EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109658/2018

Held in Glasgow on 10, 11, 12, 13 and 17 December 2018

Employment Judge: **Lucy Wiseman**
Members: **Elizabeth Farrell**
Patrick O'Donnell

Mrs Angela Dunn — **Claimant**
Represented by:
Ms D Flannagan - Solicitor

West Dunbartonshire Council — **Respondent**
Represented by:
Mr G Walsh - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 25 June 2018 alleging she had been unfairly dismissed and discriminated against because of disability in terms of a failure to make reasonable adjustments (section 20 Equality Act) and discrimination arising from disability (section 15 Equality Act). The claimant also sought payments in respect of holiday pay and notice.

2. The respondent entered a response admitting the claimant had been dismissed for some other substantial reason (being the expiry of a fixed term contract) and capability, but denying the dismissal was unfair. The respondent

denied the allegations of discrimination and denied any further payments were due to the claimant.

3. A joint bundle of documents was produced at the start of the Hearing. Ms Flannagan, in addition to this, produced some disputed documents which she invited the tribunal to allow. The documents included (1) a job advert and (2) annual leave information to which Mr Walsh did not object. We accordingly allowed these documents to be included in the bundle.

4. Mr Walsh did however object to the document entitled Glasgow City Council Evaluation and an Occupational Health report dated 15 November 2018. Ms Flannagan wished to have the documents admitted because the claimant was now carrying out a similar role with Glasgow City Council and this, it was submitted, demonstrated that if the claimant had been given more time by the respondent, it would have enabled the respondent to explore reasonable adjustments and avoid the need for dismissal.

5. Mr Walsh objected to the documents because, he submitted, the tribunal had to consider the information before the respondent at the time of these events and not afterwards. Mr Walsh further noted the Occupational Health report did not refer to Brachial Neuritis which was the condition relevant to these events.

6. The tribunal decided not to allow the disputed documents to be admitted.

7. Ms Flannagan confirmed the claimant no longer intended to pursue the claim in respect of notice pay. The claim in respect of holiday pay was also subsequently withdrawn.

8. This Hearing was to determine the issue of liability only in respect of the complaints of (i) unfair dismissal; (ii) failure to make reasonable adjustments and (iii) discrimination arising from disability.

9. We heard evidence from Ms Sharon Bell, Care Contract Development Officer; Mr Richard Butler, Section Head of the Corporate Administration Support

Team; Ms Melissa Connor, HR Advisor; Mr Arun Menon, Business Support Manager who heard the claimant's appeal; Ms Anne Marie Cosh, HR Business Partner, who supported Mr Menon at the appeal and the claimant.

10. We were also referred to a jointly produced file of documents. We, on the basis of the evidence before us, made the following material findings of fact.

Findings in fact

11. The claimant commenced employment with the respondent on the 21 July 2014. The claimant was employed on a series of fixed term contracts, the first of which was in the position of Income Management Clerical Assistant in the respondent's Revenue and Benefit section. The claimant held this post from the 21 July 2014 until the 31 March 2015.

12. The claimant thereafter held the position of Corporate Debt Assistant in the respondent's Corporate Debt team. The claimant held that post from the 1 April 2015 until the 3 January 2017.

13. The claimant, from the 4 January 2017 until the 31 December 2017, held the position of Administrative Support Assistant in the respondent's Corporate Administration Support team.

14. The claimant, when approaching the termination of the fixed term contract on the 31 December 2017, qualified to be placed on the respondent's SWITCH register because of her length of service. The SWITCH register is the respondent's mechanism for redeployment: any vacancy within the Council must be notified to the register, and HR is responsible for matching the skills of those on the register to the vacant posts.

15. Ms Melissa Connor, HR Advisor, matched the claimant to two vacant posts. The first post was not suitable for the claimant because it involved work in a school and the claimant's requirement for a later start time could not be accommodated.

16. The second vacancy was in the respondent's Health and Social Care Partnership – Care Contract team. Ms Connor contacted the claimant who confirmed she would be interested in the post.

17. The respondent (Ms Connor, HR Advisor and Ms Anne Marie Cosh, HR Business Partner) agreed the claimant's employment in the post of Administrative Support Assistant, which was due to terminate on the 31 December 2017, would be extended until the 9 January 2018 to allow her to be redeployed and undertake a trial period.

18. Ms Sharon Bell, Care Contract Development Officer met with the claimant and Ms Connor in the week commencing 8 January 2018 and agreed the claimant would commence an eight week fixed term contract trial period.

19. The standard trial period is four weeks, however it was agreed an eight week period would be offered to the claimant because the team was moving to an NHS building and also moving on to their network.

20. The principal statement of terms and conditions of employment for this post was produced at page 8/4. The effective date of appointment to the post was the 10 January 2018 and the terms of employment noted it was a fixed term appointment expected to end on the 5 March 2018 or "until the position is reviewed whichever date is sooner". The document also made clear the claimant had no right to revert to any alternative employment (that is, no right to revert to the SWITCH register).

21. The claimant is a disabled person in terms of the Equality Act. A Tailored Adjustment Agreement Form (document 20) had been completed in November 2015. The document noted the claimant had chronic migraines, back pain and inflammatory bowel disease. The claimant experienced chronic pain with these conditions. It was agreed the following adjustments would be made: high back seat with hand and arm rests, footrest, gel mat and mouse, the ability to work from home two days a week as and when required and 5 days off every 3 – 4 months for inpatient treatment of a chronic condition. It

was also agreed the claimant would have a later start to accommodate the fact she is unwell in the morning.

22. The weekend before the claimant met with Ms Bell and Ms Connor she experienced pain in her right arm. She attended at her GP on the 8 January and was sent to hospital to investigate whether she had had a stroke. The claimant was referred to see an Orthopaedic Surgeon who carried out a full assessment including taking blood samples. The claimant was subsequently diagnosed as having Brachial Neuritis, a condition which meant the claimant lost the use of her right hand and arm.

23. The claimant was very keen to attend for work and undertake any duties she could manage notwithstanding the fact she could not use her (dominant) right hand and arm. The claimant's later start time was accommodated and her chair, wrist rests and mouse were moved to the department.

24. The claimant tried using the mouse with her left hand, but found this caused pain in her left arm. The claimant also tried answering the phone with her left hand, but was then unable to take a note with her right hand or navigate the system. Ms Bell offered the claimant an opportunity to try a telephone headset, but the claimant refused this on the basis she could not wear anything on her head because of her migraines.

25. Ms Bell agreed the claimant would not be required to take minutes, and that she would be given longer to complete tasks. Ms Bell arranged training for the claimant (the training log was produced at document 33/2), gave her the procedures manual to read and arranged for her to shadow other staff. The claimant could not take any training notes so other employees assisted with this.

26. The claimant tried to write with her left hand but her writing was not legible.

27. A referral was made to OH on the 6 February 2018 (document 30/3). The referral could not be made any earlier because the respondent was waiting for the diagnosis to be confirmed and information to be obtained from the

claimant. The referral noted the claimant *"has a number of ongoing health conditions but is managing them well and, with adjustments in place, these known conditions do not impact on her ability to attend work. At the start of her trial period .. [she] was diagnosed with brachial neuritis. Angela is right handed and this is having a significant impact on her ability to undertake the tasks associated with the role. Management have put in place short-term adjustments but they cannot be sustained going forward, as they are not reasonable with regards to the requirements of the role. The length of time to complete tasks is protracted and does not meet the needs of the service. Angela is undertaking training for the role but cannot put what she has learned into practice due to the symptoms she is experiencing. Angela can answer the phone but cannot take messages or access the system to answer queries. .. Angela has attempted to take notes with her left hand but has advised this is causing her pain. Management are concerned that Angela's attempts to make adjustments are causing her pain. Management have discussed if Angela feels any other adjustments would be beneficial but none could be identified."*

28. The OH report (document 30/1) included the opinion that this was an unusual condition which would improve with no intervention over a few months. There was no predicted timeline for recovery and no specific treatment which was known to impact significantly on recuperation. It was noted the claimant remained under the care of a Specialist and was awaiting a review but had no date yet for it. The claimant indicated there had been some improvement since the onset of the condition about four weeks previously. It was stated: *"Full recovery may take many months or longer, there is no guarantee. However, some functional recovery is likely within about three months."*

29. Ms Connor had, when making the referral, asked a number of specific questions of the OH advisor. Ms Connor asked about the employee's current fitness for work and the response was *"She is at work, carrying out duties at a slower rate. It is unlikely that she will manage to increase her work pace significantly until her function is restored to some degree, this may take many*

months." She also asked whether there were any particular duties the claimant could not do, and the response was *"Yes, tasks involving the use of her right hand and arm: writing, holding items, use of the mouse, handling and sorting through paperwork and similar tasks".*

30. The report noted the claimant believed she was carrying out all tasks but at a slower pace both mentally due to medication and physically. The report advised that *"it is up to management to determine if this pace of work is acceptable. I am unable to determine how this condition is likely to progress at the present, I believe this can vary and can take many months to improve."*

31. The OH advisor suggested it may be useful to walk the claimant through each element of her role to assess what she was physically able to manage and if the speed of her function was acceptable to management needs. It was also noted the claimant had been given contact details for Access to Work who may be able to suggest other supports.

32. Ms Bell met regularly with the claimant to see how she was getting on, and Ms Bell and Ms Park, as suggested in the OH report, sat with the claimant and walked her through the steps in a case from start to finish.

33. Ms Bell noted the claimant had told OH that she was managing all tasks but taking longer to do them. Ms Bell fundamentally disagreed with this statement because it was not accurate. The claimant was not managing all tasks; she was very slow to complete any tasks she did and the errors made were of an unacceptable level. Ms Bell was additionally aware there were concerns generally with the claimant's work: the claimant had deleted formulas and files from an Excel spreadsheet; she had failed to complete all the relevant columns; the supervisor, Ms Brannigan, had to ask for an invoice prepared by the claimant to be changed and the claimant took an inordinate length of time to do one calculation.

34. Mr Richard Butler, Section Head of the Corporate Administrative Support Team wrote to the claimant on the 19 February (document 31A/1) in a letter

entitled Fixed Term Appointment – End of Trial Period. The letter confirmed the claimant's fixed term contract of employment was due to expire on the 5th March 2018. The contract had been put in place to allow the claimant to undertake an eight week trial period in the post of Clerical/Admin Assistant within the Care Contract team. The letter invited the claimant to meet with Mr Butler on the 23 February to discuss her suitability for the post based on her performance during the trial period and the supports that had been provided to assist her to effectively undertake the duties and responsibilities of the role. The letter confirmed the OH report would be discussed at the meeting.

35. The claimant emailed Mr Butler on the 22 February to confirm she was not able to attend the meeting because she had been unable to obtain trade union representation. The trade union representative was on annual leave and due to return to the office on the 28 February, but was fully booked that week and would therefore not be available to meet until the following week.

36. Mr Butler took advice from HR and understood the meeting had to proceed prior to the end of the fixed term contract. Mr Butler accordingly contacted the claimant and confirmed the meeting would proceed on the 23 February.

37. Mr Butler met with Ms Bell prior to the meeting with the claimant on the 23 February, so he could understand what Ms Bell would be recommending at the meeting, why and what evidence she had to support her position. Ms Bell confirmed the claimant had tried to carry out the tasks required of the role but had not carried them out to the standard required. Ms Bell had prepared a document (number 33/3) showing how long it had taken the claimant, in comparison to other employees, to complete various tasks, and noting if there had been errors in the work. The information on the document demonstrated the claimant was taking significantly longer to carry out each task: for example, the claimant had taken up to 5 working days to complete a task other members of staff had taken 14 minutes and 8 minutes respectively to complete. It was also noted there had been errors in the work produced by the claimant and on two occasions work had been returned to the claimant by

the supervisor. Mr Butler was shown this document and took it into account when making his decision.

38. Ms Bell acknowledged the document showed the bare information and that some adjustment would need to be made to account for the impact of the claimant's condition/s. She informed Mr Butler that the claimant could not do the role even with adjustments, and from a team perspective she could not sustain the claimant in the role because she could not do all of the tasks; the length of time it took her to complete the tasks she could do and the number of errors she made.

39. A note of the meeting on the 23 February was produced at document 32. Mr Butler chaired the meeting and was assisted by Ms Connor. Ms Bell was present and the claimant. Mr Butler called on Ms Bell to summarise the claimant's performance in the trial period. Ms Bell did this by identifying each task and noting whether the claimant had been able to perform the task and if so, confirming her performance at the task. The claimant did not disagree with what was said. The claimant also agreed Ms Bell had given her more time to undertake tasks, put additional training in place and reduced the number of phone calls she received. Ms Bell concluded by stating the claimant had attempted the tasks but was not carrying them out to the standard required. Ms Bell could not sustain the length of time taken by the claimant to complete tasks because this had an impact on budget and expenditure. The claimant responded to this by stating *"I want to do it but can't".*

40. Mr Butler discussed the OH report with the claimant. The claimant accepted what was said in the report. She informed Mr Butler that she had been referred to see a Neurologist, but this could take 6/7 months to arrange which was very frustrating, so she had been seeing a Chiropracter. The claimant also told Mr Butler she had looked up information about Access to Work and did not think there was anything else they could do for her.

41. Mr Butler concluded the meeting by advising the claimant he had considered the points raised at the meeting but based on the evidence that the claimant

was unable to carry out the role, he confirmed her fixed term contract would not be renewed and the claimant's employment would terminate on the 5th March 2018. He confirmed the claimant would not be required to work for the remainder of the fixed term period and that she would be entitled to a redundancy payment.

42. Mr Butler took this decision because of the OH advice which confirmed there were a variety of possibilities regarding recovery, but there was no specific timescale. The OH report did refer to some functional recovery, but did not explain the level of improvement or the timeframe for it. Ms Bell's view of the claimant's performance and capabilities was consistent with the OH advice and she noted that whilst there may have been some functional recovery, this had not been sufficient to have any impact on the claimant's ability to do the job. Mr Butler noted the claimant's position was that she could do all of the tasks, but the operational evidence did not support this. Mr Butler did not consider extending the trial period for these reasons.

43. Mr Butler confirmed his decision in writing by letter of the 28 February (sent to the claimant by email on the 5 March). The letter (document 33/2) confirmed the main points which had been discussed which included the claimant's suitability for the post based on her performance during the trial period and the supports provided to assist her to effectively undertake the duties and responsibilities of the role. The letter confirmed the redeployment had not been successful and accordingly the claimant's employment would end on the 5th March 2018. The claimant was entitled to a redundancy payment of £1548.23.

44. The claimant appealed against Mr Butler's decision (document 34). Mr Arun Menon, Business Support Manager, was appointed to hear the claimant's appeal. Mr Menon was in receipt of the claimant's appeal, the notes of the meeting on the 23rd February and the OH report. He decided to arrange investigation meetings with Ms Bell and Ms Connor prior to meeting with the claimant.

45. Mr Menon, accompanied by Ms Anne Marie Cosh, HR Business Partner, met with Ms Bell on the 16 March and a note of that meeting was produced at document 35. Mr Menon wanted to discuss and understand why the claimant was on an 8 week trial period; what adjustments had been made; what meetings had taken place with the claimant; the concerns regarding the claimant's ability to undertake the post; why the meeting had taken place on the 23 February prior to the end of the trial period; what tasks the claimant could do; the length of time taken to complete tasks and the errors made by the claimant; access to computer systems and the OH report.

46. Mr Menon, accompanied by Ms Cosh met with Ms Connor on the 16 March and a note of that meeting was produced at document 35A. Mr Menon wanted to understand why the claimant was on a fixed term contract; whether the manager had expressed concerns regarding the claimant's ability to undertake the post; why the meeting had been arranged before the end of the trial period; why there had been a delay in meeting the claimant to discuss the OH report; Access to Work; why the meeting had proceeded without the claimant's trade union representative and why the claimant could not return to the SWITCH register.

47. The respondent's SWITCH (Redeployment) Policy was produced at document 14. Ms Connor confirmed the claimant had been placed on the SWITCH register for the duration of her notice period in terms of the fixed term contract due to expire on the 31 December 2017. The claimant's notice period was extended to allow her to undertake a trial period for the post in Ms Bell's team. The claimant's notice period expired and thereafter the claimant had no right to return to the SWITCH register: either the trial period was a success in which case the claimant would have moved into the post, or it was unsuccessful in which case the claimant's employment would come to an end.

48. The claimant's appeal hearing took place on the 21st March 2018. Mr Menon chaired the hearing and was supported by Ms Cosh and the claimant attended with her trade union representative Mr Andy McCallion. A note of the meeting was produced at document 36. Mr Menon invited Mr Butler to outline why the

trial period for the fixed term contract was not successful and what, if any, steps were taken to redeploy the claimant. Mr Butler summarised the information he had received from Ms Bell, the OH report and from the claimant at the meeting on the 23 February. He explained he had concluded from that information that the claimant could not sustain the type of work involved in the role. The trial period/fixed term contract could, under the terms of the contract, be concluded at any time by either party. Mr Butler confirmed there had been significant issues regarding the claimant's performance and her ability to undertake the majority of tasks associated with the role: it was evident the claimant did not have the skills for the post and the trial period was concluded early.

49. Mr McCallion expressed concern regarding the fact the OH report had not been discussed with the claimant until the meeting on the 23 February. Mr Menon confirmed the report had not been discussed prior to the meeting because no adjustments had been identified in the report which could have been put in place.

50. The claimant challenged Mr Menon that she had been told by Ms Connor that if the trial period was not successful she could return to the SWITCH register. Ms Cosh clarified that this point had been raised with Ms Connor who confirmed she could not recall such a conversation but, if the claimant had refused the role identified in Ms Bell's team, she would have remained on the SWITCH register until her contract expired on the 31st December.

51. The claimant raised the fact she understood a colleague in the previous department in which she had worked was going on maternity leave, and she felt she should be given the opportunity to undertake this role. Mr Butler rejected that suggestion because the decision to fill the post and/or gain approval to recruit to cover the maternity leave had not been given. Maternity leave is not covered automatically and is dependent on budget being available. Mr Butler noted the post was still not filled. Mr Butler also voiced concern regarding the claimant's ability to undertake the role because it was

an administrative position and the claimant would face the same difficulties in carrying out the duties and responsibilities of the role.

52. The claimant was asked about Access to Work and explained she had not made contact with them because she had thought it was something to do with benefits. The claimant's representative, in his summing up, accepted the claimant should have made contact with Access to Work.

53. Mr Menon adjourned the appeal hearing to consider all of the information. He subsequently returned to advise the claimant of his decision. Mr Menon decided to reject the appeal because:-

(a) Ms Bell had met with the claimant, understood the condition, made adjustments and referred her to OH. No other adjustments were, or had been, proposed. There was nothing more the respondent could have done to sustain the claimant in work.
(b) There was no breach of policy caused by finishing the trial period early.
(c) The claimant had not pursued Access to Work.
(d) There was no evidence to suggest the claimant's condition would improve within a reasonable time scale to allow the claimant to undertake the duties of the role. Adjustments had been made but even with those adjustments the claimant could not do the role.
(e) OH had said the claimant could not do the role: accordingly, any similar role would have the same outcome. All of the roles the claimant had undertaken with the respondent had been of the same type which she could now not undertake.

54. Mr Menon confirmed his decision in writing by letter of the 29 March 2018 (document 37/2).

55. The claimant produced a document (C1) which was an advert for the post of Clerical/Admin Assistant (part time) within the Contract Care Team, which was the post she had been undertaking for the trial period. The document noted the advert was published on the 6 March 2018 and closed on the 18

March 2018. The claimant's appeal had not yet been determined. Ms Bell acknowledged the date of the advert but confirmed she had been told she could not interview or appoint anyone to the post until after the outcome of the appeal.

56. The claimant, at this Hearing, suggested the respondent had failed to consider the reasonable adjustment of Dragon Dictate which is voice activated software and which, it was said, would have enabled the claimant to carry out the role. This was put to each of the respondent's witnesses. The witnesses either were not familiar with the software and could not comment, or they rejected the suggestion this would have enabled the claimant to carry out the role because the software could not be used to compile, adjust or amend spreadsheets or calculations. The claimant offered no evidence or explanation to explain how Dragon Dictate may have enabled her to carry out the role.

Credibility and notes on the evidence

57. We found the respondent's witnesses to be credible and reliable and they gave their evidence in an honest and straightforward manner. We found each witness was able to clearly explain their role in this matter and the reason for any decision they had made.

58. Ms Bell was able to explain what had been done to try to enable the claimant to undertake the role and whilst some of the points were standard points which would apply to any new employee, other adjustments had been put in place specifically to assist the claimant. For example, the task of taking notes of meetings was removed from the claimant; the claimant was given more time to complete tasks and other members of staff took training notes for the claimant. Ms Bell impressed as being sympathetic and understanding of the claimant's position. She did not dispute the claimant tried to undertake tasks and tried to find ways round the difficulties. Ms Bell assisted the claimant with these changes, for example, changing the mouse so it could be used with the left hand, but ultimately this was not a solution because it led to the claimant

having pain in her left arm. Ms Bell was very aware of the complex nature of the claimant's conditions and was reluctant to try things (without advice) which may impact adversely on the claimant's other conditions.

59. Mr Butler was also able to clearly explain the information he collected and considered for the meeting on the 23 February, and why he decided to end the trial period early. There was one issue where Mr Butler's evidence was not reliable and that was with regards to whether he adjourned the meeting to consider things before making his decision. Mr Butler acknowledged there was nothing in the note of the meeting to indicate he had adjourned, but he believed he had done so. None of the others at the meeting recalled an adjournment. We preferred their evidence, supported by the note of the meeting and concluded Mr Butler did not adjourn before giving his decision to the claimant. We did not consider this to be a material point: we could not accept it demonstrated Mr Butler had made up his mind prior to the meeting. We considered it demonstrated the facts regarding the claimant's ability to undertake the role and the prognosis from OH were clear and not disputed by the claimant.

60. Ms Connor and Ms Cosh were both very able witnesses. Ms Connor in particular had been involved with the claimant and her employment with the respondent for some time. She knew of the claimant's various conditions and the adjustments which had been put in place. Ms Connor also made the referral to OH and dealt with the claimant whilst she was on the SWITCH register.

61. Mr Menon was an impressive witness who thoroughly investigated the points of appeal raised by the claimant in her letter of appeal and then met with her to discuss those points and hear any other points she wished to raise. Mr Menon impressed as having given full and thorough consideration to all of the points raised by the claimant and he was able to clearly explain why the appeal had been rejected.

62. We found the claimant to be a credible witness but her evidence lacked reliability in several material respects. For example (i) the claimant's trade union representative could not attend the meeting on the 23 February, but there was no evidence to suggest the claimant had tried to get someone else from the trade union or a workplace colleague to attend with her; (ii) the claimant told OH that she was undertaking all tasks, but she acknowledged that without the use of her right hand/arm she could not take notes, answer the phone or do very much on the computer system; (iii) the claimant disputed she had been given more time to complete tasks but this did not sit comfortably with the evidence of Ms Bell to the effect the claimant was, from the very start, given more time to complete tasks. It was also evident that without more time, the claimant could not have completed some of the tasks.; (iv) the claimant's evidence regarding why she did not contact Access to Work was inconsistent and unreliable and (v) the claimant's suggestion she would have been able to do another clerical/administrative role was not credible given the nature of the role and the OH advice.

63. The claimant invited the tribunal to accept it took weeks to get an advert approved for publication and from this she inferred that the decision to dismiss her had been pre-determined. Mr Butler knew nothing of the advert and denied he had made any decision prior to the meeting on the 23 February. Ms Cosh told the tribunal this was a standard advert and whilst the advert had been published, Ms Bell had been told she could not interview or appoint anyone to the post until after the outcome of the appeal. We preferred the evidence of the respondent's witnesses regarding this point.

64. The claimant also suggested the appeal hearing had been conducted in a "farcical" manner and that Mr Menon and Ms Cosh had appeared unclear regarding their roles. We noted there appeared to be no evidential basis for the claimant's suggestion. We preferred the evidence of Mr Menon and Ms Cosh regarding the conduct of the appeal and, as stated above, we found Mr Menon to be an impressive witness.

65. There was reference by Ms Bell during her evidence to the claimant's attitude whilst at work. There was a suggestion by Ms Bell that she had offered to take a reference book down from a high shelf for the claimant to read about the procedures involved in each task. The claimant had refused the offer. We did not find this aspect of Ms Bell's evidence to be material. This case was not about the claimant's attitude: the context of these events was very much that the claimant had attended work each day and tried to carry out the tasks, but was simply unable to do so.

Claimant submissions

66. Ms Flannagan referred to section 98 Employment Rights Act and to the first question to be determined by the tribunal and that was the reason for the dismissal. The respondent relied on both "some other substantial reason", being the termination of a fixed term contract after the claimant failed the 8 week trial period and "capability", specifically that despite making reasonable adjustments the claimant was not able to do the essential duties and tasks associated with the job, as being the reasons for dismissal.

67. Ms Flannagan accepted the expiry of a fixed term contract can amount to some other substantial reason for dismissal. She submitted however that the respondent had failed to demonstrate this was the reason for dismissal. If the claimant failed the trial period then the tribunal should expect that a record of the claimant's performance would be available to the decision-maker in order to show that the employer had complied with the duty of fairness.

68. The claimant did not miss a single day of work despite being in pain and having reduced mobility. The decision to dismiss was made before the end of the trial period when the claimant's physical ability to do work was improving.

69. Ms Bell kept notes of the claimant's performance, however she did not share these with Mr Butler prior to the dismissal. The notes could not therefore be relied upon in support of SOSR being a fair reason for dismissal. Mr Butler claimed to have been shown the notes prior to making his decision to dismiss

but, it was submitted, he was an unreliable witness and his evidence on this point should not be accepted.

70. Ms Bell's evidence was inconsistent with regard to the claimant's attitude to work. On the one hand she accepted the claimant never refused tasks and was always willing to try, but on the other hand much was made about the claimant allegedly not wishing to read a large procedures book. The claimant's contention that she did read the book should be preferred. In any event, it was submitted, this allegation was trivial and irrelevant in considering the fairness to dismiss, as was the dispute regarding whether the claimant had the necessary systems skills for the job.

71. Ms Flannagan submitted the respondent had failed to show the claimant was unable to do any of the essential duties and tasks associated with the role, and accordingly had failed to show the decision was made with regard to any objective criteria. The respondent had not shown that a fair procedure was adopted to determine whether the claimant was incompetent to do the job. The respondent had not, it was submitted, followed its own policy on capability and Ms Connor told the tribunal that that was because the claimant was being considered under the SWITCH Redeployment policy. This was potentially unlawful under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, although Ms Flannagan acknowledged no claim was brought under those regulations.

72. The claimant was prevented from bringing her trade union representative to the meeting on the 23 February and, it was submitted, none of the respondent's witnesses had provided an adequate reason why the meeting had to go ahead before the claimant could secure alternative representation.

73. Ms Flannagan referred to **BS v Dundee City Council 2014 IRLR 131** and **Spencer v Paragon 1976 IRLR 373** and **East Lindsey DC v Daubney 1977 IRLR 181** and to the themes set out in those cases regarding the approach to be taken by an employer when dealing with an employee absent on long term sick leave. Ms Flannagan noted the claimant was not on long term sickness

absence but she considered the approach set out in those cases would be helpful to the tribunal.

74. Mr Butler met with Ms Bell and Ms Connor prior to meeting with the claimant on the 23 February. It was submitted no reasonable investigation was carried out before deciding to dismiss the claimant. In terms of consulting the employee, the claimant was shocked to learn she may be dismissed, and she felt intimidated and ambushed given the nature of the meeting. The OH report had not been discussed with the claimant prior to this meeting.

75. The respondent did seek OH advice, but did not seek any other medical evidence from the claimant's GP or Consultant. The claimant accepted the respondent asked the correct questions of OH and were advised the claimant's condition could improve with intervention over a few months, and that some functional recovery was likely within 3 months.

76. Ms Flannagan conceded the OH report did contain information which, if relied upon in isolation by the respondent, could lead them to believe they were acting reasonably in choosing to dismiss for reasons of capability. However, given the ambiguity, the respondent should have gone further in seeking medical advice from another source or gone back to OH for further information.

77. The claimant gave evidence regarding the advertisement of the role she was carrying out. It was submitted that none of the respondent's witnesses were able to attest that this document was not an indication of the decision to dismiss being pre-determined. The claimant used to work in the department that processed these job adverts and told the tribunal that if the job was posted on the 6 March 2018, then it must have been in the system for some time before that.

78. Ms Flannagan submitted the respondent could not write policies which subverted the requirement to consider suitable alternative employment for an employee at threat of redundancy.

79. Ms Flannagan submitted the respondent did not have a fair reason for dismissing the claimant and accordingly the dismissal was unfair.

80. Ms Flannagan next had regard to the claim under section 15 Equality Act and to the guidance given in the case of **Pnaiser v NHS England 2016 IRLR 170**. Ms Flannagan invited the tribunal to find the claimant's disability had the following impacts: (a) she did not have function in her right arm for most of her trial period however this was improving by the time she was dismissed and continued to do so; (b) she was in pain and on medication during her trial period and this had an impact on her ability to complete tasks and learn the role and (c) the claimant had successfully been working with disabilities prior to her trial period with the Care Contracts team.

81. It was submitted the claimant's dismissal amounted to discrimination arising from disability. The dismissal was unfavourable treatment and the reason for the claimant's dismissal was because her performance was not to the standard required by the respondent. It was clear from the evidence that the claimant's performance was adversely affected by her disabilities:

    (a) she had difficulty performing the tasks due to her disability because she had limited function in her right arm;
    (b) she could not write and therefore could not take notes when shadowing colleagues or navigate the computer system;
    (c) her performance was further impacted by the medication she took and
    (d) the claimant could not answer the phone and take notes or navigate the system at the same time.

82. There was, it was submitted, a prima facie case of discrimination. The question then was whether the respondent could demonstrate the claimant's dismissal was a proportionate means of achieving a legitimate aim. It was accepted that ensuring employees perform to a required standard was capable of being a legitimate aim. However, dismissing the claimant was not a proportionate means of achieving that aim. Ms Flannagan invited the tribunal to consider the arguments advanced regarding the fairness of the

dismissal to find the dismissal was not a proportionate means of achieving the aim.

83. Ms Flannagan submitted the issue of alternative employment was a consideration and in this respect the complaint of failure to make reasonable adjustments should be considered. Ms Flannagan referred to the terms of section 20 Equality Act and to the case of **Carranza v General Dynamics Information Technology Ltd 2015 IRLR 43** where it was stated in determining whether it is reasonable for a person to have to take a particular step in order to comply with the duty to make reasonable adjustments, the provisions set out previously in section 18B Disability Discrimination Act would apply.

84. Ms Flannagan also referred to **Environment Agency v Rowan 2008 IRLR 20** for guidance on how a tribunal should approach the question of whether the employer has failed to comply with the duty to make reasonable adjustments.

85. The PCP was the requirement to complete the duties of the Clerical Admin role to a certain standard, and this, it was submitted, was applied to the claimant. This placed the claimant at a substantial disadvantage because she was unable to complete the duties to a certain standard and was dismissed. The respondent failed to adjust any targets/measures of the claimant's performance to reflect her reduced processing speed. This was demonstrated by the fact Ms Bell's performance document made no account for the claimant's disability.

86. Ms Flannagan noted that none of the respondent's witnesses seemed aware that software such as Dragon Dictate could have assisted the claimant and no-one looked into this. The witnesses had referred to the fact OH had not recommended this adjustment, but it was submitted that it is the responsibility of the respondent and not OH to make adjustments. Further, none of the respondent's witnesses could explain why the trial period could not be extended.

87. The tribunal heard evidence about the mouse being moved to the left, but this adjustment did not avoid the disadvantage of dismissal. Also, although a telephone headset was offered to the claimant, it was not appropriate given the claimant's migraines. The respondent, it was submitted, sought to argue that they reduced the claimant's duties but they had not been able to lead any objective evidence of this. Ms Flannagan invited the tribunal to prefer the evidence of the claimant who stated she was not given any extra time over and above what a new employee would have been permitted.

88. The OH report recommended the claimant be walked through each aspect of the role in order to identify what aspects the claimant struggled with due to her disability. Ms Bell advised that she and other staff had taken the claimant through a case however there was no evidence that this was in response to the OH report.

89. The respondent did not speak to the claimant about any adjustments which could assist her until the meeting on the 23 February. The claimant believed that the decision to terminate the fixed term contract had already been made at this point. Further, it is not the claimant's responsibility to state what adjustments would remove the disadvantage.

90. Ms Flannagan submitted the question for the tribunal was whether there were further adjustments which were reasonable for the respondent to have to make and which would have avoided her dismissal. The claimant told the tribunal about the effectiveness of software to assist with the job, and extending the trial period would have removed the disadvantage particularly as the claimant stated her function did in fact improve.

91. The claimant worked for the respondent for 3.5 years and had no previous performance issues. There were reasonable adjustments which could have been made and alternative roles. In the circumstances dismissal was not a proportionate means of achieving a legitimate aim.

92. Ms Flannagan invited the tribunal to uphold the claims made by the claimant.

93. Ms Flannagan referred to a considerable number of authorities and, in addition to those referred to above, the following were included in the written submissions:

(a) Beard v St Joseph's School Governors 1979 ILR 144
(b) Taylor v Alidair 1978 IRLR 82
(c) Trustees of Swansea University Pension & Assurance Scheme v Williams 2015 IRLR 885
(d) Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305
(e) Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893
(f) Hardy and Hansons plc v Lax 2005 ICR 1565
(g) Hensman v Ministry of Defence 2014 EqLR 670
(h) City of York Council v Grosset UKEAT/0015/16
(i) Archibald v Fife Council 2004 IRLR 651
(j) Chief Constable of South Yorkshire Police v Jelic 2010 IRLR 744
(k) Romec v Rudham 2007 All ER 206
(l) Cumbria Probation Board v Collngwood 2008 All ER 04

Respondent's submissions

94. Mr Walsh noted the claimant (who was already a disabled person as a result of her various chronic health conditions which had remained significant but static until December 2017) developed a serious new condition in early January 2018, and on the 9 January 2018 reported that she was unable to use her dominant right arm/hand. This was diagnosed as Brachial Neuritis. The respondent accepted the claimant was a disabled person during the trial period in terms of this new condition as well as her other chronic health conditions.

95. Mr Walsh noted the PCP as defined by Ms Flannagan, and submitted the claimant was not expected to complete tasks at the same level as others. The claimant had accordingly not set out correctly what PCP put her at a comparative substantial disadvantage. The onus is on the claimant to set out

a valid PCP that applied, and she had not done so. The claim of failure to make reasonable adjustments was therefore incapable of proper assessment given the incorrect narration of the PCP (**Smith v Churchill Stairlifts plc 2005 ICR 524**). Further, if the claimant meant she was required to carry out the duties of the post to any standard, then no claim was pled for reasonable adjustments that corresponded to that PCP or any disadvantage the claimant would have suffered in respect thereof.

96. Mr Walsh submitted, with regard to the claimant's position that Dragon Dictate software would have been a reasonable adjustment, that this was not legally capable of being pled in those terms, and should have been a claim in terms of section 20(5) of the Equality Act, namely provision of an auxiliary aid.

97. The respondent had successfully made adjustments for the claimant throughout her employment prior to the trial period. Ms Bell ensured the adjustments which had been in place continued to be made for the claimant in her new post. The main issue in this case was that the new condition operated on top of the claimant's other conditions, and Ms Bell consulted with the claimant regarding additional adjustments relative to the new condition. The claimant's duties and workload were adjusted (for example no minute taking) and reduced, and she was allowed longer time to complete tasks. The claimant shadowed colleagues and they provided her with notes because she could not take her own notes. Mr Walsh submitted the claimant's assertion that these were not adjustments was not credible.

98. Mr Walsh referred to the case of **Burke v College of Law 2012 All ER 29** where it was held that a number of various adjustments made by the employer must be considered as a whole.

99. Mr Walsh submitted the combination of the claimant's serious health difficulties did not assist the making of adjustments. This was demonstrated by the proposal of using a headset to assist with answering the phone, but this was refused because of the claimant's chronic migraines. Also, moving the mouse to the left, but this caused pain in the claimant's left arm.

100. Mr Walsh submitted there was close consultation with the claimant and reference to OH to ask if it could recommend other adjustments. Mr Walsh accepted the duty to make reasonable adjustment rested with the employer, but submitted that in reality it was essential to include the disabled person in discussions to see what their position was and whether any adjustments were sufficient, or whether other adjustments could be considered.

101. The claimant, in the meeting on the 23 February, appeared to agree that all adjustments that could be made had been made. There really was, she said, nothing more management could have done. The respondent's evidence was that it honestly did not consider other adjustments were available, and the tribunal was invited to accept this assessment was reasonable. If the tribunal did not accept this, it was submitted that not providing voice dragon software for the claimant to use was not a failure to make reasonable adjustments because it would not have addressed the claimant's difficulties such as to allow her to then be able to carry out the essential tasks of the role with adjustments. There was no evidence as to what impact such software would have had. Ms Connor confirmed she was aware of speech software but could not conceive how this would make a material difference for the claimant.

102. Mr Walsh submitted that in terms of lengthening the trial period, the advice from OH was that there was no predicted time scale for recovery. Although the claimant had recovered some functionality, this had not led to any corresponding increase in her ability to do the work with the adjustments in place. Further, whilst it was also said that some further functional recovery was possible in 3 months, there was no guarantee of this, and it did not mean it was likely to lead to a sufficient increase in her ability to do the work with adjustments.

103. The claimant's representative asserted the claimant was feeling somewhat better by the time of her appeal, but it should be noted there was nothing of substance provided at either the meeting on the 23 February or at the appeal

hearing demonstrating the claimant was able to do the essential elements of the work with adjustments.

104. Mr Walsh submitted that given the extent of the capability issue which persisted despite the range of various adjustments made, extending the trial period would not reasonably have had the prospect of enabling the claimant to do the job.

105. Mr Walsh invited the tribunal to dismiss the complaint of failure to make reasonable adjustments.

106. Mr Walsh next referred to section 98 Employment Rights Act. He submitted the reason for the dismissal was two fold: (i) the capability of the employee for performing work of the kind which she was employed by the employer to do, namely, despite making reasonable adjustments, she was not able to do the essential duties and tasks associated with the job; and (ii) some other substantial reason of a kind such as to justify the dismissal of the employee holding the position the employee held, namely the claimant's fixed term contract coming to an end, she having failed the trial period in the Care Contracts Clerical/Admin post.

107. Mr Walsh submitted capability was the principal reason for the dismissal because the claimant was unable to carry out the role despite adjustments, and this led to the fixed term contract not being renewed. Mr Walsh invited the tribunal to accept the respondent acted reasonably in treating these reasons as sufficient for dismissal, and that the termination of the claimant's employment was procedurally fair in terms of equity and the merits of the case. The respondent made various reasonable adjustments but the claimant was not able to do the majority of the tasks associated with the role even with those adjustments.

108. This was supported by the OH report and by the claimant at the meeting on the 23 February. The claimant did attend for work during the trial period, but she was not able to do that work in spite of attempting to do so with the

adjustments. The OH report confirmed the claimant was not able to do a significant list of tasks involving the use of her right arm/hand. The claimant stated she was managing to do tasks slowly, but, it was submitted that it was for management to determine if the claimant's pace of work was acceptable. Ms Bell explained in her evidence that (a) what the claimant stated in the OH report was not correct because she could not manage most tasks even with adjustments and (b) the level of work, with the claimant unable to do the majority of tasks, was not acceptable and could not be sustained. Mr Walsh invited the tribunal to accept Ms Bell's evidence that she had walked the claimant through the elements of her role.

109. The OH report did not recommend further adjustments. Ms Connor told the tribunal that if adjustments had been proposed, management would have met with the claimant to discuss the report and proposals and address with her whether they would have made a difference. As it was, no further adjustments were proposed and an assessment was made by Ms Bell indicating that as the claimant was unable to do the majority of tasks she was recommending the trial period be ended. This led to the meeting with Mr Butler.

110. Mr Walsh noted it had been suggested the claimant did not know her employment may be ended at this meeting. He submitted the purpose of the meeting was clearly set out in the letter at document 31A. He conceded the letter did not use the word "dismissal" but the claimant acknowledged in cross examination that she understood her contract was due to expire and the meeting was to discuss the outcome of her trial period, so she appreciated one outcome may be that this would come to an end. The claimant also thought the OH report would be discussed, and that this might lead to a different outcome. This, it was submitted, was in line with Mr Butler's evidence when he said he was there to hear from management and to consider anything the clamant said and the terms of the OH report, before making a decision.

111. The claimant attended without her trade union representative and was critical of the respondent for not postponing the meeting. Mr Walsh invited the

tribunal to have regard to the evidence of Mr Butler, Ms Connor and Ms Cosh regarding the fact management were concerned that the meeting should take place before the claimant's fixed term contract was due to expire on the 5th March. It was submitted the respondent had adopted a fair approach and that it had been important for the claimant to attend the meeting and be given the opportunity to confirm or challenge matters. The claimant largely confirmed there was not really anything else Ms Bell could have done to support her, and she agreed she had been trying to do the tasks but could not do so. The claimant, at this hearing, sought to describe that she had felt intimidated at the meeting because she was not represented. Mr Walsh suggested that whilst anyone may be apprehensive at such a meeting, the claimant – who had stood up for herself in cross examination in this hearing – would not have agreed those matters if she had not actually agreed with them.

112. Mr Walsh invited the tribunal to accept Mr Butler's evidence regarding his decision and the reasons for it.

113. The claimant had been employed as a clerical/admin worker, and OH had advised that she would likely have the same issues with any job requiring good functioning of her right arm. Mr Butler considered that advice and concluded that alternative employment would not have been feasible for the claimant because she would have faced the same problems in respect of other clerical/admin posts.

114. The advice from OH regarding lengthening the trial period was that there was no predicted time scale for recovery and no guarantee of this. There was no specific treatment known to impact significantly on recuperation. Although the claimant had recovered some functionality, this did not lead to any corresponding increase in her ability to do the work with adjustments. The OH report did indicate that some further functional recovery was possible in three months, but there was neither any guarantee of this nor was it likely this would lead to a sufficient increase in her ability to do the work with adjustments. Management were to assess whether her pace of work was acceptable and sadly it was not, even with adjustments.

115. Mr Walsh submitted there was no evidence either before Mr Butler, or Mr Menon, that the claimant was able to carry out the role with adjustments: the evidence to the contrary was substantial. Mr Menon gave thorough consideration to the grounds of appeal and he investigated points with Ms Bell and Ms Connor. Mr Walsh invited the tribunal to accept Mr Menon's clear and detailed evidence.

116. Mr Walsh invited the tribunal to find the dismissal of the claimant fair.

117. Mr Walsh next had regard to section 15 of Equality Act. Mr Walsh accepted dismissal was unfavourable treatment because of something arising in consequence of disability. He submitted the dismissal was justified because employment was terminated because the claimant failed the trial period because she was not able to do the majority of the tasks associated with the role. This was a legitimate aim because an employee must be capable, with adjustments, of doing the essential tasks of their role.

118. Mr Walsh submitted dismissal was a proportionate means of achieving a legitimate aim because alternative employment was not, for the reasons set out above, feasible, and lengthening the trial period was not, for the reasons set out above, likely to lead to a sufficient increase in her ability to do the work with adjustments.

119. Mr Walsh concluded his submission by inviting the tribunal to dismiss all of the claims.

Discussion and Decision

Failure to make reasonable adjustments

120. We decided it would be appropriate to consider and determine the complaint of failure to make reasonable adjustments first. We had regard to the terms of section 20 Equality Act which provides that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not

disabled, then the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

121. The provision, criterion or practice (PCP) in this case was defined as being the requirement the claimant *"had to complete the duties of the Clerical Admin role to a certain standard"*. Ms Flannagan argued it was clear the claimant had been required to complete the duties of the role to a certain standard in order to remain in employment. Mr Welsh disagreed and submitted the claimant had not been expected to complete duties at the same level as others. We, in considering the application of the PCP, had regard firstly to the fact there was no evidence before the tribunal regarding what the "certain standard" may have been. Ms Bell was not cross examined regarding either any standards in place regarding the completion of duties, or what standard the claimant was expected to reach.

122. Ms Bell did prepare a document (page 33/3) showing the length of time it took the claimant to complete certain tasks in comparison to other members of the team. Ms Bell accepted the document showed the raw data which had not been adjusted to take into account the claimant's disabilities. There was no suggestion that if the claimant had taken, for example, 4 days to do a Reassessment, rather than 5 days, it would have been acceptable. Further, there was no suggestion the claimant had to match the times of the other members of the team.

123. We had regard to the fact the duty on the employer is to make reasonable adjustments to stop the PCP putting the disabled employee at a substantial disadvantage. We considered that if the PCP is not sufficiently well specified, it will not be possible for an employer to assess what adjustments need to be put in place (or the reasonableness of them) to remove the disadvantage of the PCP applying.

124. We were referred by Mr Walsh to the case of **Smith v Churchills Stairlifts plc 2005 ICR 524** where, at paragraph 34, it was confirmed that the failure to correctly identify a PCP said to give rise to the disadvantage triggering the

duty to make reasonable adjustments is likely to invalidate any finding that this placed the claimant at that particular substantial disadvantage with non-disabled persons.

125. We concluded the PCP identified by the claimant was not sufficiently certain. We did consider whether the PCP was to be interpreted as meaning there was a requirement on the claimant to carry out the duties of the post to any/some standard, but we accepted Mr Welsh's submission that this PCP, or interpretation of the PCP, had not been pled and lacked specification in any event.

126. We decided it would, however, be appropriate to continue to consider whether, if the PCP of requiring the claimant to complete the duties of her role to a certain standard was a PCP, it placed the claimant at a substantial disadvantage. We accepted it did place the claimant at a substantial disadvantage because the claimant could not comply with the standard and the fixed term contract came to an end. The duty to make reasonable adjustments would have arisen, and we considered the claim that the respondent should have made the following adjustments:

(a) adjusting any targets/measurements of the claimant's performance to reflect her reduced processing speed;
(b) reducing her workload;
(c) adjusting her duties to give her non urgent tasks to accommodate her slower processing speed;
(d) using software such as Dragon Dictate and/or
(e) lengthening the trial period.

127. We considered it important to note at this stage that there was no dispute regarding the fact that on the day prior to starting the trial period the claimant lost the use of her dominant right hand and arm. The OH report (document 30) noted this was a Brachial Neuritis, and that the claimant had reported various symptoms including numbness affecting her full arm and nerve pain

radiating from her shoulder into her neck. The claimant told OH this was impacting greatly on her function and that she had little use of her right arm.

128. The OH nurse, in response to the question asked whether there were any duties the claimant could not do, confirmed the claimant could not do tasks involving the use of her right hand and arm: "writing, holding items, use of the mouse, handling and sorting through paperwork and similar tasks". Ms Bell described that the claimant could answer the telephone, but could not, at the same time, take a note or message or access the computer systems to respond to an enquiry.

129. The OH report also noted this was an unusual condition which could improve with no intervention over a few months. There was no predicted timeline for recovery and no specific treatment which was known to impact significantly on recuperation. The claimant told the OH nurse there had been some improvement since the onset of the condition four weeks ago. The OH nurse advised full recovery may take many months or longer, and there was no guarantee. However, some functional recovery was likely within about three months.

130. We noted, with regard to the above proposed adjustments, that the claimant's position was that she had not been given extra time to complete tasks. We could not accept that evidence because we preferred the evidence of Ms Bell when she told the tribunal that the claimant was given longer to complete tasks undertaken. We considered Ms Bell's evidence was supported by the fact that at the meeting on the 23 February, the claimant agreed she had been given more time to complete tasks.

131. We also accepted Ms Bell's evidence that the claimant's workload had been reduced. Ms Bell's evidence that the claimant was not, for example, expected to take minutes was not challenged. We also drew an inference from the fact the claimant had no/limited use of her right hand and arm, and from the evidence of Ms Bell and the OH report, that the claimant's workload was limited by this in any event.

132. There was a conflict between the evidence of the claimant on the one hand and Ms Bell and the OH report on the other hand, regarding the duties the claimant was able to carry out. The claimant's position was that she managing all tasks slowly. The claimant told the OH nurse that she was *"managing all tasks asked of her but at a slow pace".* We could not accept the claimant's position in circumstances where Ms Bell's evidence, supported by the OH report, was that the claimant could not do certain things. Ms Bell told the tribunal the claimant could not write. The claimant could answer the telephone with her left hand, but she could not then write a message, or access the computer systems, with her right hand. The claimant undertook training and shadowing colleagues, but could not make notes regarding that training, and had to rely on others doing that for her.

133. The OH referral had specifically asked the nurse to comment on whether there were any particular duties the employee could not do. The OH nurse had responded "yes, tasks involving the use of her right hand and arm: writing, holding items, use of the mouse, handling and sorting through paperwork and similar tasks".

134. The suggestion the respondent could have adjusted the claimant's duties to give her non-urgent tasks to accommodate her slower processing speed was not supported by any evidence. The respondent's witnesses were not asked about adjusting the claimant's duties in this way and there was no evidence to suggest there were non-urgent tasks the claimant could have carried out. Accordingly, we were not able to further consider whether this would have been a reasonable adjustment.

135. The claimant, in her claim form and at this Hearing, argued that it would have been a reasonable adjustment to have provided her with Dragon Dictate. The claimant's only evidence to this tribunal, when asked how this would have helped, was to say *"it avoids the need to use your arms".* There was nothing to suggest how Dragon Dictate works: for example, it is within the industrial knowledge of this tribunal, that a headset may be worn when using Dragon

Dictate. The claimant cannot wear a headset because of her migraines. Further, Ms Connor, who was familiar with Dragon Dictate, questioned how it would work when using spreadsheets. There was no evidence to suggest the scope of use of Dragon Dictate and whether it may be used for tasks beyond dictating and composing a document.

136. We concluded that in the absence of evidence to demonstrate how an adjustment of providing the claimant with Dragon Dictate would have assisted the claimant and reduced the impact of the PCP, we could not find the adjustment would have been reasonable.

137. The claimant also argued that it would have been a reasonable adjustment for the respondent to extend the trial period. We reminded ourselves that the purpose of making a reasonable adjustment is to remove the substantial disadvantage caused by the application of the PCP. So, in this case, a reasonable adjustment would have to remove or limit the substantial disadvantage of the claimant being unable to complete the duties of the role to a certain standard. There was no evidence to suggest either the length of the extension which would have been considered reasonable, or the way in which this would have reduced or removed the substantial disadvantage. The only evidence before the tribunal was firstly, from the OH report, which explained *"some functional recovery is likely within about three months".* There was nothing to suggest the scope or extent of the functional recovery likely within that timescale. Secondly, the claimant told OH and the respondent that there had been some improvement in the four weeks since it had happened. Again, there was no evidence to explain what "some improvement" meant. The respondent did not challenge the claimant regarding the improvement, but Mr Butler accepted Ms Bell's evidence when she told him that any recovery had not translated into an improvement in the time for completing tasks.

138. The claimant's trial period had already been extended by four weeks, for reasons unrelated to her disability. We concluded that if the adjustment sought was for a further period of four weeks, there was no evidence to

suggest this would have reduced or removed the substantial disadvantage. Indeed, there was evidence to suggest there was concern on the respondent's part that the claimant's efforts to do the work and to make her own adjustments may cause further injury. The claimant's attempt to use the mouse with the left hand resulted in causing pain in the left arm. The claimant suffered from a complex range of conditions, each of which caused chronic pain. Further, if the adjustment sought was for a period of three months, we concluded this would not have been a reasonable adjustment in circumstances where (a) there was no guarantee of recovery within that timescale and (b) the impact on the department of the claimant taking days to complete tasks which other employees completed in hours/minutes was severe.

139. The claimant, in addition to the above points, argued it would have been a reasonable adjustment to move her to another post. Mr Butler did consider this within the context of the claimant identifying a post in her previous department which was "vacant" because of maternity leave. Mr Butler noted the claimant is a clerical and administrative employee: all of the roles held by the claimant whilst employed with the respondent were clerical/administrative roles. The roles involve clerical and administrative duties which are similar in nature: writing, taking notes/minutes, answering the phone, accessing the system and inputting information into documents and reports. Mr Butler concluded, and we say reasonably concluded, the claimant had difficulty completing clerical and administrative tasks and this would apply equally to other clerical and administrative roles. We concluded, for this reason, that alternative employment would not have been a reasonable adjustment in the circumstances.

140. We, in conclusion, decided to dismiss the claim of reasonable adjustments because the PCP was not specified with sufficient clarity and, even if the PCP had been clearly specified, the claim would still have failed because the adjustments proposed by the claimant were not reasonable.

Unfair Dismissal

141. We next considered the complaint of unfair dismissal. We had regard to the terms of section 98 Employment Rights Act which set out how a tribunal should approach the question of whether a dismissal is fair. There are two stages: first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2). If the employer is successful at the first stage, the tribunal must then determine whether the dismissal was fair or unfair under section 98(4). This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

142. The respondent in this case admitted dismissing the claimant and asserted the reason for dismissal was some other substantial reason (relating to the expiry of a fixed term contract) and capability. The respondent submitted the principal reason for dismissal was capability. The claimant challenged both of those reasons.

143. We, in considering this matter, noted firstly that the burden of proof on the employer at this stage is not a heavy one. The employer does not have to prove the reason actually did justify the dismissal. It was stated in **Gilham v Kent County Council (No 2) 1985 IR 233** that *"if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to section 98(4) and the question of reasonableness."* Further, in **Abernethy v Mott, Hay and Anderson 1974 ICR 323** it was stated that *"A reason for dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."*

144. We secondly had regard to the terms of section 95(1)(b) Employment Rights Act which provide that termination of a limited term contract without renewal is deemed to be a dismissal. The expiry of a limited term contract is not itself a potentially fair reason for dismissal, and the employer must accordingly still establish that the expiry falls within one of the potentially fair reasons for

dismissal set out in section 98(1) and (2). The expiry of a limited term contract is commonly argued as some other substantial reason for dismissal (SOSR).

145. We thirdly had regard to the case of **Fay v North Yorkshire County Council 1986 ICR 133** where the Court of Appeal clarified the circumstances in which the expiry of a limited term contract can amount to SOSR. It was stated that it must be shown that the contract was adopted for a genuine purpose, which was known to the employee, and that that purpose had ceased to be applicable.

146. We, having had regard to the above points, next turned to consider the facts of this case. There was no dispute regarding the fact the claimant was employed on a fixed term contract from the 10 January 2018 until the 5 March 2018 (or until the position was reviewed whichever date was sooner). The fixed term contract was put in place to allow the claimant to undertake an 8 week trial period in an effort to find suitable alternative employment and avoid redundancy. We were satisfied, in terms of the above case, that the fixed term contract was adopted for a genuine purpose which was known to the claimant. We were further satisfied the purpose of the fixed term contract – which was to enable the claimant to have a trial period in the role - ceased to be applicable. We say that for the following reasons.

147. The claimant was undertaking a trial period in the role, and would be offered employment in that position if the trial period was completed successfully. Ms Bell reached the conclusion the trial period should be terminated because the claimant was unable to do the role. Ms Bell reached that conclusion through her own observations of the claimant and her performance, and having had regard to the OH report.

148. There was no dispute regarding the fact that at the time of starting the trial period, and throughout its duration, the claimant had Brachial Neuritis, a condition which affected her right hand and arm, and meant she lost the ability to use her right hand and arm. This, in stark terms, meant the claimant was endeavouring to perform a clerical/admin role without the use of her right hand

and arm. The claimant undertook training for the role, which included shadowing other employees and undertaking the easier tasks whilst someone sat with her to show her how to navigate the system.

149. The claimant tried using the mouse with her left hand, but this caused pain in her left arm. She also tried writing with her left hand, but her writing was not legible. There were various tasks the claimant could not do, for example, taking notes; writing and answering the phone and taking a note or accessing the system at the same time to answer an enquiry; and other tasks she could do albeit very slowly.

150. Ms Bell prepared document 33 showing the tasks undertaken by the claimant, the time it took to complete the task and the number of errors made and a comparison with two other employees in the team. The document noted it took the claimant 5 days to complete the paperwork for a Reassessment, whereas it had taken other employees one hour and eight minutes respectively. Similarly it had taken the claimant 6 working days to complete a Private Contract task, whereas it had taken other employees 23 minutes and 16 minutes respectively. The claimant had taken 6 working days to complete a Discharge and 4 working days to complete an Emergency, whereas it had taken other employees 43 minutes and 27 minutes, and 4 minutes and 17 minutes respectively.

151. Ms Bell acknowledged the document contained only the raw data which had not been adjusted to take into account any of the claimant's disabilities. However, even allowing for the fact the claimant was given longer to complete tasks, the length of time it took the claimant to complete these tasks was not acceptable to the respondent and was not something the team could accommodate.

152. Ms Bell also had regard to the fact the claimant made a high number of errors, including deleting information and formulae from a document, which caused her to question the claimant's ability to use processes such as Excel.

153. The OH report confirmed the claimant had reported she had little use of her right arm, and that there were particular tasks she could not do, for example, tasks involving the use of her right hand and arm, such as writing, holding items, use of the mouse and handling and sorting through paperwork. In terms of the prognosis, the report confirmed Brachial Neuritis was an unusual condition which could improve with no intervention over a few months. There was no predicted timeline for recovery and no specific treatment was known to impact significantly on recuperation. Full recovery may take many months or longer, and there was no guarantee. The claimant had reported some improvement since onset, and the report confirmed some functional recovery was likely within about three months.

154. A meeting to consider all of the above information was arranged and took place on the 23 February. Mr Butler chaired that meeting. Mr Butler invited Ms Bell to give a detailed account of the claimant's performance in the role, and he accepted what she said because she provided evidence (document 33) to support what she had said and Mr Butler had regard to that document. He also had regard to the fact the claimant did not dispute what was said by Ms Bell and agreed that whilst she had tried to undertake the duties, and wanted to do them, she could not do so.

155. The claimant told the tribunal she had felt intimidated at the meeting because she had not known it was a dismissal meeting and she was there without her trade union representative being present. We deal with these points below.

156. Mr Butler also had regard to the OH report which was discussed with the claimant. He noted there was no guarantee of a recovery, and if there was one it could take many months. The claimant did not dispute this and although the claimant told Mr Butler there had been some functional recovery, Ms Bell confirmed it had not impacted positively on the claimant's ability to do the job.

157. Mr Butler concluded, based on the evidence the claimant was unable to carry out the role and based on the prognosis set out in the OH report, the fixed term contract would come to an end on the 5th March 2018. The purpose of the fixed term contract, which was to allow the claimant to have a trial period

in the role, ceased to be applicable in circumstances where the claimant could not carry out the role.

158. Mr Welsh submitted the principal reason for the dismissal was capability in terms of section 98(2)(b) Employment Rights Act in circumstances where, despite making reasonable adjustments, the claimant was not able to do the essential duties and tasks associated with the role. We acknowledged the claimant's capability for performing the work of the kind which she was employed to do during the trial period led to the fixed term contract ending, however, having had regard to the analysis set out above, we concluded that the principal reason for dismissal in this case was the ending of the fixed term contract. It was the ending of the fixed term contract that caused the termination of the claimant's employment.

159. We were satisfied the respondent had shown the reason for dismissal was some other substantial reason of a kind such as to justify the dismissal of the employee holding the position the employee held, namely the claimant's fixed term contract coming to an end in circumstances where the claimant was unable to carry out the role. SOSR is a potentially fair reason for dismissal falling within section 98(1) Employment Rights Act. We must now continue to determine whether dismissal for that reason was fair or unfair in terms of section 98(4).

160. Ms Flannagan, in her cross examination and in her submissions, sought to argue the respondent had no record of the claimant's performance showing she had failed the trial: they had, in other words, failed to show the claimant was unable to do tasks. We could not accept that submission in circumstances where (a) Ms Bell had prepared a document showing the claimant's performance in relation to certain tasks and (b) the OH report clearly set out what the claimant could not do. This was a case where there were some tasks the claimant could not do, and other tasks which the claimant could undertake but at a significantly slower pace.

161. Ms Flannagan and the claimant were critical of document 33 because no adjustment had been made for the claimant's disability. Ms Bell accepted this and accepted the claimant's disability would need to be taken into account. The information on the document, however, was a stark illustration of how difficult these tasks were for the claimant. For example, taking 5 days to complete a task which other employees could complete in one hour. We accepted Ms Bell's evidence that even with adjustments in place (for example, being given additional time to complete tasks) the claimant could not complete work in a time acceptable to the respondent.

162. We, in considering the claimant's criticism of the respondent's assessment of her capability, also had regard to the evidence of Mr Butler. Mr Butler told the tribunal that he was keen to understand Ms Bell's recommendation regarding the fixed term contract, and whether she had any evidence to support her position. Ms Bell not only provided Mr Butler with her recommendation and the reasons for it, but she also provided to Mr Butler, the document demonstrating the length of time the claimant took to complete certain tasks. We accepted Ms Bell had gone through the steps of a task with the claimant and had a good understanding of what the claimant could and could not do.

163. Mr Butler also relied on the evidence provided by the claimant during the discussions at the meeting on the 23 February. The claimant did not dispute what Ms Bell said regarding her performance, and agreed she had been given more time to complete tasks. Ms Bell stated at one point that *"Angela has attempted the tasks but is not carrying them out to the standard required."* The claimant, in response to this, stated *"I want to but can't".*

164. We concluded, having had regard to the above points, that the respondent had a record of the claimant's performance and had put in place a fair procedure to determine her ability to complete tasks in a time acceptable to the department.

165. Ms Flannagan acknowledged this was not a long term sickness absence case, but she submitted it would be helpful to have regard to the main themes

and principles in the key authorities of **East Lindsey District Council v Daubney; Spencer v Paragon** and **BS v Dundee City Council**. The Court of Session in the latter case stated:

"Three important themes emerge from the authorities. First, in a case where an employee has been absent from work for some time owing to sickness, the critical question is whether in all the circumstances of the case any reasonable employer would have waited longer before dismissing the employee. Secondly, there is a need to consult the employee and take their views into account. This is a factor that can operate both for and against dismissal – if the employee states that they are anxious to return to work as soon as they can and hope that they will be able to do so in the near future, that operates in their favour; if on the other hand they state that they are not better and do not know when they can return to work, that is a significant factor operating against them. Thirdly, there is a need to take steps to discover the employee's medical condition and their likely prognosis, but this merely requires the obtaining of proper medical advice: it does not require the employer to pursue detailed medical examination: all that the employer requires to do is to ensure that the correct question is asked and answered."

166. There was no dispute in this case regarding the fact the respondent obtained an OH report prior to making their decision regarding the termination of the fixed term contract. The OH report was clear in its terms insofar as (i) the condition was described as an unusual condition which can improve with no intervention over a few months; (ii) full recovery may take many months or longer but there was no guarantee (iii) some functional recovery was likely within about three months and (iv) symptoms were ongoing and likely to be persistent for many months.

167. There was no suggestion the incorrect questions had been asked of the OH advisor. The report confirmed the claimant was at work carrying out duties at a slower rate, and that it was unlikely she would be able to increase her work pace significantly until her function was restored to some degree, and this

may take many months. The report also set out the duties the claimant could not do and confirmed there were no adjustments which could alleviate the condition or aid rehabilitation. The OH advisor did provide the claimant with contact details for Access to Work whom, it was said, may be able to support the claimant further, but the claimant did not pursue this option.

168. Mr Butler and Mr Menon took from the OH report the advice that there was no guarantee of a recovery/full recovery and although any recovery may take many months, functional recovery was likely within three months.

169. The claimant argued the respondent should have extended the trial period because there had been some functional improvement in her arm/hand. We noted this was an observation made by the claimant to the OH advisor, rather than a medical observation made by either OH or the claimant's GP. The respondent did not doubt what the claimant said, but balanced this with the fact Ms Bell had noted no corresponding improvement in the timescale in which the claimant completed tasks.

170. We were satisfied the respondent took reasonable steps to discover the claimant's medical condition and the prognosis, and based on the OH report, accepted that although there was no guarantee of recovery, there was a likelihood of some functional recovery within three months. The claimant argued the respondent ought to have obtained further medical information from OH or her GP, but there was no suggestion a further medical report would have told the respondent anything different to what was contained in the OH report.

171. We next considered the consultation which took place with the claimant. There was no dispute Ms Bell met frequently with the claimant to understand the claimant's condition, its impact on carrying out work and what adjustments could be made. There was also a meeting with Mr Butler on the 23 February. A number of criticisms were made of the meeting on the 23rd February: (i) it proceeded in the absence of the claimant's trade union representative; (ii) it proceeded prior to the end of the trial period; (iii) there was inadequate

explanation why the meeting had to proceed prior to the end of the fixed term contract; (iv) the OH report had not been discussed prior to the meeting and (v) Mr Butler's decision was predetermined. We considered each of these matters.

172. There was no dispute regarding the fact the claimant asked her trade union representative to attend the meeting with her, but the representative could not do so, and confirmed she would be unavailable for the next two weeks. This put the respondent in the position where, if they waited for the trade union representative, the fixed term contract would have expired. We noted, above, there was no evidence to suggest whether (given the size of the respondent) other trade union representatives may have been available – or indeed a workplace colleague - or whether this was explored by the claimant. The claimant appeared, from her evidence, to have made one request of the trade union representative, and upon learning she was not available, she informed Mr Butler of this and proceeded on the basis the meeting would be postponed.

173. We could not accept Ms Flannagan's suggestion there was an inadequate explanation why the meeting had to proceed. The reason was clear: the claimant's fixed term contract was due to expire on the 5th March. The respondent essentially had three options: firstly, to end the contract without having met with the claimant; secondly, to extend the trial period to accommodate a meeting with the claimant and her trade union representative two weeks later or thirdly, to allow the claimant to continuing working in the role after the expiry of the fixed term contract, thereby confirming her in the role.

174. The first of these options was not an option for the respondent. The respondent decided the second option was not acceptable because there was nothing to suggest an extended trial period would enable the claimant to increase her ability to undertake the tasks of the role. This was not a case where the employee needed a little longer to be able to demonstrate improvement: this was a case where the period for improvement was going

to take many months. The third option was not considered by the respondent for the same reasons.

175. We accepted the respondent's explanation why the meeting had to proceed prior to the end of the trial period. We decided the decision to proceed on the 23 February was a reasonable decision: it was a decision which fell within the band of reasonable responses which a reasonable employer might adopt in the circumstances. We further decided the decision to proceed in the absence of the claimant's trade union representative was also a decision which fell within the band of reasonable responses in the circumstances. We say that because the meeting had to proceed prior to the end of the fixed term contract; the respondent informed the claimant of her right to bring a representative and it was for the claimant to bring a representative to the meeting.

176. We should state that if we have erred in our above conclusions, and in fact proceeding with the meeting and in the absence of the claimant's trade union representative were flaws in the procedure followed by the respondent, we would have found those flaws were cured on appeal **(Taylor v OCS 2006 ICR 1602).**

177. There was no dispute regarding the fact the OH report was discussed at the meeting on the 23 February. The claimant challenged the respondent regarding the fact the OH report should have been discussed with her shortly after being received. The respondent accepted that was the usual procedure, but explained that procedure had not been followed in the claimant's case on this occasion because there were no adjustments proposed in the report. We were satisfied that notwithstanding the technical breach identified by the claimant, it did not disadvantage her in circumstances where the report was discussed at the meeting on the 23 February and did not identify any adjustments which could be made to improve the claimant's position at work.

178. The claimant argued Mr Butler's decision was predetermined, and the basis for that argument was (a) the fact Mr Butler did not take an adjournment prior

to making his decision and (b) the advert for the post she had been carrying out.

179. We have set out above, the fact Mr Butler's evidence regarding an adjournment was not reliable insofar as he thought he had taken an adjournment, but the notes of the meeting did not support this. Further, no-one else at the meeting recalled an adjournment. However, this one point, did not render Mr Butler's entire evidence unreliable. Mr Butler met with Ms Bell prior to meeting the claimant, so he could understand her recommendation and whether she had any evidence to support it. Mr Butler also took into account the fact the claimant did not dispute what was said by Ms Bell.

180. The claimant, at this hearing, argued she had felt intimidated at the meeting, particularly when she realised the meeting was about dismissal. Mr Butler acknowledged employees, including the claimant, will feel anxious about a meeting with management, but the reason for the meeting had been clear, and the claimant participated in the discussion. Mr Butler also had regard to the fact the claimant would have an opportunity to discuss matters with her trade union representative after the meeting, and would have an opportunity to appeal any decision he made.

181. We also had regard to the fact the terms of the letter to the claimant (document 31A/1) inviting her to the meeting, were clear. The letter was entitled "Fixed Term Appointment – End of Trial Period". The letter confirmed the fixed term contract was due to expire on the 5th March, and the meeting was to discuss the outcome of the trial period. We also had regard to the fact the claimant was familiar with fixed term contracts because she had previously been employed on a number of these types of contract. The claimant knew that dismissal would be one outcome of the meeting because she knew that was how fixed term contracts operated.

182. We did not attach any weight to the fact Mr Butler did not have an adjournment. We considered that fact, of itself, did not point to the decision being predetermined. Mr Butler had gathered information prior to the meeting,

and in circumstances where the claimant agreed she tried to do the tasks but couldn't, the decision to be made was, arguably, clear.

183. We, as set out above, preferred the evidence of the respondent's witnesses regarding the advert for the claimant's role. There was no dispute the advert had been placed prior to the appeal hearing outcome, but we accepted Ms Bell had been given clear instructions regarding the fact she could not interview or appoint to the post prior to the outcome of the appeal.

184. We concluded, for these reasons, that Mr Butler's decision was not predetermined.

185. We next had regard to whether the respondent should have waited longer before dismissing the claimant. We have referred above to the respondent's reasons for not extending the trial period, and our conclusion this was a decision which fell within the band of reasonable responses in the circumstances. The claimant generally, and with the benefit of hindsight, argued the respondent should have waited longer before dismissing her. We could not accept that argument in circumstances where there was no medical basis for it. This was not a case where the claimant would have been fit to perform the role if she had been given several weeks longer. This was a case where the prognosis was for a likelihood of some functional recovery in three months. There was nothing to suggest what level of functional recovery was likely and, against a background where the functional recovery which had taken place, had not impacted positively on the time taken by the claimant to complete tasks, there was no medical basis upon which the respondent could make such a decision.

186. We did consider the issue of suitable alternative employment. We considered it helpful to remind ourselves that these events occurred in the context of a redundancy situation. The claimant had been employed on a fixed term contract and, due to her length of service, was placed on the respondent's redeployment register for the duration of her period of notice. The claimant's employment would have ended if the respondent had not been able to identify

potentially suitable alternative employment. The trial period undertaken by the claimant was in the context of suitable alternative employment. If the trial period was successful the claimant would become employed in that role: if it was not successful the claimant's employment would end. We noted there were no submissions regarding the legal basis for arguing, in a case of unfair dismissal, a second bite at the suitable alternative employment cherry.

187. We also had regard to the fact we concluded above, in respect of reasonable adjustments, that moving the claimant to another post would not have been a reasonable adjustment.

188. We continued, against that background, to consider the points raised by the claimant. The claimant argued there was a post in her previous department which was not covered because the employee had commenced maternity leave. The claimant argued she could have been moved to that post to cover the maternity leave. We could not accept that argument for two reasons: firstly, Mr Butler confirmed (and we accepted his evidence) there was a period of maternity leave, but no authority had been given for the post to be covered during the period of the maternity leave. Secondly, we considered Mr Butler (and Mr Menon) was entitled to conclude the difficulties experienced by the claimant in carrying out the tasks of the current role, would equally apply to other clerical and administrative roles. There was no evidence to suggest the tasks in the post identified by the claimant would have been different.

189. The OH report identified photocopying as a task the claimant could undertake. There was no evidence to suggest there was a suitable alternative post involving only photocopying available.

190. The claimant also asserted she had been told by Ms Connor that she would return to the SWITCH register if the trial was not successful. We preferred Ms Connor's evidence regarding this matter. We found as a matter of fact that the claimant would, if she had refused this offer of a trial period, have remained on the SWITCH register until her employment ended on the 31 December

2017. The claimant had no right to return to the SWITCH register if the trial period was not successful. This was clearly set out in the claimant's contract.

191. We, in conclusion, were satisfied the respondent had consulted the claimant and taken her views into account; they had obtained an OH report to inform themselves of the medical condition and the prognosis and they had considered whether to extend the trial period. We had regard to the terms of section 98(4) Employment Rights Act, and decided the respondent, having had regard to the OH report, the information prepared by Ms Bell and the fact the claimant could not complete tasks within a reasonable timescale, fairly dismissed the claimant when they decided to allow the fixed term contract to expire without renewal. The decision was one which fell within the band of reasonable responses which a reasonable employer might adopt.

Discrimination arising from disability

192. We had regard firstly to the statutory provisions set out in section 15 Equality Act, which provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. We also had regard to the guidance set out in the case of **Pnaiser v NHS England** (above), to which we were referred.

193. The unfavourable treatment said to have occurred was the dismissal of the claimant. We noted the respondent did not dispute dismissal amounted to unfavourable treatment. Accordingly the issue for this tribunal was whether the respondent had a legitimate aim, and if so, whether the dismissal of the claimant was a proportionate means of achieving that aim.

194. Mr Welsh submitted the legitimate aim of the respondent was to employ employees who were capable, with reasonable adjustments where necessary, of doing the essential tasks of their role. We had regard to the EHRC Employment Code where it is stated that for an aim to be legitimate it must be "legal, should not be discriminatory in itself, and it must represent a

real, objective consideration". We were satisfied the legitimate aim of the respondent, as stated by Mr Welsh, was legal, not in itself discriminatory and represented a real and objective consideration.

195. We next had to consider whether the claimant's dismissal was a proportionate means of achieving that aim. We, in considering this question, had regard firstly to the fact the respondent did make adjustments to the role for the claimant. We accepted Ms Bell's evidence that the claimant was not asked to carry out the full range of duties, and that she was given more time to complete tasks. We secondly had regard to the fact the claimant, notwithstanding the adjustments which had been made, was still unable to complete tasks either at all or within an acceptable timeframe. Thirdly, we had regard to our conclusion that the adjustments proposed by the claimant were not reasonable for the reasons set out above. Fourthly, we had regard to Ms Bell's evidence that she could not, from a team point of view, sustain the claimant in the role because of the length of time it took her to complete tasks, the errors she made and the fact the claimant was unable to do all tasks.

196. We concluded, having had regard to the above points, that dismissal in this case, was a proportionate means of achieving a legitimate aim.

197. We decided to dismiss the claim in its entirety.

Employment Judge: Lucy Wiseman
Date of Judgement: 20 February 2019

Entered in Register,
Copied to Parties: 22 February 2019