde, a Business Operations Manager, saying that she was extremely concerned about the claimant going overseas. Ms Hoskin understood that the claimant was keen to go and believed she was OK and the business wanted to support this but Healix were highly concerned that this was a high risk both for the claimant and the respondent (page 161). There was concern for claimant travelling to a place where the care was not equivalent to the NHS where they might not be as capable at managing any potential medical need. Ms Hoskin thought this could potentially be detrimental to her.

67. On 8 November Ms Conde replied saying that she believed that both the respondent and Healix should be doing more to help the claimant create an action plan which worked for them taking into account the realistic provisions that could be offered. She felt they should "*interrogate*" Healix's stance on the matter. At the beginning of November 2018 the respondent had become a Disability Confident Employer. Managers were keen for the claimant to go on the secondment. They decided to refer the claimant to OH. Ms Conde said: "*Healix are not in a position to advise on cases such as this without an OH referral."*

68. Ms Lawrence was clear in her evidence that this is not part of the Healix process or Healix requirements. Ms Diane Taylor in HR, leading at that time on resourcing and recruitment including OH, could not tell the tribunal whether this was correct on process or not as she did not know.

69. We found Ms Lawrence to be an experienced and considered medical professional in the views that she expressed during her evidence. We find that an OH referral was not a standard part of the process but that it was part of this particular process.

<u>OH first assessment</u>

70. The claimant had a telephone OH assessment the following day on 9 November 2018. The OH Nurse, Ms Paula Lawson, told the claimant that she had no concerns with the claimant going abroad. The report was at page 167. It said that the claimant "*demonstrated an in depth knowledge of her strengths and weaknesses".* It went on to say:

"long quotation **REDACTED***."*

71. The claimant's start date in Montenegro was deferred (email 9 November 2018 from Mr Ballantyne).

72. The claimant wanted to see the OH report before it was sent to management but this did not happen. She saw it after it had been sent to the respondent. The respondent received the report on 12 November 2018. The claimant preferred that details of her condition were not shared with Mr Ballantyne as her new line manager (page 168).

The four OH recommendations

73. The OH report was sent to Helix on 12 November 2018 with a list of four potential mitigating recommendations. Ms Hoskin asked Helix whether, if these were put in place, Helix would consider approving clearance (email page 180).

74. Mr Hopper at Helix replied as follows in relation to each of the four recommendations. The recommendations are underlined below:

> *Register with a local doctor and ask them to contact OH/UK GP – is this even possible in Montenegro?*
> *Montenegro has a reciprocal agreement with the UK for emergency care only. GP service does exist but English is not widely spoken; Montenegro is in the default clinical language. There are interpreters in hospitals but availability is unknown. [The claimant's] clinical presentation relies* **REDACTED***, thus rendering this proposal and non-starter.*
> *Take out appropriate medical insurance*
> *[The claimant] is highly unlikely to acquire private health insurance with the recent medical [history] that she has. A significant period of time would need to pass before risk would be considered low. Note if she failed to declare her [history] the policy would be null and void. FCO Healthline is the PAG alternate to insurance and we advise on risk with the same process as an insurance company: hence the risk here remains HIGH.*
> *Produce a wellbeing plan in consultation with OH*
> *The wellbeing advice from FCO Healthline is to mitigate the risk to the claimant and not support travel to Montenegro; the healthcare in country is suboptimal in the specialist care in format that the claimant accesses, specifically in an emergency, does not exist.*
> *Ensure procedures are in place in case of an emergency*
> *First port of call would be an ambulance and then to A/E dept. To reiterate: English is not widely spoken and the claimant has a [history] of being frugal with the truth in a thus the clinical emergency would be compromised from the start.*
> *Apologies for this not being the positive response required but it remains FCO Healthline's considered view that this clearance is HIGH risk and mitigation is undeliverable in the format recommended.*

Mr Hopper could not have been clearer in his view that these

recommendations from OH would not have mitigated the risk they had assessed. One of the considerations for the clinicians at Healix was the fact that the claimant was still **REDACTED**. We saw from the claimant's medical records at page 505 and find that as at 12 November 2018 she had "quotation **REDACTED**" and on page 501 we noted and find that **REDACTED** continued into 2019 with appointments in May and August 2019.

75. It was put to the claimant in cross-examination that the difficulty with the four mitigating recommendations mentioned in the OH report was that none of them mitigated the risk that if she had a crisis in Montenegro in the same way as she had in August 2018, they would not have the same "*joined up*" services as in the UK. For example the claimant was able to **REDACTED**. The claimant agreed that "*potentially*" Montenegro would not offer these same services, but she stressed that her condition was well managed and she took the view that a lot of her support could be obtained over the phone.

<u>The decision making at the respondent</u>

76. There was a distinct lack of clarity in the respondent's witness evidence as to who made the decision to withdraw the secondment from the claimant. At paragraph 13 of his witness statement, Mr Studman said that the decision was made by Mr Jamie Davies, a Senior HR Manager, Ms Hoskin and himself. Ms Hoskin in her evidence said that she agreed with Mr Studman that the respondent could not fulfil the mitigation recommendations as per the advice of Healix (statement paragraph 15). Although he did not say so anywhere in his witness statement, Deputy Director Mr Mullally told the tribunal in oral evidence that he was the decision-maker. He said his witness statement should have been clearer. He also told the tribunal in oral evidence that he "*took accountability for the final decision*".

77. In terms of the decision making, we find that Healix made the decision that the claimant was high risk and they advised against travel to country. This was not a decision of the employer. We find as set out in the above paragraph, it was Ms Hoskin, Mr Davies and Mr Studman who made the decision based on the Healix advice. The decided that they would adhere to the Healix advice. They were not medical experts and had contracted this function to qualified specialists. We find that Mr Mullally was not the decision maker. We find as he said, that technically he had the authority to overturn the decision but he did not do so. He held ultimate accountability but it was Ms Hoskin, Mr Davies and Mr Studman who made the decision. This is consistent with the evidence-in-chief of the respondent witnesses from whom we heard.

78. On 14 November 2018 Mr Dominic Studman in HR told Mr Ballantyne that the Healix decision was that the claimant should not travel overseas. Mr Studman first became involved on 12 November 2018 and he took over the HR role from Ms Taylor. It was decided that the news would be best

given by Mr Ballantyne, who called the claimant to tell her that this decision had been made. The claimant was very upset by the decision. They expected a complaint of discrimination to follow. The claimant followed this with a call to Mr Studman who also said that she was very upset by the decision.

Other possible opportunities

79. In November 2018 the respondent was also recruiting to positions in the following countries: Macedonia, Ukraine, South Africa, Nigeria, Jordan, Romania, Czech Republic and Slovakia (Mr Mullally's statement paragraph 5). A lunch event was organised on about 23 November 2018 for short-term international opportunities. They were mainly for 3 to 5 day opportunities to deliver training in various countries. They also announced a number of rolling secondment opportunities in 2019 lasting between three days to 3 months for Government communicators. This information was sent on behalf of Mr Mullally (at page 240).

80. Based on Mr Mullally's evidence we find that it was unlikely in November 2018 that they would have been able to put anything in place before the end of the year. We also find based on Mr Mullally's evidence that funding for overseas postings tends to be limited as the end of the financial year approaches and it is not until the new financial year in April that the prospect of new postings becomes known or available.

81. On the evidence that we heard, we find that the healthcare in those countries was suboptimal compared to the UK and we find on a balance of probabilities that Healix advice would have been the same in relation to travel to any of those countries. Furthermore, none of those countries would have had the same access to the claimant's medical records in an emergency situation.

82. There was a lengthy grievance process which is not in issue in these proceedings. During a grievance meeting on 4 March 2019 the claimant was given the opportunity to stay in a UK role but as she clearly said in her witness statement at paragraph 51, she declined this. She only wanted to take up the seconded role overseas, she said that is why she applied for it. Had she wanted a UK based role she would have stayed in her role with the Department for Transport.

The meetings on 19 November 2018

83. The claimant had not been given the opportunity to discuss the decision face-to-face so she requested a meeting. This took place on 19 November 2018 with Ms Hoskin and Mr Studman. Ms Hoskin made clear in her oral evidence and at paragraph 16 of her witness statement that cost was not an issue in the respondent's decision-making. We accepted this evidence and find that cost was not the issue, it was a medical risk matter. Mr Studman told the claimant at that meeting that he "*would never forgive himself*" if something bad happened to her should they ignore Healix

advice.

84. Also on 19 November 2018 the claimant met separately with Mr Mullally at her request. She followed this meeting with an email which we saw at page 207-208. We find that Mr Mullally was keen to have her in place in the post in Montenegro. There was a need for Mr Ballantyne to have the assistance and they were satisfied that the claimant had the necessary skill set.

85. None of the respondent witnesses had the full picture on the claimant's health as Healix did. Nor did OH. She had not wished to disclose this which we understand and it was a decision she was entitled to make. They did not know that she had made **REDACTED** three months earlier. Mr Mullally and other respondent witnesses considered the adjustments suggested by OH to be "*workable"* but we find that they held this view without the detailed knowledge of the claimant's most recent mental health crises.

A further OH assessment

86. On 22 November 2018 that the claimant received an email to say that the respondent was requesting a further OH assessment – this time in person rather than by telephone. On 5 December 2018 the claimant saw Dr Jacelyn Ong an OH physician. Dr Ong wished to obtain further medical information from the claimant's treating clinician before she could form an opinion. She wrote to Dr P……. (page 251) with a series of questions. She also spoke to Healix to find out about the medical facilities in Montenegro.

87. Dr Ong's OH report of 12 December 2018 there was at page 263. She said under the heading "*OH Opinion*": "*I did contact Healix…… and spoke to a medical case manager…….. she was not able to give me details on the* **REDACTED** *services available in Montenegro but did state that their concerns were that the medical facilities that there was suboptimal in general and that there may be difficulty obtaining translation services particularly in cases of crisis. Ultimately, the decision with regards medical insurances there as that is out with my remit as an occupational health position."* We find that this last sentence underlines the difference in role between Helix and OH. We find that Dr Ong does not and did not make the same sort of medical risk assessment as did Healix. Initially the claimant withheld consent for the disclosure of Dr Ong's report to the respondent, she could not recall the reason why, but she later consented.

88. Dr P……. wrote to Dr Ong on 20 December 2018, page 277. He said the claimant was presently on **REDACTED**. He referred to a **REDACTED** but said she was weathering that well. He did not go into the detail and did not mention the **REDACTED** so Dr Ong had no knowledge of this when preparing her report. At no point during the OH process did the claimant disclose this information.

89. Dr P….. said he did not have any specific concerns about the secondment to Montenegro but said: "*there is clearly the risk of* **REDACTED** *that cannot be predicted and it would be important for [the claimant] to have an idea of what support if any she may be able to access should that occur for example an* **REDACTED** *and have a clear contingency plan for such event."* He considered that the claimant had the ability to weigh the risks and benefits of the change of role.

90. Dr Ong produced an OH report on 18 January 2019 having seen Dr P……'s letter, (pages 284 – 285). The claimant consented to the disclosure of this report. Dr Ong said that the claimant was "*likely to benefit from health and safety risk assessment of her seconded role, being made aware of how to access emergency services in Montenegro though with expected continued* **REDACTED** *the risks of requiring this would be deemed low*".

91. Ms Hoskin had obtained some input from a health and safety adviser Mukesh Jethwa on 30 October 2018 (page 123) who said amongst other things: "*The health, safety and welfare of the employee must take priority over business needs."* There was no further health and safety risk assessment after Dr Ong's second report.

92. On 4 February 2019, in connection with the investigation into claimant's grievance, Ms Lawrence sent an email to Ms Hoskin (page 290) saying "*I would suggest that the OH doctor has not had sight of the medical reports that we have had from [the claimant's] specialist from earlier in 2018. There are several items within those reports that would be valuable for your OH doctor to be aware of, I cannot provide medical details but can advise of the dates and themes".* We find that Ms Lawrence was correctly preserving the claimant's confidentiality and highlighting to the respondent that there were relevant medical matters about which they and OH were unaware. This was a matter for the claimant's consent, which she had not given.

93. On 28 February 2019 Mr Studman sent an email to Mr Mullally and Mr Ballantyne saying: "*brief update on [the claimant's] complaint; Healix said the case is closed and they still deem her "high risk". I'm unsure why they requested additional reports from [the claimant] or if they received them."* (page 304).

The relevant law

Reasonable adjustments

94. The duty to make reasonable adjustments is found under section 20 Equality Act 2010.

> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

95. The issue of what is a provision, criterion or practice was recently considered by the Court of Appeal in ***Ishola v Transport for London 2020 EWCA Civ 112.*** A one-off decision in an individual case, where there is nothing to indicate that the decision would apply in the future, is not a PCP. In that case the claimant sought to argue that there was a PCP or requiring him to return to work without concluding a proper and fair investigation into his grievances. The CA and EAT upheld the decision of the ET that this was not a PCP. Simler LJ said at paragraph 37: *"however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee"*

96. The duty to make reasonable adjustments is on the employer, not the employee: ***Cosgrove v Caesar and Howie 2001 IRLR 653, EAT*****.** The test of whether an adjustment is reasonable is an objective one: ***Smith v Churchills Stairlifts plc 2006 ICR 524*** and may require the tribunal to substitute its own view for that of the employer.

97. The EAT in ***Royal Bank of Scotland v Ashton 2011 ICR 632*** held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment.

98. This case was considered by the Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ*** on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied to equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of her disability.

99. Under section 21 of the Equality Act a failure to comply with section 20 is a failure to make reasonable adjustments. Section 21(2) provides that "*A discriminates against a disabled person if A fails to comply with that duty in relation to that disabled person".*

100. In deciding whether an employer has failed to make reasonable adjustments, as set out by the EAT in ***Environment Agency v Rowan 2007 IRLR 20,*** the tribunal must identify:

> *(a) the provision, criterion or practice applied by or on behalf of an employer, or;*
>
> *(b) the physical feature of premises occupied by the employer;*
>
> *(c) the identity of non-disabled comparators (where appropriate); and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the claimant.*

101. In relation to knowledge of disability and reasonable adjustments Schedule 8 paragraph 20(1)(b) of the Equality Act provides:

> *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know - …..that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

102. The extent to which tribunals should take into account the actual or assumed knowledge of an employer in the context of the duty to make reasonable adjustments was considered by the EAT in ***Ridout v TC Group 1998 IRLR 628*****.** The EAT stated that section 6 of the legislation then in place (Disability Discrimination Act) requires the tribunal to measure the extent of the duty against the actual or assumed knowledge of the employer both as to the disability and its likelihood of causing the individual a substantial disadvantage in comparison with persons who are not disabled. The extent of the duty to make reasonable adjustments will depend partly on the amount of information volunteered by the disabled person as to any disadvantage being suffered.

103. It is only if the adjustment concerned would remove the disadvantage from the employee that the duty will arise to make it – ***Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins 2013 EqLR 1180*****.**

104. It is well established that the duty to make reasonable adjustments is about the outcome and not about the process - ***Owen v AMEC Foster Wheeler Energy Ltd & Others 2019 EWCA Civ 822;*** Singh LJ at paragraph 86.

105. There does not necessarily have to be a good or real prospect of an adjustment removing a disadvantage for that prospect to be a reasonable one: it is sufficient for a tribunal to find simply that there would have been a prospect of it being alleviated: ***Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10****.* Richardson J observed in ***Noor v Foreign and Commonwealth Office 2001 ICR 695, EAT***: *"Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective"* – paragraph 33. Whilst a measure may on its own be ineffective, it could be one of several adjustments which, cumulatively, remove or reduce the disadvantage experienced by the disabled person.

<u>Discrimination arising from disability</u>

106. Discrimination arising from disability is found in section 15 Equality Act 2010:

> *(1) A person (A) discriminates against a disabled person (B) if –*

(a) A treats B unfavourably because of something arising in consequence of B's disability and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim,

Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

107. The approach to be taken in section 15 claims is set out in ***Pnaiser v NHS England 2016 IRLR 170 (EAT)*** by Simler P at paragraph 31. This case also addresses the burden of proof in section 15 cases. Under section 136, once a claimant has proved facts from which a tribunal could conclude that an unlawful act of discrimination has taken place, the burden shifts to the respondent to provide a non-discriminatory explanation. In order to prove a prima facie case of discrimination and shift the burden to the employer, the claimant needs to show:

a. that he or she has been subjected to unfavourable treatment;

b. that he or she is disabled and that the employer had actual or constructive knowledge of this;

c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment;

d. some evidence from which it can be inferred that the 'something' was the reason for the treatment.

108. The Tribunal must determine whether the reason or cause is "something arising in consequence of disability". That expression could describe a range of causal links. At that stage the causation test involves an objective question.

109. ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305*** states that there are two causal links in the chain of causation. The first link is "because of something" therefore the "something" must be identified and be causative. The second link is that the "something" must arise as a consequence of the disability.

110. In justifying any such unfavourable treatment, it is usually sufficient for a respondent to show that the PCP was a proportionate means of achieving a legitimate aim in general, although it did not rule out that it might be necessary in some cases to consider whether the application to the particular employee was justified in that particular case (***Seldon v Clarkson, Wright & Jakes 2012 UKSC 16***).

111. A measure is proportionate if it is both appropriate with a view to achieving the objectives pursued and necessary to that end (***Bilka-Kaufhaus GmbH v Weber Von Hartz 1986 IRLR 317***).

112. The respondent relied upon the decision of the Supreme Court in ***Bank***

Mellat v HM Treasury (No 2) 2014 AC 700 – not an employment case but dealing with the issue of objective justification and proportionality - it is for the tribunal to ascertain (per Lord Reed at paragraph 74):

(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;
(2) whether the measure is rationally connected to the objective;
(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective;
(4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

16. The test under section 15(1)(b) is an objective one according to which the tribunal must make its own assessment: see ***City of York v Grosset 2018 IRLR 746 CA.*** The tribunal's consideration of this objective question should give a substantial degree of respect to the judgment of the decision-taker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly: see ***O'Brien v Bolton's St Catherine's Academy 2017 IRLR 549*****, CA,** at paragraph 53.

113. It does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or otherwise caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine (***Birtenshaw v Oldfield 2019 IRLR 946, EAT*** at paragraph 38) and would give primacy to the evidence and position of the respondent's decision-maker: see the example in ***Grosset*** at paragraph 58.

Conclusions

<u>The reasonable adjustments claim</u>

114. On the issue of whether the respondent applied the PCPs relied upon, the respondent admits applying three out of four PCPs. They denied applying a PCP of the requirement of liaison with a UK doctor/OH and a local doctor.

115. It was not necessary for us to consider whether the respondent applied a requirement of liaison with a UK doctor/OH and a local doctor because the claimant accepted in submissions that this "*did not work"* as a PCP and it was no longer relied upon.

116. The substantial disadvantage is that the claimant did not secure the posting to Montenegro – the secondment offer was withdrawn. It is not in dispute that she did not secure the posting or secondment. The respondent accepted in submissions that the three PCPs it admits applying put the claimant at a substantial disadvantage (submissions

paragraph 29).

117. We have considered whether the respondent took such steps as it was reasonable to have to take to avoid the disadvantage.

118. There were in effect four adjustments contended for and we have considered each of them and whether they would have been reasonable adjustments and more widely whether the respondent complied with the duty to make reasonable adjustments.

119. We find that in the absence of the claimant's recent **REDACTED**, the OH "mitigating" recommendations would have been reasonable to make. The respondent was keen to have the claimant in post in Montenegro, they "*interrogated"* the position with three OH reports. They were seeking to be as fair as possible to the claimant as both sides wanted the secondment to happen.

120. We have considered whether or not it was reasonable to rely on the Healix assessment that the claimant was high risk and therefore whether it would have been a reasonable adjustment to send her on the secondment overseas in late 2018. The claimant submitted that there was poor ownership and poor communication at the respondent and they simply deferred to and inherited the Healix decision.

121. The claimant criticised the fact that there was no in-person assessment of her by Healix. We agreed with the respondent's submission that an in-person assessment was not necessary. Healix are not treating clinicians and they had the benefit of all the relevant information from the treating clinicians .

122. The claimant criticised the fact that the Healix decision was made by Dr Rom who is a GP and not a **REDACTED** specialist. She nevertheless had seen the relevant medical information including the **REDACTED** which was a key influencing factor.

123. The claimant submitted that there was no express consideration of her levels of insight. Whilst we recognise that the claimant was able to show insight into her own condition, she is not a medical practitioner experienced at assessing medical risk which was the expertise of Healix in the light of all the relevant circumstances including the sub-optimal healthcare in country. Whilst the claimant can take her own decisions about risks with her personal travel insurance, we agreed with the respondent's submission that this is not a risk that the respondent can take on her behalf when they own a duty of care towards her as their employee.

124. The claimant said that there were no standardised criteria by which the clinician was assessing the claimant. We have found that there were three. The criteria were low, medium and high risk and these words have their ordinary meaning. These were the classifications that Healix applied. We find that clinicians can be trusted to form a professional view on these

categorisations. We agree that it was not clear to the respondent how Healix had arrived at their classifications but this was because the claimant did not wish the full details of her health condition to be disclosed to the respondent, for example, we have found she did not wish Mr Ballantyne as the line manager to have details of her condition (page 168).

125. The only way to have avoided the substantial disadvantage relied upon was to allow the claimant to go ahead with the secondment. They did not do so because their experts had said that the claimant was "*high risk*". This was unusual and a "first" in the respondent's experience. The respondent did what they could by seeking more than one OH referral. We have found that OH did not have the full picture as they did not know about the **REDACTED** within three months prior to intended travel.

126. The claimant wanted confidentiality on her medical matters and Healix could not divulge all the relevant details without her consent. The claimant realised what the position might be as she told Mr Ballantyne on 29 October 2018, prior to her knowing the decision, that there was the potential that Healix might refuse to clear her. The claimant knew why.

127. Healix had classified the claimant as high risk and this was highly unusual for the respondent, for them it was a first. It was unusual for Healix to make this high risk assessment and they made it clear that the OH report was not going to change that view, because they knew about **REDACTED**, but they could not tell the respondent this without consent.

128. They knew that if the claimant hit a **REDACTED**, perhaps because of some **REDACTED** in country, that the medical facilities there would not have access to her medical records. The claimant may, as she was in August 2018 **REDACTED**. There would not be the same joined up services **REDACTED**, not to mention the language difficulty. The claimant could not **REDACTED**. Whichever of the adjustments the claimant contended for, these would not resolve a potential emergency, **REDACTED**. The claimant herself acknowledged in cross examination that she would "*potentially*" be at risk or in danger.

129. The rare nature of the high risk classification was something that the respondent could not ignore. It would have been a risk to disregard that classification and let the claimant go to Montenegro. It was open to the claimant, in challenging the refusal, to give full disclosure of her medical situation as understood by Healix and she chose, as she is entitled to, not to give that disclosure. Ms Lawrence had gone as far as she could with the reasons in her email of 6 November 2018 and we find that the respondent could not ignore this. It was not a permanent restriction, but one that could be reviewed after about a year. On Mr Mullally's evidence more secondment opportunities were likely to arise.

130. We find that given the high risk classification, it was not a reasonable adjustment to allow the claimant to go to Montenegro. This was not a permanent prohibition on the Healix decision.

131. We find that on the facts of this case, given that it was high risk for her to take an overseas posting, it was a reasonable adjustment for the respondent to consider an alternative UK role; but the claimant declined this.

132. We find that there was no failure to make reasonable adjustments.

Discrimination arising from disability

133. The unfavourable treatment of not being posted to Montenegro is not in dispute.

134. Was that because of something arising in consequence of the claimant's disability? What arose from the claimant's disability was the potential need for medical treatment and support. The respondent accepted in submissions (paragraph 19) that the unfavourable treatment was because of something arising in consequence of the claimant's disability.

135. Was it a proportionate means of achieving a legitimate aim: The legitimate aim was put as the health, safety and wellbeing of its secondees when working abroad. As we have set out above, the claimant accepted that it was a legitimate aim on the part of the respondent to seek to safeguard her health and safety whilst she was abroad. It is a legitimate aim in respect of any of their employees. The respondent in any event has a duty of care as an employer towards the health and safety of its employees.

136. We have considered whether the decision to withdraw the offer of the posting to Montenegro was a proportionate means of achieving that aim.

137. The respondent's decision was based upon the Healix advice that the claimant was at medical high risk if she travelled to Montenegro in November 2018 to undertake the secondment. It was a risk for the claimant as well as the respondent. We have found that none of the OH mitigating factors would have achieved the aim of protecting the health, safety and wellbeing of the claimant, because OH did not have the full picture and did not understand the full risk.

138. We find that withdrawing the secondment offer in November 2018 was a proportionate means of achieving a legitimate aim at that time. The question of an overseas secondment could be reviewed, as stated by Ms Lawrence, after about a year or so.

139. We find that there was no discrimination arising from disability because the unfavourable treatment was a proportionate means of achieving a legitimate aim.

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Employment Judge Elliott
Date: 6 March 2020

Judgment sent to the parties and entered in the Register on: 08/06/2020 : :

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_____ for the Tribunals