CASE NUMBER: 2303516/2019 V-CVP

EMPLOYMENT TRIBUNALS

Claimant: **Mrs S D'Silva**

Respondent: **Croydon Health Services**

Heard at: **London South by CVP** **On:** **12-16 October 2020, 2 November 2020 (In chambers)**

Before: **Employment Judge Corrigan**
Dr S Chacko
Mr J Turley

Representation
Claimant: Miss E Sole, Counsel
Respondent: Mr D Patel, Counsel

JUDGMENT

This was a remote hearing which was not objected to by the parties. The form of remote hearing was V – Video (CVP). A face to face hearing was not held because it was not practicable due to the Covid-19 lockdown. We had regard to the parties' witness statements, the agreed bundle and the Respondent's written submissions.

1. The Tribunal has found the Respondent contravened the Equality Act 2010 in respect of the claim of failure to make reasonable adjustments, but not in respect of the claims of disability-related harassment or victimisation.

2. The claims of disability-related harassment and victimisation are dismissed.

3. The Claimant was unfairly dismissed by the Respondent.

REASONS

1. The Claimant brought claims of failure to make reasonable adjustments, unfair dismissal, disability-related harassment, and victimisation.

2. The agreed issues were set out on pages 38-41 of the bundle save that by the start of the hearing the Respondent confirmed no point was being taken about time limits or about knowledge of disability. It is agreed that the Claimant had two disabilities at the relevant time: stress and anxiety and a musculoskeletal thyroid condition. In respect of the claims of disability discrimination, these rely solely on the stress and anxiety. It was agreed that this hearing was to decide liability only.

3. The remaining issues to be determined by the Tribunal were therefore agreed to be as follows. Note the order of the issues has been changed to the order the Tribunal considers is the most appropriate order to decide the issues.

Failure to make reasonable adjustments

4. Did the Respondent impose the following provision, criterion or practice which placed the Claimant at a substantial disadvantage by reason of her Stress and Anxiety: solely having patient-facing roles in the Chest Clinic;

5. If so, did the Respondent fail to carry out reasonable adjustments by failing to provide the Claimant with a role without and/or with limited patient facing responsibilities, either on a permanent basis or with a view to attempting to build up patient facing responsibilities over time?

Unfair dismissal

6. What was the principal reason for dismissal and is it a potentially fair reason? The Respondent relied on capability.

7. If the reason was capability did the Respondent act reasonably in treating that as sufficient reason for dismissing the Claimant, taking into account the circumstances of the Respondent and the equity and substantive merits of the case?

8. The Claimant contends that her dismissal was unreasonable because:

   (1) She could and should have been permitted to return to work in the administrative support role she carried out from February 2017 to November 2017;

   (2) Insufficient efforts were made to allow her to return to work by way of modifying vacant roles and/or the Pathway Support Worker role;

(3) The Respondent wrongly asserted that there were suitable alternative vacancies in the lists provided to the Claimant;

(4) Dismissal fell outwith the range of reasonable responses.

9. Did the Respondent follow a fair procedure in taking that decision to dismiss?

10. Was there a possibility the Claimant would otherwise have been fairly dismissed had a fair procedure been followed by the Respondent?

Harassment

11. Did the Respondent engage in unwanted conduct related to the Claimant's disability that had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

12. The Claimant relies on the following acts:

(1) The alleged refusal to allow the Claimant to return to the administrative support role from October 2018 until her dismissal;

(2) The Respondent's alleged 'determination' that the Claimant had to return to the role of Pathway Support Worker, which was 100% patient facing; and

(3) The Claimant's dismissal.

Victimisation

13. Did the Claimant do a protected act and/or did the Respondent believe that the Claimant had done or might do a protected act? The Claimant relies on the following:

(1) The Claimant's previous Employment Tribunal claim against the Respondent;

(2) The Claimant's attendance at meetings with Dr King on 27 June 2017, 29 September 2017, 9 October 2018 and 13 November 2018 in which it is alleged that reasonable adjustments were discussed and considered.

14. Did the Claimant suffer any of the following alleged detriments:

(1) The Respondent's alleged insistence that the Claimant was employed as a Pathway Support Worker and that it was a 100% patient facing role, so that she was prevented from returning to work from October 2018 until dismissal, and

(2) The Claimant's dismissal.

15. If so, did the Respondent subject the Claimant to any of the alleged detriments because the Claimant did a protected act?

Hearing

16. The Tribunal heard evidence from the Claimant on her own behalf.

17. The Tribunal heard evidence on the Respondents' behalf from Ms Tara Terry (the Claimant's Line Manager), Ms Ann Marie Quiller (HR Advisor), Ms Belinda Wigmore (Head of Community Nursing), and Ms Shaheen Vesamia (Chair of Appeal Hearing).

18. There was a 911 page bundle. The parties were each given the opportunity to check whether there was additional documentation confirming whether the Claimant was invited to an interview for an alternative role (as asserted by the Respondent) but neither side produced any.

19. There were discussions with the parties as to whether the issues needed to be amended to reflect the case that the Claimant's representative put to the witnesses (in particular Ms Terry), discussed further below, but she did not consider this necessary and the issues remained as set out above. The parties were also invited to agree relevant facts in relation to the agreed protected act of the previous Tribunal claim, at least sufficient for the Tribunal to understand its relevance to this claim. The parties insisted no detail was needed.

20. The parties made oral submissions and the Respondent provided written submissions.

21. Based on the evidence heard and the documents before us we found the following facts. Note that where the page number referred to is followed by lower case "e" that is the electronic page number not the hard copy page number of the bundle.

Facts

22. The Claimant started working for the Respondent on 17 March 2003 as a receptionist. It is agreed that the Claimant is disabled with stress and anxiety.

23. The Claimant had a period of long-term absence in 2016- 2017, returning to work in February 2017. Some of the sick notes for that period (for example, August and September 2016 and the last fit note for February 2017 (p 206e)) said the reason for the absence was a stress related problem.

24. Upon her return there had been a restructure and she was given a POD 2 role as patient pathway support in the chest clinic, which is part of a POD with cardiology. P173e lists the PODs (Point of Delivery Teams). POD 2, the Claimant's POD, includes 6 specialties including cardiology, respiratory, and heart failure.

This was a band 2 role. The chest clinic administration team, managed by Tara Terry, also consisted of two band 3 roles and two band 4 roles.

25. The generic job description includes administration work and reception work (as "applicable to relevant PODs"). No matter when she was given it, that job description is the one at pp 138-144e. The Claimant produced a job description from 2007 but we accept it is unlikely to be that one that was being discussed upon her return, given the recent restructure into the PODs.

26. There was an OH assessment before the Claimant's return. She was to complete a stress risk assessment and there was to be a phased return in respect of hours of work. No issue was raised at that stage about whether there were any duties she could not perform (p211e).

27. There was a meeting about the return to work with her new manager Tara Terry and Maria Johnson (the team leader of cardio-respiratory). This is recorded in the email on page 214e. This recorded a phased return in respect of hours and also that they discussed two options in respect of work. Firstly, a back office role involving marking up of clinics, scanning and booking follow up appointments, opening post and sending out patient letters. This was to be based in the secretarial area. The second option was at the reception desk, checking in patients and completing follow ups. We accept that these two options combined make up the full band 2 job role of Patient Pathway Support in the chest clinic.

28. There's a dispute between the parties about whether those options were to be permanent or temporary. Whether or not the word temporary was used in the meeting (as Ms Terry asserts) it is not recorded in the email despite the express intention of the email being to capture the discussion, and by implication the most important parts of it. There is no time limit put on the two options and there is no apparent reason for the options arising out of the OH assessment. We accept there was no intention to formally depart from the generic job description and there was budget for only one band 2 role doing all those tasks, nevertheless it was not made clear to the Claimant that this division of roles was temporary, nor was it intended to be particularly short term as no end date was given.

29. The Claimant replied selecting the first option. The only issue she raised was to say both options were well below her capabilities. There was no indication at that stage that she was not able to do the second option.

30. Tara Terry was expressly told by HR to do the stress questionnaire (p217e) and this was done on 20 Feb 2017 (p221e). Nothing was said about the Claimant not being able to perform particular duties or being unable to do patient facing work on reception.

31. The phased return and the stress questionnaire were reviewed again on 8 March 2017 (p226e). The record of the meeting records that the Claimant was currently marking up the clinics. The Claimant again raised the issue that it is very junior work and the role is "stressing her out". Ms Terry explained that she was on a phased return and they did not want to overload her and that the role was part of the band 2 job description. She was recorded as being obviously upset in the

meeting. There was a discussion about where she would sit and the possibility of her working on the front desk. She said she was not ready to work at the front desk. It is recorded that at this time "completing "marking up" does not require her to be at the front desk. However this may change in the future". It is clear from this that she was only doing part of the role but also there was no hurry for her to return to the front desk or full duties.

32. The record of the meeting records that the Claimant had some grievances in respect of her role, banding and hours. She was invited to apply for band 4 roles. At this point it was envisaged she would start booking follow up appointments from 13 March 2017 (p226e).

33. There is a "note to self" by Tara Terry recording some issues on 15 March 2017 (233e). For the first time this records that the Claimant was upset about a document as it was regarding working on the reception desk. Ms Terry records her response as being they could slowly introduce her to the reception desk but that they could discuss this further the following Monday. Again though the Claimant's concern is recorded as being the banding of her role.

34. There was a further meeting between Tara Terry and the Claimant on 21 March 2017, recorded in Ms Terry's file note (p237e). There is a subheading in that document "Current case against the trust" followed by a paragraph that mentions the banding issue. Later the note refers to the Claimant's concerns appearing to "relate to the case against the trust that she is still awaiting an outcome". There is a dispute about whether this refers to letters the Claimant had written to the Chief Executive or her Tribunal claim. The note makes reference to a further referral to OH because of concerns about the Claimant's mental health as Ms Terry records she had cried whenever Ms Terry spoke with her.

35. The evidence suggests that the Claimant was unhappy with HR at that time, for example, she said HR was obstructing her in some way (p233e). Ms Terry also records her as saying she did not want to take sick leave because she does not want "HR to have a reason to sack her" (p231e).

36. On page 246 Ms Terry relayed further information to OH on 10 April 2017 as part of the Claimant's OH referral. This included the statement "[the Claimant] has relayed that she does not feel she is ready to work on the reception desk in Chest Clinic. Unfortunately the nature of the work dictates that she will need to spend some time at the desk."

37. On 8 May the Claimant added her comments to the stress questionnaire (p255-264e). She did not say that a public facing role caused her difficulty although a number of other issues were raised.

38. There was a further meeting between Tara Terry and the Claimant on 9 May 2017 which is recorded by way of additional comments in the stress questionnaire, commencing p274e. It is noted that the Claimant raised concerns with respect to her previous role which are being dealt with by the Trust. It also records the following: "[Tara Terry]…explained that [the Claimant marking up clinics] was put in place during [her] phased return to work to help support her

and ease her into her new role… [Tara Terry] explained that at the time she was learning the role of the Chest Clinic front desk and following this period it is very clear that the follow up appointments must be booked when the patient leaves the clinic…In order for this to be completed [the Claimant] would need to be sat at the front desk". It records that the Claimant has relayed that she cannot work at the front desk and an OH referral is pending.

39. This document does not say why the Claimant cannot do patient facing front desk work. The issues recorded to be causing her stress are different and include uncertainty at not having a static work station, not being given feedback about the chest clinic, her skills, abilities and hours, and not being given follow up appointments to book.

40. We find that at this point it was clear that to do the full role the Claimant needed to do some patient facing work at the front desk.

41. An OH assessment was provided on 5 June 2017. That said the Claimant was fit to work in her current role, but not on the front desk as she reports that she does not have the necessary functional resilience to manage this need. This was to be reviewed in three months after she had started an advanced counselling programme (p286e).

42. Tara Terry produced a further note to self dated 7 June 2017 recording some other management issues with the Claimant including that the Claimant was agitated and that Ms Terry was considering consulting HR (p287e).

43. On 13-14 June 2017 the Claimant was absent with sciatica. There was then a further OH referral on 22 June 2017. The Claimant had been absent on 9 March, 10 April and the above in June. Ms Terry recorded on the referral that the Claimant was unable to complete duties and was not engaging with her manager and colleagues. She asked again why the Claimant was unable to complete work within her role (despite the previous OH report).

44. Dr King of OH replied on 27 June (p294e). He mentioned that she had refused a request to work for a day in cardiology because she did not want to work with a different team due to her worries and distrust of the Trust. He also said that the stress related to historical issues (indicating there had been some history). He said: "The dominant issue does appear to be the state of her mental health…she does have a problem with trusting of Trust agendas and management decisions. She is also very anxious about the possibility of working in the front office and I understand is exclusively working back-office functions. She is fit to work for that but does not feel mentally able to work elsewhere in the Trust owing to a feeling of anxiety." He also recorded that the Claimant saw the request to move as harassment. He said he would review in 3 months.

45. We were told that there were 100 patients a day at the chest clinic and cardiology was even busier. An additional band 2 receptionist was recruited from July 2017 until May 2018, using budget borrowed from cardiology.

46. The Claimant was absent for 20 days with shingles in July 2017 – 6 August 2017.

47. This led to a stage 1 sickness absence review on 21 August 2017 (p303e). There was no discussion here in relation to front desk duties. The Claimant said she felt her symptoms were all stress-related. She said her main concern was that she was not recognised for work she had done in the past and it was "bringing her down". She was told her sickness absence was to be monitored and she was to have no further absences for two months otherwise the matter would proceed to a stage 2 Sickness Absence Review (304e).

48. On 12 September the Claimant left work at approximately 1pm due to issues with her eye. She had tried to take this as annual leave but this was refused. Under the policy this should not count as sick leave.

49. The Claimant was reviewed again by OH on 19 September 2017 by Dr King (p308e). He said that apart from a short spell when she was off sick with shingles she has been working normally in the back office in the Chest Clinic. He considered she was fit to work in this area and recommended she be left to do so. He said he was discharging her.

50. There was a stage 2 sickness absence review meeting on 1 November 2017. For the first time Ann Marie Quiller was involved on behalf of HR. The outcome letter is at page 309e. This refers back to the stage 1 formal warning issued on 21 August 2017, although it had not been referred to as that previously. In evidence Ms Quiller said there was no such thing as a formal warning at stage 1. The letter then referred to a number of absence dates as occurring after the previous warning when in fact they pre-dated that warning. In fact the only absence since the warning was the Claimant going home early on 12 September 2017 (pp282-3) which under the policy should be discounted. So in fact the Claimant had not had any further absence in the period following the warning. Nevertheless she was issued with a further stage 1 warning (even though Ms Quiller said this does not exist in the policy). In addition she was to be monitored for three months and told she should have no sickness absence in that time.

51. Page 69 of the policy says that in setting the standards to be achieved following a sickness absence review meeting the manager is to take a number of matters into account including the likelihood of further absence arising, her own relevant personal circumstances or mitigating factors and any OH advice available, and the length and spacing of good health. In the Claimant's case the three months was the maximum period of time that can be set, despite the Claimant having two disabilities, having returned from long-term sickness absence, OH saying they were discharging her, and she had not had any sickness since the warning in August. This was very onerous. In total it was an expectation that she go 5 months without any illness, when she has two disabilities.

52. On the same day there was a separate meeting with the same attendees. This was to discuss the OH discharge letter of 19 September 2017, at paragraph 49 above. The Claimant was told that the role she was currently completing was temporary until she was deemed fit to do reception work. The job description included reception duties and there were no back office jobs within the chest clinic. The Claimant said she was unable to do this and this was to be clarified

with Dr King (p312e). This position had been put to the Claimant before, at least by 8 May, though she has never accepted this.

53. The Claimant became very unwell and went to A & E. She remained off sick. The first sick note covering 10-30 November 2017 said she was not fit for work because of stress at work and chest pains. The following note said stress at work.

54. On 1 December 2017 the Respondent received the letter from Dr King dated 28 November 2017 (p315e). He said:

55. "I understand that the content of my report of 19 September 2017 is unable to be fulfilled in view of the fact that there is no post specific to the back office in the Chest Clinic and that the adjustment was on a temporary basis.

56. It was clear from discussing this with [the Claimant] today [28 November 2017] that she would be unfit to engage in a patient facing post…[the Claimant is absolutely adamant that there was a back office function that she would be able to do …and that this option was emailed to her [a reference to the email at page 214e covered at paragraph 27 above]…The prognosis for [the Claimant] being able to fulfil the post as you wish is guarded. The problem has been apparent for quite a long time and an appointment for further help has been arranged for January 2018".

57. He suggested he would review the Claimant in 3 months time to see if she would then be able to work on a patient facing basis. He said if the Respondent is unable to accommodate her in the back office where she has currently been working, then she will need to remain off sick. He mentioned that the only other option would be redeployment to a non patient facing role and asked that this be looked at.

58. The possibility of the Claimant continuing to work in the back office role whilst redeployment was investigated was not considered as she was treated as being off sick, and did continue to provide sick notes saying she was not fit for work. For example, the Claimant provided a sick note from 4 January 2017 – 1 March 2017 saying she was not fit for work.

59. Ms Terry, who no longer works for the Trust, made a number of concessions during her evidence, including that the status quo prior to November 2017 (with the Claimant doing the adjusted back office role) could have continued whilst the reception cover was in place, although there would have been budgetary implications. The effect of borrowing from cardiology's budget was that it would be recouped if they needed to recruit in the future, meaning they would only be able to recruit another post at fewer hours. She also conceded that there might have been back office work in cardiology but we note she was not the team leader in cardiology and that was not the position adopted at the time when she was still employed by the Respondent, though there is no evidence this was properly considered. She also conceded in cross examination that the combined effect of the meetings on 1 November 2017 could have created the necessary environment for a harassment claim, although the questions put went beyond the Claimant's

own evidence about those meetings and did not reflect the harassment case as expressed by the list of issues. Her willingness to concede so much, some of which was then retracted in re-examination, made us reluctant to put too much reliance on any of her concessions alone.

60. The situation was not discussed until the long-term sickness review meeting on 10 January 2018 at which point the recommendation for redeployment was discussed. The meeting was originally to be 19 December but it was postponed because the Claimant did not feel well enough (p320e). The Claimant in the meeting was still saying she did not know the back office role was temporary. She confirmed she could not do a patient facing role. She did not distinguish between front desk and phone work at this point. When asked when the work-related stress started she mentioned an incident in 2014 which she could not discuss for legal reasons.

61. She was told the back office role was unsustainable as all her work colleagues were covering her role whereas in fact by the time of that meeting a member of staff had been appointed to cover reception and did so until May 2018.

62. Ms Quiller told the Claimant that if she was unable to do her role her other option was redeployment and that as it had been going on a long time it could not be pushed back any further. She asked if the historic incident had been dealt with and it is recorded that the Claimant did not give a satisfactory answer. She was referred to paragraph 5.7 of the redeployment policy and told she would be sent a bulletin of all the suitable posts. She was told she can apply for any roles she thinks she can do.

63. There was no discussion as to whether she could continue to perform the role she had been doing whilst awaiting redeployment.

64. The policy at 5.7 states (p75) redeployment will be subject to standard recruitment and selection procedures. The only exemption to this is if the employee is considered to fall within the definition of disability…in which case the individual would be given preferential treatment and considered for suitable vacant posts. It states the Trust will seek redeployment opportunities within a 4 week timeframe although this can be extended in exceptional circumstances, but would not be expected to exceed 8 weeks. During this time the employee will be placed on the internal redeployment register and will receive copies of the weekly internal bulletin and details of any positions that may be considered as suitable. The policy states that attached with the details will be a form for employees to complete and return outlining why a position is, or is not, suitable.

65. The policy says “Whilst every effort should be made to find suitable alternative employment, the option is subject to availability….The Trust is under no obligation to create a special post solely for the benefit of an absent employee”. It says managers should consult OH to ensure individuals are suitable for new posts. If the timeframe expires a Sickness Absence review hearing should be set up where continuation of the contract should be considered.

66. Ms Quiller said this policy was under review and that the form mentioned above at paragraph 64 was no longer in use. She said this was because some employees were more qualified than the Respondent realised. Nevertheless the full process was cited in the letter to the Claimant (pp294-295 bundle).

67. What the Claimant in fact received was a bulletin of all vacancies sent to all those on the redeployment register. There was no attempt on the Respondent's side to identify suitable vacancies. Nor was there a form sent to the Claimant with any suitable post. In fact the Claimant did not start to get vacancies sent to her until 7 February 2018. She did however have access to her "Trac" account from 2 February 2018 which enabled her to review posts and apply for them.

68. We note that on 7 February 2018 (at p312) Ms Quiller is recorded as saying the Claimant was "not very au fait with the IT systems".

69. On 19 February 2018 the Claimant responded to the letters following the meetings of 1 November 2017 and 10 January 2018 challenging the temporary nature of the back office role she had been doing in the Chest Clinic (pp310-311).

70. The Claimant also tried to apply to NHS professionals as there had been nothing suitable on the vacancy list. This covers more temporary roles but includes maternity absence and sickness absence cover. The Claimant's thinking was that if she saw something suitable she could alert HR. However she required a reference from Ms Terry and we were told this was not provided as the Respondent's policy is that staff on sickness absence cannot apply for NHS Professionals unless it will support their recovery. In fact the emails suggest that there were steps to action the reference request by Tara Terry and HR (pp318, 318C) before Ms Quiller wrote to the Claimant on 8 March 2018 stating that the form will only be signed by the Line Manager if they believe that working additional shifts on the bank would not be to the detriment of her current role or health. She said as the Claimant had been on long-term sick since 4 December 2017 it would not be appropriate to work additional hours until she was fulfilling her substantive duties.

71. We agree there were not suitable roles for the Claimant on the vacancy list at page 316 and there had been nothing suitable by the review meeting on 13 March 2018 (p337A). At that meeting NHS Jobs and the approach to the reference request for NHS professionals were explained. The Claimant was told that the Respondent would move to a Long Term Review hearing but would continue to send vacancy bulletins to the Claimant.

72. The Respondent's representative put to the Claimant that she could do the following few roles: Patient Pathway Support (p347) which was the same job the Claimant could not do in the Chest Clinic as it was patient facing; Team Administrator (Acting up role (band 4)) (p367) which the Claimant said would be too stressful as it was a team leader role; Operating Department Orderly (p380) which the Claimant said would be too physical because of her physical disability (pain in bones) and also that she had not seen the vacancy; Ward Clerk (p393) which the Claimant said would be patient facing; Clinical typist (p394) and Secretary/Admin Assistant (p411) which the Claimant says she is not able to do as they would involve typing wearing a head set which she cannot do due to ringing

in her ear. None of these roles were discussed with the Claimant at the time (nor the possibility of adjusting any of those roles to alleviate any substantial disadvantage due to her stress and anxiety). If the Respondent thought these roles were suitable they should have been discussed at the time.

73. On 15 April 2018 the Claimant wrote to Tara Terry (pp386-387) in part to explain why she wished to use NHS professionals. She said she still could do the back office job she had been doing. With reference to Ms Quiller's statement that working additional shifts on Bank would be detrimental to her health, she said "It is the losing of my job that is causing me stress and fear of how the NHS treats employees….I have never requested additional shifts from NHS Professionals, I just needed to be registered to look for a back office job with my experience of 15 years at the NHS, as I have not been successful in finding a suitable vacancy in the areas you and HR are asking me to look at."

74. Ms Quiller replied on 17 April 2018, at page 389. She reiterated the content of her email of 8 March 2018 (paragraph 65 above). She said the back office role was temporary and her colleagues were covering the reception aspect of the role (not at that stage correct, as an additional colleague remained in post covering reception). She said a back office role does not exist in the structure. She went on to say "to date you have not applied for any roles although there has been several roles advertised within the Trust…I believe you have not applied for any as you believe there are no vacant posts suitable to your previous experience." We find the tone here indicates Ms Quiller was starting to suggest the Claimant was not assisting herself, rather than that there were no suitable roles. She did not herself highlight what roles she considered were suitable for the Claimant.

75. On 25 April 2018 Ms Quiller emailed the Claimant to see if the Claimant had "had any luck applying for roles in the Trust or the NHS". She said to let her know if she was applying for any roles and she would do what she could to assist her during the process. The onus was on the Claimant to apply for jobs.

76. The Claimant responded the next day to say that finally she had seen a job she would like to apply for (Patient Pathway Coordinator) and provided the reference. She asked some questions about working hours and the department. Ms Quiller replied with the job description and a phone number to contact for more information. She said that the advert would close either on 1 May or as soon as they had enough job applications and so she advised doing it as soon as possible. She believed there was more than one post. She pointed out the job description included reception work and she was going to ask Dr King (OH) to review. She suggested the Claimant contact the person leading the recruitment to make her aware that she was looking for redeployment and looking for a non patient facing role. The Claimant responded shortly after to say she could not get through to the contact provided and that the job description she had seen on Trac had not mentioned dealing with patients at reception.

77. We find the job description (pp436L-436S) was not clear that the role would be face to face patient facing on a front desk or reception, rather than dealing with patients over the phone for example, and it does have a high emphasis on administration. It was potentially suitable.

78. Meanwhile Ms Quiller and Ms Terry had been preparing their detailed report for the long-term sickness review meeting, which ended with events on 26 April 2018, so it is likely they were working on it that week.

79. Ms Quiller did not contact the person responsible for the Patient Pathway Coordinator role until 1 May 2018 with the email on page 436G. 1 May 2018 was the deadline. The Claimant in the end missed the deadline by a minute.

80. The long-term sickness review meeting took place on 7 June 2018. The Claimant said she had not been reviewed by Dr King and had been unable to complete a job application without information from Dr King. She said she had not heard further from the recruitment lead about the Patient Pathway Coordinator role and whether it would involve dealing with patients (p442).

81. Ms Quiller only then chased up a response to her email about the Patient Pathway Coordinator role (436G). She also chased up a response from OH saying in that that this was the exact same role the Claimant was currently employed to do (it was not) but she currently "declines" to deal with the patient facing aspects.

82. The recruitment lead responded to Ms Quiller, copying in the Claimant on 11 June 2018 as follows (p439A):

> "We have regular recruitment meetings with HR and the cohort that required redeployment were discussed. The full cohort got invited to complete assessments. I'm not sure how your candidate got missed???
> There are still band 4 vacancies –[I'd] suggest she sits the assessment and we take it from there.
> If you require urgent response- I'd suggest calling me instead of emailing me a month later. I'd assumed the below had been resolved".

83. She followed this up shortly after with a further email (p440): "I'll identify the remaining band 4 roles and the recruiting managers – So [the Claimant] can discuss roles. I'm not the correct person to speak to re the roles as each POD will have different requirements. All roles will have patient contact – but she will need to discuss with the relevant PODs if it's face to face". This accords with our reading of the job description as set out at paragraph 77 above, namely that the roles were not necessarily patient facing on a front desk as opposed to by phone.

84. Ms Quiller never followed this up herself. In her evidence she said she believed that the Claimant was offered an interview based on information from the Claimant herself in the much later meeting with Occupational Health on 9 October 2018 (see page 454 "I had an email to attend the interview but I was waiting for confirmation of what the role involved"). The Claimant in her evidence said she was not offered an interview. We gave both parties an opportunity to produce any documentation about such an interview and none was produced. If there had been an interview invite we consider there would be some documentary trail. The Claimant also said she had continued to try to reach the relevant recruitment lead after 27 April 2018, and had tried to put in an application but it came back the job had closed. She was waiting for the response from Ms Quiller's referral

to Dr King and she also wanted to know how she should address her medical condition and absence on the form (as she had communicated to Ms Quiller).

85. As far as the evidence shows this went no further after the Claimant did not submit an application. We have been shown no evidence as to why this was not followed up by the Respondent nor an explanation as to why the Claimant was not included if there were regular recruitment meetings discussing a redeployment cohort. We find that in the absence of any evidence to support an invitation to an interview the mostly likely explanation for the Claimant's statement on page 454 is that she was referring to the emails on page 439B and 440 from the recruitment lead which mention both the possibility of her attending an assessment and that further information will be provided about the recruiting managers so she can find out more about the role. This conclusion is also supported by a statement made by the Claimant in her appeal hearing at page 531 where she said the recruitment lead "also got back to me late but told me I would have to find out at the interview, which I was going to do." In the same paragraph she said she did not apply as Ms Quiller had got back to her late.

86. The Claimant was further signed off sick from 29 June until 31 August 2018.

87. In the long-term sickness report that commences p481A there is reference to an email sent on 29 June 2018 from Ms Quiller to a different colleague saying: "please can you clarify if you have any vacant posts in your PODS…I have a lady who has been on the redeployment list now for some time…She is a band 4 Patient Pathway Co-Ordinator but is unable to perform her full role. She requires a role that is non patient facing. If you have vacant roles that fit this criteria would you consider [her] please" (p481G). She copied her into the emails in June with the recruitment lead for the Patient Pathway Coordinator post. It was incorrect that the Claimant was a band 4 Patient Pathway Coordinator already. There is no further information about this after that.

88. Dr King (OH) saw the Claimant on 10 July 2018 (p445) for the first time since November 2017. He said she remained strongly of the view that she wanted nothing more than to return to work but was absolutely petrified of the thought of working in a patient facing role. He referred again to the dispute about whether the back office role she had been doing was temporary, with the Claimant still saying it was not and that it represented the full remit of her work. He suggested a meeting with the Claimant and the Claimant's husband, himself, and Ms Terry and Ms Quiller. He said she remained unfit for work until clarity is given over her current role or whether she should formally redeploy.

89. The Claimant also wrote to Ms Terry on 11 July 2018 explaining further why she considered there was sufficient back office work for her, and why she believed that the Patient Pathway Coordinator role was a suitable role (p446).

90. On 9 October 2018 the meeting took place with OH, Ms Terry and Ms Quiller. The Respondent did not allow the Claimant's husband to accompany her but ultimately allowed her Mental Health advocate/career coach (pp. 454-459).

91. At that meeting Ms Quiller said that back office roles do not exist within the Trust and that the Claimant had been given the opportunity for redeployment but had not applied for any other jobs. She said the Claimant highlighted a similar role to the one she was employed to do and that she Ms Quiller had checked and it was a patient facing role. This is a reference to the email chain with the recruitment lead set out above and we find that it is evident that Ms Quiller did not understand the nuance between reception front desk (face to face) work and other patient facing work that is not face to face, for example by telephone. It is also not correct that there are no back office roles in the Trust as we have seen. Ms Quiller said the Claimant had had every opportunity to contact the recruitment lead. At page 456 she said again that there were no back office roles available in Cardiology and as far as she was aware in the Trust, so management could not accommodate a back office role.

92. Dr King asked about redeployment to a suitable role and the Respondent's position was that the Claimant had had 6 months and chosen not to apply for other roles. Ms Quiller said (at page 458) "I do not know if there is a resolution as [she] does not want to carry out the role she is employed to do. There are no other roles with just admin tasks that I am aware of and [she] was given more time than she should have been for redeployment but did not apply for roles…".

93. Dr King then assessed the Claimant again on 13 November 2018 (p469) following a further referral. His subsequent letter described the Claimant's anxiety in relation to patient facing roles and called it "public phobia". He stated "It is clear from your referral that the role would be an occasional patient facing arrangement to cover the receptionist when she is at lunch or on leave, and that burden would be shared equally between other members of the team…" He said on that basis she should return to work, with a phased return over 4 weeks. He said that during that time the Claimant should take on the patient facing responsibility on the limited basis in the referral. He also suggested as a reasonable adjustment that the Claimant be allowed "time out".

94. Tara Terry then clarified that it was the other roles in the team which are only occasionally patient facing and the Claimant's band 2 role was patient facing on the front desk (p470C). She later added that it was 100% reception/patient facing (470A).

95. Following this misunderstanding Dr King organised another appointment with the Claimant.

96. In the meantime the Claimant had a stage 3 long term sickness absence review hearing on 27 November 2018 (p471). This was chaired by Ms Wigmore.

97. At that meeting Ms Quiller said it was the Claimant's responsibility to apply for a role and that she was sent emails with the vacancies and they were copied to her (Ms Quiller) (p477). The Claimant did say in response to a question as to whether she was looking at the bulletin to review jobs "yes sometimes" (p478). The redeployment period was February until June 2018 but then the Claimant's access to Trac continued. By this meeting the Claimant was saying she could

not do reception and customer facing. She was doing telephone calls and believed she could do the Coordinator role. Ms Quiller said there was no evidence she had applied for any roles (p480).

98. The meeting was adjourned to consider all the information and await the latest OH report. Ms Wigmore was herself aware of administrative posts in her own department and during the adjournment obtained the list of positions at pages 473A-G, but these were not shown to the Claimant at that time. These are jobs that ought to have been on Trac and NHS jobs during the period from February to November. Both sides agree that there are suitable jobs on this list such as the health records librarian (band 2) (a number of entries with different closing dates); health records supervisor (band 3) (May and June closing dates); health roster administrator (band 4)(July closing date) ; MDT Co-ordinator (closing dates February, May, July and August); account payable clerk (band 3 September closing date). The Claimant said in evidence she had not seen any of these roles.

99. We note that during a discussion about the Coordinator role the Claimant said again (p476) that the recruitment lead had emailed her and said it will be discussed in interview, as she did at page 454. This did not alter our view of what we have found above at paragraphs 84-85.

100. OH spoke with the Claimant again on 4 December 2018 and produced the letter at pp482-3. He suggested once again a reasonable adjustment that the administrative aspects of the role are maximised and the patient-facing aspects minimised. Again he recommended redeployment into a non patient facing role as an alternative. He said ill health retirement was not an option. The Claimant followed this up with Dr King by sending the email dated 14 December 2018 (p491) asking him to make clear that the primary request was to adjust her existing role, saying “surely redeployment should not even come into it at this stage”.

101. The long term sickness absence hearing outcome was sent to the Claimant by letter dated 15 January 2019 (p494). Ms Wigmore recorded the key points raised in the hearing as follows: The Claimant had been working with a modified job plan as a temporary phased return to work from 27 February 2017 following a long period of sick leave. She had had 31 days sick from 10/0417-06/08/2017. She had been on long term sickness since 10 November 2017 and remained so. She considered:

102. “Management [had] followed the sickness and attendance at work policy and provided detailed evidence to show the depth and breadth of their efforts…[the Claimant had] been supported by occupational health and…attended many Occupational health appointments between April 2017 to the current date.

103. The temporary adjustments that were made to the Claimant’s current role in 2017 including making it non patient facing could not continue indefinitely as they have a serious impact on the rest of the team and service delivery.

104. As your current role requests patient facing activities which [you] cannot fulfil due to your mental health management has made reasonable steps to offer you

redeployment. There have been in excess of 200 admin jobs within the Respondent that [you could] have chosen to apply for.

105. You have not to date applied for any vacant posts…"

106. The conclusions were that the Claimant had been on long term sickness absence for over 12 months and there was no outlook for the Claimant returning. Prior to this her levels of sickness had been unreasonably high. She was not satisfied the Claimant would be able to sustain a satisfactory level of attendance in the future and it was not unreasonable to anticipate further long term sickness absence. She considered extensive attempts had been made to support the Claimant with temporary adjustments but they could not continue without detriment to service provision. There had been extensive attempts to offer re-deployment. She had not applied for any jobs during re-deployment and the OH report of 4 December 2018 confirmed the Claimant remained unfit to work.

107. The decision was to dismiss with notice on grounds of capability due to ill health but she said "we will continue to search for any suitable redeployment roles". Even then there was no discussion about which of the roles she had found on pp473A-G were suitable. She did not give the Claimant the list.

108. The Claimant appealed the decision on 6 February 2019.The appeal was very focused on going back to contesting that the back office role she had been offered on her return to work in February 2017 was a "modified job plan as a temporary phased return to work". She said she was prepared to trial some patient facing work and that it might be possible to build up this aspect of work over time. With these adjustments she could return to work. She said that a band 4 role had come up in the chest clinic whilst she was off sick but she had not been informed. She did not comment on the reference to 200 admin jobs which she said she had not seen. She also did a further letter at pages 501-3. At page 501 she said she should have been given a chance to go to the interview for the Patient Pathway Coordinator role and explain how she matched the role. This was a further mention of the Patient Pathway Coordinator Role and does not alter our findings at paragraphs 84-85 above.

109. The appeal was heard on 31 May 2019 by a panel chaired by Ms Shaheen Vesamia. A management statement of case was prepared for the hearing at pages 508 onwards. This still did not attach the alleged 200 vacancies on pages 473A-G. It included a comment at page 511 in respect to the band 4 role in the chest clinic that became available while she was off sick. The response was that suitable re-deployment is defined as the same band or the band above and the Claimant was band 2 so it was not considered suitable.

110. It was noted in an email at page 513 that the bundle for the appeal hearing was the same as the bundle for the hearing on 27 November 2018 so it is likely the list of jobs at 473A-G were not included there either.

111. The notes of the hearing are at page 530 onwards. The Claimant made reference to the 200 jobs not being relevant to her (she still had only seen those that she saw on Trac or were sent to her in the bulletins, and not the list at 473A-G).

She said there were two roles that she wanted to apply for, the chest clinic role and the Patient Pathway Coordinator role, and she was "left to the side". She said when she had returned back to work on 19 September 2017 she was working. If she had only been given a chance she could have got to see patients. With respect to the redeployment she said she was sent band 2 roles but wanted a band 4 role. She said she went to a talk about the process and having to fill out an expression of interest form and they would be placed in a suitable role, but she was never placed. She said she was sent band 2 roles or patient facing roles. She did say she did not apply for any band 2 roles because she knew she could do more. She would have wanted the band 4 role in the clinic but it was not advertised. She said she had been in a dark place. She did look for band 4 roles on Trac. She had earlier at page 530 talked about an expression of interest form as part of the restructure which had occurred prior to her return to work in February 2017, and not being considered for the band 4 roles she had been interested in (p530). We find that there was some confusion by the Claimant between the redeployment and the earlier restructure. There is nevertheless evidence that she did not want a band 2 role in the later redeployment process with which we are concerned. She wanted the band 4 role, which is also what she had wanted in the restructure. It is clear here that the Claimant when she refers to 200 roles, believes it is the roles she was sent during the redeployment process (and she does not agree there were 200 or that they were suitable). She was still not aware of the list at 473A-G.

112. Ms Wigmore began the management statement of case saying that the reason band 2 roles were sent was because she knew there were a lot of suitable band 2 non patient facing roles, especially in her department. She was talking about the list at 473A-G but that would not have been clear to the Claimant. The HR representative in the meeting described the redeployment process (p534). He said "we looked at the roles that would be suited based on the medical advice we were given. She would have been emailed the roles through bulletin. There was some confusion on what she could do or does and that is unfortunate." He did not say, as Ms Quiller said to us, that the redeployment policy was under review. It was not correct that HR had looked at the roles that were suitable based on the medical advice. She was simply emailed the bulletins.

113. Ms Vesamia asked the Claimant what she wanted out of the meeting. She said she wanted to work. She said she could not say if she would come back right now but that she wanted to work. The panel asked for the evidence of what the Claimant was told about the redeployment process and the jobs she was sent (p536). We note there are emails detailing an exchange about additional documentation with the Claimant during the adjournment after the hearing. This references additional documentation being provided by the management but there is no suggestion the Claimant was copied into that or was asked about it (p539).

114. The decision was communicated to the Claimant on 24 June 2019 (p545). It recorded that the Claimant's case was that she had not been given access to 200 jobs as part of the redeployment process and that she had expressed an interest in the Patient Pathway Coordinator role, that she had tried to get touch with the recruitment lead but could not reach her and therefore she did not apply. It was also recorded that she had not been informed of the band 4 role in the

chest clinic and that the management case was that this was because it was 2 bands above her current post. Ms Vesamia said that having subsequently re-viewed the evidence provided on the redeployment process she was satisfied it was managed in line with Trust policy. She acknowledged that there were not 200 suitable posts but there were a number that were suitable. She was satisfied the decision to dismiss was fair and reasonable and upheld the decision.

115. In evidence Ms Vesamia said her view was that it looked like the Claimant wanted a band 4 role not band 2. She had confirmed the Claimant had access to Trac. Ms Wigmore confirmed the Claimant was not shown the lists she requested (pp473A-G) before she made her decision. We find there is no evidence the Claimant was sent the roles at pp473A-G at the appeal stage either. The Claimant said, and we accept, she did not see those roles until these proceedings and in particular she had not seen them on the vacancy lists. There is no suggestion that she was asked about their suitability at any time by the Respondent.

Relevant law

Failure to make reasonable adjustments

116. s20 Equality Act requires "…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" [the employer is required]… "to take such steps as it is reasonable to have to take to avoid the disadvantage."

117. *RBS v Ashton* [2011] ICR 632, in particular paragraphs 13 and 24, provides that:

"it is irrelevant…what an employer may or may not have thought in the process of coming to a decision as to whatever adjustment might or might not be made. It does not matter what process the employer may have adopted to reach that conclusion. What does matter is the practical effect of the measures concerned….It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."

118. The Tribunal does need to consider how effective the adjustment would be in removing or reducing the particular disadvantage, and a real prospect of it doing so may make an adjustment reasonable (*Romec Ltd v Rudham* EAT 0069/07).

119. Whether an adjustment is reasonable depends on the particular circumstances of the case. It could, on appropriate facts, include transferring, without the necessity for competitive interviews, a disabled employee from a post she can no longer do to one that she can, and for which she is qualified and suitable, even if that post is a slightly higher grade than her own (*Archibald v Fife County Council* [2004] IRLR 651). A tribunal is not precluded from holding that it would

be a reasonable adjustment to create a new job for a disabled employee, or to swap posts, if the particular facts support such a finding (*Chief Constable of South Yorkshire Police v Jelic* UKEAT/0491/09/CEA).

120. An employer cannot use his lack of knowledge that would have resulted from a consultation to defend a claim that he has not made reasonable adjustments (*Tarbuck v Sainsbury's Supermarket Ltd* [2006] IRLR 664). A similar premise applies to a failure to make proper enquiries in respect to what would alleviate a substantial disadvantage (*Southampton City College v Randall* UKEAT/0372/05/DM).

Unfair dismissal

121. The test in relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3). . .

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking)

the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

122. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances. The range of reasonable responses test applies as much to the investigation as to the substantive decision to dismiss *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.

123. The Respondent's representative referred us to the cases of *Spencer v Paragon Wallpapers Ltd* 1977 ICR 301 and *East Lindsey District Council v Daubney* 1977 ICR 566 and the principles that in a long term absence case the key question will be whether the employer can be expected to wait any longer for the employee to return and that the employer should consult the employee and take steps to discover the true medical position.

124. In addition an employer should give reasonable consideration to redeploying employees who are not able to carry out some or all of their former duties due to ill health where alternative work exists.

Harassment

125. Section 26 Equality Act 2010 defines sex related harassment as unwanted conduct related to sex, which has the purpose or effect of violating the employee's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee. In deciding whether the conduct has the required effect the Tribunal must take into account the employee's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

126. In *Weeks v Newham College of Further Education* EAT 0630/11 the EAT clarified that "the word is "environment". An environment is a state of affairs. It may be created by an incident but the effects are of longer duration". We also had regard to the EAT in *Betsi Cadwaladr University Health Board v Hughes and ors* EAT 0179/13 which stated as follows: "The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence".

Victimisation

127. Victimisation is defined in section 27 Equality Act as being where a person (A) subjects a person (B) to a detriment because B does a protected act or A believes B has done, or may do, a protected act. A protected act includes making an allegation (whether or not express) that A or another person has contravened the Equality Act or doing any other thing for the purposes of or in connection with the Equality Act.

Conclusions

Failure to make reasonable adjustments

Did the Respondent impose the following provision, criterion or practice which placed the Claimant at a substantial disadvantage by reason of her Stress and Anxiety: solely having patient-facing roles in the Chest Clinic?

128. The Respondent did require the Claimant's substantive role in the chest clinic to be patient facing on the reception/front desk. She was also told that there were only patient facing roles in the chest clinic and that was the position adopted by the Respondent when dealing with the Claimant. This was not strictly true as the other band 3 and band 4 roles had much less front desk patient facing work, though they did assist with covering the reception, in the receptionist's absence.

129. We accept the fact her substantive role was patient facing on the reception/front desk placed the Claimant at a substantial disadvantage by reason of her stress and anxiety as she was very anxious about resuming a patient facing front desk role, described at one stage by OH as "public phobia". Despite the language used at times by Ms Quiller (see paragraphs 81 and 92 for example) there is no suggestion from OH that the Claimant was not genuinely unfit to work in a public facing face to face reception/front desk role.

If so, did the Respondent fail to carry out reasonable adjustments by failing to provide the Claimant with a role without and/or with limited patient facing responsibilities, either on a permanent basis or with a view to attempting to build up patient facing responsibilities over time?

130. The Respondent did initially make an adjustment to the Claimant's role and allow a back-office role. This was to facilitate her phased return from longterm absence and not to alleviate the particular substantial disadvantage of a patient facing reception role. However, with time the Claimant's concerns about the reception desk became apparent and this adjustment was not initially withdrawn. The Claimant did the adjusted role for 9 months, facilitated by the supernumerary reception post.

131. However, once the potential permanence of the substantial disadvantage became apparent through OH the Respondent did make clear this was only a temporary adjustment. The Claimant then commenced further sick leave. OH suggested on 28 November 2017 that the Claimant might have been fit to return

to that role but if that role was unavailable she would have to remain off sick (paragraph 53). However the Claimant was also submitting fit notes that said she was not fit to work and indeed had to rearrange the long term absence meeting on 19 December 2018 because she felt too unwell. When the meeting took place on 10 January 2018 the Claimant confirmed she could not do the reception role and was told the back office role was unsustainable. It was agreed to consider redeployment. No consideration was given to the Claimant returning to the back office role until redeployment was found, despite the additional receptionist being in place until May 2018.

132. On the Respondent's own case there were redeployment opportunities in non patient facing administrative roles which we find the Respondent could reasonably have offered to the Claimant and did not do so. This was a failure to make reasonable adjustments. In particular, both sides agree that the roles described at paragraph 98 were suitable, and were available over the period from February 2018 to September 2018.

133. The Respondent's own case is that these were suitable vacancies (at paragraph 98), and the Respondent seeks to blame the Claimant for not applying for them. To focus on whether or not the Claimant should have seen them advertised or applied for the vacancies is to focus on the adequacy or not of the process adopted by the Respondent rather than, applying *RBS v Ashton,* looking at whether moving the Claimant to one of those vacancies would have been, objectively, a reasonable adjustment. We find moving the Claimant to one of those vacancies would clearly have been a reasonable adjustment to make and this was not done.

134. Nevertheless we note that we agree with the Claimant that the Respondent's process was merely to send the Claimant the vacancies and, on the whole, leave her to it. The Respondent themselves made no effort to identify suitable roles for the Claimant until they were looked at with hindsight at the stage 3 hearing in order to justify dismissing the Claimant. They did not follow their own policy, which in itself is "light touch", still putting a lot of the onus on the employee. The duty to make reasonable adjustments is on the Respondent not the Claimant. Leaving it to the employee to find an alternative role might successfully lead to an adjustment being made in some cases but the approach adopted by the Respondent to leave all the effort to the Claimant, and indeed the only slightly better "light touch" approach in the policy, runs the risk that, like here, there are a number of suitable roles that would be reasonable adjustments but an adjustment is nevertheless not made.

135. The Respondent's Representative seeks to rely on what the Respondent saw as a reluctance on the part of the Claimant to apply for the roles as a reason for arguing that those vacancies were not reasonable adjustments as the Claimant, it is argued, would not have done the roles even if they had been offered. The Respondent asserts that she did not want to be redeployed anywhere except within the chest clinic or possibly the other POD role (in gynae and theatre).

136. We do not agree. Firstly we do not accept that the evidence suggests the Claimant would not have done one of the suitable roles if they had been offered. There is evidence she was more focused on band 4 roles than band 2 roles, nevertheless we cannot find that she would not have agreed to a post if a suitable post was presented or offered. She said, and we accept, that she had not seen the roles. Her evidence before us once she had seen the full list of available posts (473A-G) was to agree that about 6 different roles were suitable and she would have done them (paragraph 98). We note she had concerns about her own band 2 role in the clinic after the restructure but she was nevertheless performing the role from February to November 2017 and was persistent in wanting that role to continue, despite her concerns.

137. It is right that she did express interest in both the chest clinic band 4 role and the band 4 POD roles in other departments which she did try to pursue, and they are addressed below. It makes sense that she would look at whether there were roles similar to her existing role that she could do if they came available. The fact that the Claimant considered the role in a different specialism shows she was willing to move outside the chest clinic. Moreover there is some evidence of the Claimant being willing to work elsewhere within the Respondent in the form of her persistent interest in signing up with NHS Professionals.

138. The Claimant had explanations for not applying for those roles which she did see in the bulletins she was sent (paragraph 67 above). The Respondent did not identify any suitable roles and canvas them with the Claimant. Had the Respondent offered roles and the Claimant turned them down then the position might be different. That is not this case.

139. Indeed, just as it was reasonable for the Claimant to consider other roles in her own team or similar roles within the wider PODs, it would have been reasonable for the Respondent when looking at redeployment as a reasonable adjustment to consider also whether there were other roles she could do, adjusted or otherwise, in her existing chest clinic team or wider POD including cardiology. Ms Terry indicated that there might have been the possibility of adjusting the work within the respiratory and cardiology teams to give the Claimant more back office duties. We have said that we are reluctant to rely solely on her evidence but at the very least we accept that adjustments of this nature were not considered at all by the Respondent, which instead adopted the position that all roles were patient facing. The Respondent also failed to consider whether the band 4 role that came available in the chest clinic would have been suitable, adjusted or otherwise. The Claimant, based on her previous experience with the Respondent and with her own experience of working in that team, felt it would have been suitable. She had experience of band 4 duties. This was ruled out by the Respondent without discussion with the Claimant, or consideration of whether she had suitable skills and experience.

140. In addition it would have been reasonable to consider roles in the wider PODs including those with the same Patient Pathway Support job description, adjusted or otherwise, in another specialism. The generic job description suggests that only some specialisms require the reception duties, suggesting that there are band 2 roles that are more administrative in some PODs. The

band 4 coordinator job description has much less emphasis on reception work and the evidence from the recruitment lead was that the amount and type (face to face or telephone) of patient facing work varied dependent on the specialism (p80). We know there were band 4 coordinator vacancies available at the relevant time, some of which may well have had much less face to face reception type patient contact. She was deterred from exploring the role in the other POD by Ms Quiller who incorrectly told her it was the same as her existing role and job description. We were offered no explanation as to why the Claimant was not included in the POD redeployment meetings and the assessments referred to by the recruitment lead in answer to the enquiry about the POD role in gynae and theatre. There was mention of her having an assessment but this was never followed up by the Respondent. We have found that that job description was potentially suitable, adjusted or otherwise, as it had far greater emphasis on administration than patient contact. Moreover the indication from the recruitment lead is that not all of those roles involved front desk work. The Claimant said she had experience of band 4 duties. The Respondent failed to look at this seriously as a potential reasonable adjustment.

141. There is no evidence that the Respondent considered any of these with any seriousness. Instead the Claimant was incorrectly told non patient facing roles do not exist within the Trust.

142. Moreover, as the Respondent did not identify the vacancies in paragraph 69 and discuss them with the Claimant in order to understand her issues with them, there was no discussion as to whether any of those roles could have been adjusted to become suitable roles.

143. We find that the Respondent did initially allow the back office role to persist as a reasonable adjustment. We accept that this was not a permanent solution as there was only one band 2 role in the chest clinic and it was a reception role. It would have been a reasonable adjustment to move the Claimant to a non face to face patient facing role. If it was not possible to adjust work within her own POD, as Ms Terry suggested it was, we find there were numerous roles that were suitable amongst the patient pathway support roles with less reception duties, the band 4 coordinator roles or one of the suitable roles listed at paragraph 98. The parties agree that at least those roles were both suitable and available. The Respondent did not make the reasonable adjustment. This aspect of the Claimant's claim is well -founded.

144. We also observe that the Respondent could have allowed the Claimant to return to the back office role until redeployment was achieved, as it is preferable to enable a disabled employee to continue to work rather than remain on long term sickness absence, if possible. However we recognize that situation was temporary and ended initially due to the Claimant's absence from November 2017, and had prompt redeployment been achieved we would not have considered a failure to do that in and of itself to be a failure to make a reasonable adjustment.

145. In a similar vein it might well have assisted the Claimant's return to work in a suitable post to enable her to keep working via NHS Professionals if suitable positions were available. As above it would have been better to keep the Claimant working than her remain on long-term absence of any length when she was fit to perform non reception duties. It would have been reasonable for the Respondent to adjust their policy and enable the Claimant to work via NHS Professionals until a suitable permanent alternative was found.

Unfair dismissal

What was the principal reason for dismissal and is it a potentially fair reason? The Respondent relied on capability.

146. We accept that the reason for dismissal was the Claimant's long term absence due to her inability to perform the band 2 reception role.

If the reason was capability did the respondent act reasonably in treating that as sufficient reason for dismissing the Claimant, taking into account the circumstances of the Respondent and the equity and substantive merits of the case?

147. The Respondent treated the case as a case of long term absence and took into account the length of the absence and their view was that there was no sign of a return to work in the foreseeable future. It was held against the Claimant that there were a number of vacancies and she had not applied for them, the Respondent taking the view that the onus had been on her to find the alternative work. The view that can be inferred from the comments of Ms Quiller in October 2018 (that the Claimant did not want to do her existing role and had not made a single application during the redeployment period) pervaded the evidence of the Respondent's witnesses. The Claimant's indication that she wanted to return to work in the appeal was interpreted that she probably did not want to return then but would want to in the future.

148. There was little if any consideration of whether there would have been a return to work sooner if the Claimant had been able to continue in the back office role longer or redeployed to a suitable alternative position sooner (including enabled to work via NHS Professionals until a suitable position was found). There was the suggestion in the OH report as early as 28 November 2017 that though the Claimant was unfit to work in her current position she would have been fit to work in the back office position (and by inference another non reception position). Although he said he would review in 3 months the Claimant was not then seen again by OH until 10 July 2018. At that point he said she was unfit for work until there was clarity in respect of her current role or redeployment to a suitable role. This led to the meeting in October 2018 between the Claimant, OH and management and the subsequent OH report just before the stage 3 long term absence meeting when OH recommended the Claimant return to work with limited patient facing reception work. The subsequent report after the meeting, before the decision, was that the Claimant was unfit for work as she was not able to work in a role that was a 100% patient facing. It suggests

she would be fit for a non patient-facing role and he would be happy to review if a suitable alternative was identified. Overall the suggestion from OH is that the Claimant would have been fit to return to a non-reception role much sooner, possibly as early as November 2017, but certainly well before the stage 3 hearing.

149. At the same time the stage 3 meeting panel and the appeal panels looked at what posts were in fact available and suitable. This was the first time the Respondent had done this. It was done not with a view of finding suitable alternative work to facilitate a return but to test whether the Claimant had sufficiently "helped herself". The view was taken that she had not.

150. We do not find this to be a reasonable approach. It was the Respondent that had the duty to make reasonable adjustments or, in unfair dismissal terms, to take reasonable steps to investigate alternative work and consider redeployment. The Respondent did not do so. The Claimant was sent bulletins, told to look at what was advertised and to apply. No one from the Respondent identified potential suitable vacancies or discussed them with the Claimant. There were such vacancies, though we accept the Claimant did not see them. Had they been identified to her and she had been supported to be redeployed into one of them, the likelihood is that the Claimant would have returned to work much earlier. It is likely the Claimant was fit to return at the time of the stage 3 meeting to a suitable post. Although it is right the Claimant had a preference for a band 4 position there is insufficient evidence to suggest she would not have done a suitable band 2 role if offered. There was no discussion of available posts at that stage with a view to facilitate redeployment, only to justify dismissing the Claimant because she had not applied for them. This was not rectified at the time of the appeal. For the avoidance of doubt we find it was not reasonable to adopt an approach that the Claimant had had long enough already in the redeployment period. A reasonable employer would keep the question of whether there was a suitable alternative vacancy under consideration until the date of dismissal, including during the notice period. To ignore suitable positions because a redeployment period has ended is outside the range of reasonable responses.

151. It was outside the range of reasonable responses to dismiss the Claimant when the evidence suggests she was fit to work in non reception roles and there were a number of those roles available within the Respondent.

152. Her previous absences were also held against her, and the likelihood of further absences in the future. In reality the Claimant had returned and performed the back office role from February to November 2017, until she was told this was not a permanent solution. There were some absences in that period but we find the approach to her absences during that period was heavy handed. She was subjected to two formal warnings, which Ms Quiller said do not exist at stage 1 of the procedure. The second was issued despite the fact the Claimant had not in fact had any further absences. She was also expected to be absence free for the subsequent three months despite having disabilities. Overall we do not consider the Respondent's approach to the absences as reasonable.

153. Turning to the specific reasons the Claimant contends that her dismissal was unreasonable at paragraph 8 above. She asserts she could and should have been permitted to return to work in the administrative support role she carried out from February 2017 to November 2017. We have accepted that it was not unreasonable to see that post as a temporary post. We accept that there was one band 2 reception role in that team and that it was to be on the reception desk dealing face to face with a substantial number of patients. It is not clear that there was an active decision as to when that arrangement should end, as the Claimant was off sick from November 2017 and the Respondent then proceeded to manage that absence, without giving consideration to allowing a short term return to that role. The Respondent could have given consideration to keeping the Claimant in the role whilst the other receptionist was in post and whilst redeployment was explored given the indication from OH that she might have been able to return as early as 28 November 2017, but in circumstances where the Claimant submitted fit notes saying she was unfit to work we do not find it unreasonable that this did not happen.

154. It was however unreasonable to dismiss the Claimant without making reasonable adjustments pursuant to the Equality Act 2010. In addition to the alternative vacancies on pages 473 A-G the Respondent also failed to consider roles, adjusted or otherwise, in either the existing clinic and/or POD or in other PODs.

Did the Respondent follow a fair procedure in taking that decision to dismiss?

155. It is right that there were regular meetings with the Claimant, culminating in a stage 3 meeting with an independent manager and then an appeal with another independent panel. However at both stages of the process the management had before them the list of vacancies at pages 473A-G which were never shown or discussed with the Claimant. This was not a reasonable procedure. The Claimant should have been shown this document and allowed the opportunity to comment.

Was there a possibility the Claimant would otherwise have been fairly dismissed had a fair procedure been followed by the Respondent?

156. If a fair procedure had been followed and reasonable consideration been given to redeployment then the likelihood is the Claimant would have remained at work in a suitable vacancy. From the point of view of an unfair dismissal claim there would not normally be an expectation of a promotion when considering redeployment. Considering the unfair dismissal claim in isolation the likelihood is that the redeployment would have been to a band 2 role (though a band 4 role could be a reasonable adjustment in the Disability Discrimination claim). We acknowledge the Respondent's concerns about the Claimant's preference for a band 4 role and that she might not have been happy in a band 2 role. We find that there is a chance that the Claimant's mistrust of the Respondent would have continued along with her upset at being put in a band 2 role. There is a chance that the redeployment would not have ultimately been successful but we do not on the evidence find this more likely than not. Especially as there is

also evidence that suggests it would have been successful, such as the Claimant's commitment to the back office role, despite her misgivings about it being a band 2, and her keenness to work via NHS Professionals.

157. We need to hear further from the parties with respect to the size of this possibility (and whether it is material given the failure to make reasonable adjustments claim is also successful). We also need to hear from the parties in respect of what period of loss should be affected, if any deduction is made to reflect this.

Harassment

Did the Respondent engage in unwanted conduct related to the Claimant's disability that had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
The Claimant relies on the following acts:

The alleged refusal to allow the Claimant to return to the administrative support role from October 2018 until her dismissal

The Respondent's alleged 'determination' that the Claimant had to return to the role of Pathway Support Worker, which was 100% patient facing

158. These are two sides of the same issue, which is that the back office role was a temporary adjustment to the patient pathway support worker role, which we accept was a reception role with a significant degree of patient facing face to face work, located at the front desk.

159. We have accepted that the back office role was a temporary measure and it was not unreasonable that by October 2018 that adjustment was no longer on offer and the focus was on whether the Claimant could do the Pathway Support Worker role or whether to pursue the alternative of redeployment. She was not required to return to the role at any time as redeployment was the alternative. It is right that the Claimant maintained the view that she had been offered the back office role on a permanent basis but we do not agree that to be the case. It was always intended that her role was a reception role, and the back office role was a short term adjustment. To that degree the refusal to allow her to continue to do the back office role was unwanted but it had neither the purpose or effect of creating the necessary environment. The Respondent was stating the position in respect of the role.

160. In so deciding we have taken into account that it is not reasonable to perceive the Respondent's position as having the necessary effect. The Claimant was told by 9 May 2017 that she needed to be able to sit at the front desk to do the full role. We have found the full role was a reception role. There was never insistence that the Claimant return to the role of Pathway Support Worker, rather that the matter needed to go back for OH advice because there had been a misunderstanding about the degree of patient facing face to face work in that

role, which was the role that she remained employed to do, subject to redeployment. We accept there was a significant degree of face to face patient facing work in the role including working on the reception at clinics with 100 patients attending, and that if she could not perform that role then it was reasonable to consider redeployment.

161. As said above at paragraph 56, Ms Terry made a concession that the two meetings on 1 November 2017 together potentially created the necessary environment for the Claimant required in a harassment claim. It was put and she accepted that the combined effect of saying the adjusted role was not permanent, along with putting the Claimant on a further warning that there should be no further absences for three months, when she had a disability that meant she could not do the full role, potentially created the requisite environment. This line of questioning did not reflect the Claimant's own evidence about the meetings. She herself did not say she felt that the combined effect of the two meetings put her in an impossible situation. Nevertheless, the Claimant's representative was invited to consider whether she needed to apply to amend the issues to include this allegation as part of the harassment claim. She said she did not consider it necessary. In the absence of her doing so it is not at all clear how the events of 1 November 2017 related to the harassment allegations in the list of issues which were solely about the decisions in October 2018. The history of the 1 November meetings does not alter our view in respect of the decisions in October 2018.

The Claimant's dismissal

162. We have found the dismissal unfair. It was because of the absence and therefore related to disability. It was not pursued as a claim of direct disability discrimination or discrimination arising from disability, only as a claim of harassment. We do not find that it is unwanted conduct that had the purpose or effect of creating the necessary environment. It was not unreasonable to have reached the stage of considering redeployment. The Respondent failed to adequately consider redeployment because the onus was placed on the Claimant to apply for vacancies and she did not do so. The Respondent also did not share the vacancies at pp473 A-G with the Claimant and she did not get an opportunity to comment. This rendered the dismissal unfair but it is not reasonable to consider that it created the necessary environment for the Claimant required by s26 Equality Act 2010.

163. There were background comments made by Ms Quiller and those dealing with the dismissal and appeal that reflect the Respondent's incorrect perspective that redeployment was the Claimant's responsibility and she had not tried enough to help herself but that is not the Claimant's claim in respect of harassment.

Victimisation

Did the Claimant do a protected act and/or did the Respondent believe that the Claimant had done or might do a protected act? The Claimant relies on the following:

The Claimant's previous Employment Tribunal claim against the Respondent;
The Claimant's attendance at meetings with Dr King on 27 June 2017, 29 September 2017, 9 October 2018 and 13 November 2018 in which it is alleged that reasonable adjustments were discussed and considered.

164. The Respondent accepts that the Claimant brought a previous Employment Tribunal claim that amounted to a protected act. We know little more about it.

165. With the exception of the three way meeting on 9 October 2018, The Claimant did attend the above meetings but the Respondent was only aware of the OH advice that followed them. It is right that potential reasonable adjustments for the Claimant were mentioned and/or requested by Dr King on 28 November 2017, 10 July 2018, 13 November 2018 and 4 December 2018. They were also raised and discussed in the three way meeting with OH on 9 October 2018.

Did the Claimant suffer any of the following alleged detriments:

The respondent's alleged insistence that the Claimant was employed as a Pathway Support Worker and that it was 100% patient facing role, so that she was prevented from returning to work from October 2018 until dismissal, and

The Claimant's dismissal.

166. The Claimant was correctly told that the Pathway Support Worker in the chest clinic was a patient facing role on a reception desk. Reference was made to this being 100%. Although she was given an adjusted role for some time, once it was clear she was unable to do the role, redeployment was considered. The Claimant did not return to the chest clinic during the redeployment process. The Claimant was dismissed when she had not been redeployed by November 2018. The Claimant therefore did suffer these detriments.

If so, did the Respondent subject the Claimant to any of the alleged detriments because the Claimant did a protected act?

167. We cannot find that the reason the Claimant was not able to return to the Pathway Support Worker post or that she was dismissed was that she had done a protected act.

168. We have accepted that the Pathway Support Worker post was a reception worker post on a busy clinic with up to 100 patients attending. This was always the case as made clear to the Claimant from 8 May 2017, albeit the Claimant was temporarily given a back office role when she first returned from long term absence.

169. The Respondent informed the Claimant of this on 1 November 2017 and the Claimant was absent again. The reason the Respondent informed the Claimant of this then was because OH had indicated she should be allowed to remain permanently in the back office role (19 September 2017) and this was not a possibility on a permanent basis. Whilst she was absent it was agreed that

redeployment would be sought. Long after that decision had been made the Claimant continued to assert that she should be able to return to the back office role which is what led to the meeting with OH in October 2018. There the Respondent reiterated what had been said before that it was a reception role. There appears to have been a misunderstanding about this on the part of OH, which led to the confirmation after that meeting that it was 100 % patient facing.

170. Initially she did not continue with the Pathway Support Worker post as the Claimant commenced a second period of long term absence, and it was agreed during that absence that the redeployment process would be followed. It is right that there was no further consideration of her return on a temporary basis but that is because the focus moved to redeployment.

171. We have of course been critical of the Respondent in failing to make reasonable adjustments sooner to enable the Claimant to return to work. However we cannot make any inference that one reason the Claimant was not allowed back to the Pathway Support Worker post was a Tribunal case that we know nothing more about other than that it met the test to be a protected act. It is true there are some references to a past dispute in the documentation but the relevant Respondent staff did not know the details. In any event the Claimant's substantive role was a reception desk patient facing role which she agreed and OH agreed she could not do. This had nothing to do with the Tribunal case.

172. The Claimant was then dismissed when no redeployment had been found and the Respondent perceived she had not helped herself. Again we have found this unfair. We find the Respondent's attitude to the Claimant and her employment is summarized by the comments of Ms Quiller in the meeting with Dr King on 9 October 2018 as follows: "we are going round and round this point for almost an hour now [why she could not still do back office work in the chest clinic]. I do not know if there is a resolution as[the Claimant] does not want to carry out the role she is employed to do. There are no other roles with just admin tasks that I am aware of and [the Claimant] was given more time than she should have been for redeployment but did not apply for roles either within the Trust or other Trusts that I am aware of." This attitude pervaded the decision making. The Respondent did not consider the Claimant had helped herself sufficiently. We have not been referred to evidence from which we could conclude that this had anything to do with the Tribunal case.

173. Underlying the above (and evidence in the appeal decision) was also the Claimant's insistence that she had been put in the wrong band with the Pathway Support Worker role and her preference for a band 4 post, and her unwillingness throughout to give up her insistence that she had been given the back office post permanently. These issues underlay the Respondent's belief that the Claimant had not helped herself with the redeployment.

174. With respect to the meetings with OH and the requests for adjustments which followed them. We agree with the Respondent that there is no evidence that the insistence that the Claimant's role was patient facing and her dismissal had anything to do with her attending meetings with OH. The Respondent had organized the referrals. OH had requested adjustments to the Claimant's role

in the form of limiting the patient facing duties or redeployment. Initially when it appeared the need for adjusted back office duties might be temporary the Claimant was able to remain doing those back office duties as OH requested. The Respondent had said the full role required reception duties as early as 8 May 2017 but once it became clear that the expectation was that the adjustment to a back office role should be permanent the Respondent emphasized again that it was a reception role. There is no suggestion that this was motivated because the Claimant had been to OH and that reasonable adjustments had been requested on her behalf. We accept the role was always intended to be a reception role.

175. The Respondent did seek to implement the requested adjustment of redeployment to the extent that bulletins were sent to the Claimant and she was given a lengthier than normal period to seek alternative work. We have found that the Respondent did not make the reasonable adjustments required but there is no suggestion that the ultimate dismissal of the Claimant was because she had been to OH and there had been a request for reasonable adjustments on her behalf.

Next steps

176. The Claimant's claims for failure to make reasonable adjustments and unfair dismissal having succeeded the matter will proceed to a remedy hearing which has already been listed for one day on **25 January 2021**.

Employment Judge Corrigan
22 January 2021