Appeal No. EA-2019-000962-BA (previously UKEAT/0235/20/BA)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 3 June 2021
Judgment handed down on 9 September 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

MRS MARIA YORKE — APPELLANT

GLAXOSMITHKLINE SERVICES UNLIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR THOMAS CROXFORD (One of Her Majesty's Counsel) Advocate
For the Respondent	MR DAVID MITCHELL (of Counsel) Instructed by: Eversheds Sutherland (International) LLP 1 Callaghan Square Cardiff CF10 5BT

SUMMARY

DISABILITY DISCRIMINATION

The claimant, acting in person at the time, brought a claim that she had been dismissed because of ill health absence that resulted from her disability and could have been avoided by transferring her to an alternative role. The claimant was represented at a preliminary hearing for case management and the final hearing. The parties agreed a list of issues that was convoluted and, in some respects, simply did not work. The claim was dismissed.

The claimant's appeal was permitted to proceed, limited to the contention that she should have been transferred to a specific alternative role. The tribunal could not properly be criticised for determining the case on the basis of the agreed list of issues. In any event, the tribunal had made factual findings that the role was not suitable for the claimant. Even if the issues had been better set out, the contentions that transferring her to the alternative role would have been a reasonable adjustment, and that the failure to do so prevented her dismissal being justified, would not have been made out.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the majority judgment of the employment tribunal sitting in North Shields, Employment Judge Morris and members, from 29-31 May 2019. Claims of failure to make reasonable adjustments, discrimination because of something arising in consequence of disability and unfair dismissal were dismissed by a majority decision. The judgment was sent to the parties on 4 September 2019.

2. The claimant appealed. The appeal was considered at the sift by HHJ Martyn Barklem who concluded that there were no reasonable grounds for bringing the appeal. The claimant sought a hearing pursuant to Rule 3(10) of the EAT Rules. HHJ Auerbach permitted the appeal to proceed on substituted grounds drafted by Thomas Croxford QC who represented the claimant under the ELAAS scheme. The two grounds of appeal that were permitted to proceed are limited. My consideration of the facts found by, and legal analysis of, the Tribunal is limited to that necessary to consider those two grounds of appeal.

3. The claimant was employed as a Mover. She was regularly absent from work because she has rheumatoid arthritis. The claimant contends that the Mover role was not suitable for her because of her arthritis, but that there was a role, First Line Leader (FLL), that she could have undertaken, and would have prevented her eventual dismissal for medical incapability. The respondent contends that the FLL role was barely mentioned when the claimant's attendance was being managed and formed only a limited part of the claim in the Tribunal. The specific role was mentioned for the first time in the claimant's witness statement for the employment tribunal hearing and so was not dealt with in the witness statements of the respondent's witnesses, but

oral evidence was given about why the FLL role would not have been suitable for her. It was also said that the claimant had never shown any interest in the role prior to it being mentioned at meetings about her absences and that her level of absences would preclude her from being promoted into a "management" role. That is the context to the two grounds of appeal that were permitted to proceed. It is asserted that the Tribunal erred in law by not holding that it would have been a reasonable adjustment to slot the claimant into the FLL role without her having formally to apply for it, that excluding her from consideration for the FLL role, in part, because of her absences, would involve discrimination because of something arising in consequence of disability (her absences) and that her dismissal without making the reasonable adjustment constituted discrimination because of something arising in consequence of disability, and was not justified.

4. The amended Notice of Appeal is in the following terms:

> **The Tribunal erred in law in the following respects:**
>
> **1. The Tribunal found that the Appellant's poor attendance record, which related to her disability, was one of the grounds for excluding her from consideration from a role as FLL. In those circumstances, the Tribunal erred in failing to eliminate the effect of this factor when considering whether the Respondent thereby breached section 15 Equality Act 2020.**
>
> **2. The Tribunal erred in dismissing the Appellant's claims under sections 15 and 20, Equality Act 2010, when concluding that because the Appellant had not formally applied for an FLL role, the question of whether she should have been redeployed to such a role was purely hypothetical.**

5. There is no remaining challenge to any of the Tribunal's other findings. There is no proper basis for me to go behind the Tribunal's findings of fact, as some of Mr Croxford's submissions could be read as suggesting I should do.

A

The relevant facts found by the Tribunal

6. The parties are referred to as the claimant and respondent as they were before the employment tribunal. The Tribunal described the respondent:

B

> **7.1 The respondent is a well-known company in the pharmaceutical sector of some considerable size and significant resources including a dedicated human resources department ("HR"). One of its sites, which is said to be one of its largest in the world, is at Barnard Castle at which some twelve hundred people are employed. That site focuses on four business areas: Sterile; Derms; Liquid and Cephalosporins. The claimant worked in Derms.**

C

7. The claimant was employed by the respondent as a "Mover". The Tribunal described the claimant's role, at paragraph 7.2:

D

> **… Her duties included such matters as printing/collating batch documentation, printing labels, attending meetings, ordering materials from the warehouse, moving pallets, reconciling orders, checking documentation and liaison with other employees. It was, however, quite a physical role and included opening heavy doors, handling heavy materials, pallets and the compulsory wearing of safety shoes; although there were alternative safety shoes that were lighter on the feet that were offered to employees with diabetes but which the claimant had never requested. Mr Hodgson's estimate (which was not challenged) was that the Mover role was approximately 70% physical with the remaining 30% relating to administrative tasks such as document checking, reporting on quality issues and checking samples. …**

E

8. From March 2016 the claimant began to have symptoms of rheumatoid arthritis. She received a formal diagnosis in June 2020.

F

9. The Tribunal described the claimant's condition at paragraph 7.3:

G

> **… The physical effects of her condition include immense pain, swelling and stiffness in her joints particularly her hands, wrists, hips, feet, ankles, knees and elbows. She has no strength or grip in her hands or wrists, stiffens and aches if in one position for too long and cannot do any repetitive tasks. If she walks or stands in a position for too long her hips become painful and begin to stiffen. She has been prescribed various medications in the past but suffered adverse reactions to all of them and now has a weekly injection that she has taken since January 2018 with no side effects.**

10. The Tribunal described the respondent's premises from which the claimant worked in terms that should give the respondent pause for reflection as a health care business:

H

> **7.4 There is no dispute that the respondent's premises within which the claimant worked were not "disability friendly" (to adopt a phrase from one of the witnesses). It is constructed on four levels with only stairs between the levels. There is no lift other**

> **than a lift the primary purpose of which is to transport goods and materials. The disabled lavatories are located on the ground floor and level one. The claimant worked in the basement.**

11. I was told that the respondent has taken steps to improve the premises and that a passenger lift has been installed.

12. The Tribunal noted that the claimant had significant periods of absence and was referred to occupational health on a number of occasions.

13. A report was provided by occupational health on 11 June 2017. The Tribunal held at paragraph 7.13.

> **… The letter from OH of 11 June 2017 (149) records the claimant's condition and her symptoms, which had affected her ability to attend work, and advised that the claimant "would benefit from redeployment into a sedentary role which hopefully would enable her to sustain her attendance at work." That said, the claimant was then absent from work until 12 July and was not in a position to undertake any work, sedentary or otherwise. [emphasis added]**

14. A letter was sent by occupational health on 14 July 2017, to which the Tribunal referred at paragraph 7.16:

> **… It is apparent from the phrase, "I understand that the exploring of redeployment opportunities for Maria continues which hopefully will help her manage her condition more proactively", that redeployment continued to be an issue and Mr Hodgson agreed in evidence that the advice regarding redeployment in the earlier letter of 11 June still stood. Despite that, however, OH advised that the claimant could return to "perform her usual mover role" albeit initially on a phased basis working for four hours daily for two weeks and then extending that by one hour each week until back to full-time but "using lifting aids available and seeking assistance for the DUAC campaign which involves increased walking for components". … [emphasis added]**

15. Accordingly, from July 2017 occupational health recommended that consideration be given to the claimant being redeployed to a sedentary role. Perhaps unsurprisingly, there was no reference to any particular role, such as FLL.

16. The claimant's line manager was a Mr Raine, one of the FLLs. Mr Raine described his role as a FLL in his witness statement:

> **… My responsibilities include managing the coordination of the filling and packing area; ensuring the filling and packing process is running smoothly; and staff management which includes activities such as preparing rotas and carrying out return to work meetings. Prior to this role I was a Shift Team Manager.**

17. Mr Raine reported to Mr Hodgson. The Claimant was advised by Mr Raine to 'self restrict' the activity of her job as a Mover. Mr Hodgson conducted some investigation of possible sedentary roles.

18. Mr Hodgson met with the claimant on 12 October 2017. The Tribunal described the meeting, including the discussion of possible sedentary work:

> **7.23 HR asked Mr Hodgson to meet the claimant on an informal basis, which he did on 12 October 2017 (161/184). He was accompanied by an HR colleague and the claimant was accompanied by her trade union representative. Amongst other things, the claimant agreed that when she had returned to work in June 2017 she had been told only to do what she could manage but her Mover role involved physical aspects and she could not do her role. The possibility of splitting the claimant's role so that she only did the administrative side was considered but even then the claimant could not confirm that she could return to work. Indeed, throughout the discussions at this meeting the claimant repeatedly stated that she was currently signed off from work and even if a suitable alternative opportunity were to be available she would not be able to return to work at that time. Mr Hodgson mentioned, for example, that she could return to create training documents but the claimant said that she could not return. He stated that he had funding for the claimant and another employee to do a paperwork role from August 2017 to December 2017. The claimant's evidence in her witness statement is that she was currently in too much pain and was signed off and that she also asked Mr Hodgson why he was only informing her of this now. In her oral evidence, however, this latter point seemed to be the principal issue, the claimant declining the opportunity to undertake the short term paperwork role as she appeared to have been miffed at Mr Hodgson having delayed from August until the date of this meeting in October before offering if to her.**
>
> **7.24 Also at this meeting the claimant mentioned other employees whom she considered had received more favourable treatment than her. For example, one woman (ER) had been offered a role in the Operational Quality department ("OQ"), another had been moved to Process Support on a secondment and a third (EH) had been offered a FLL role, while a man was doing a job that did not have any title or budget. Mr Hodgson explained, however, that although he could not go into the personal circumstances of others, the claimant's understanding of these situations was factually incorrect. He referred to the claimant not having said that she wanted to go down the FLL career path.**
>
> **7.25 In oral evidence, Mr Hodgson explained that ER was a high-performer who had expressed interest through her development plans to explore opportunities such as OQ but she had never been offered a job, and a job had never been withdrawn. As to EH, the respondent has a succession planning process through which consideration is**

given to potentially high performing candidates who might go on to FLL roles. EH had performed well on a secondment and Mr Hodgson had a conversation with her as to whether she was interested in attending a FLL Assessment Centre but she chose not to. He had not had a similar conversation with the claimant for a number of reasons: she had never displayed such behaviours, her attendance would prohibit him promoting her into a managerial role, she was rarely at work to fulfil that activity and she had never talked to him or other managers about an FLL role being something that she could aspire to.

7.26 At the meeting on 12 October, in the context of considering alternative roles, Mr Hodgson remarked that if there was a secondment opportunity the claimant could be considered but she would need to understand that this would only be a temporary measure so when the secondment came to an end she would be at risk of there not being a role to move into and the question of her capability would stand … [emphasis added]

19. There are a number of key points, relevant to the appeal, that emerge from the Tribunal's findings of fact about the meeting on 12 October 2017:

(1) Consideration was given to the possibility of the Claimant undertaking a sedentary role such as:

a. only undertaking the administrative elements of her role

b. working on training documents

(2) The claimant thought other employees had been treated more favourably than she had been, including erroneously thinking that a colleague had been slotted into a FLL role

(3) Mr Hodgson thought there were a number of reasons why the FLL role would not be suitable for the claimant:

a. the claimant had not displayed the "behaviours" necessary for the role

b. she had not suggested to managers that she aspired to the FLL role

c. her attendance would prohibit him promoting her into a managerial role

d. she was rarely at work

(4) The claimant said that even if a suitable alternative opportunity was available she would not be able to return to work at that time.

20. An independent workstation assessment was conducted in November 2017. The tribunal described the recommendations made in the report at paragraph 7.27:

> **… The report divided the claimant's duties into six main categories. With the exception of office-based duties, the remaining five categories were considered to be physically demanding. The recommendations contained in the report are as follows:**
>
> > **"Due to Ms Yorke's current on-going physical problems, that are yet to be managed/controlled with medication from consultant level, she is at high risk of exacerbating her symptoms significantly returning to her current job role, with a high probable chance of further sick leave based on her current irritability and nature of her reported symptoms.**
> >
> > **Once she has controlled her symptoms better with medication she could realistically return to work, however due to the chronic nature of her symptoms this would be recommended only in a light capacity and not in her current role. Sitting based tasks without manual lifting/twisting/turning, repeated gripping would be realistic if this option is available to her." [emphasis added]**

21. The Tribunal describes some attempts to look at redeployment opportunities:

> **7.29 In light of the report's recommendations, Mr Hodgson raised the claimant's case at the weekly meeting of all the Production Operations Managers on 3 November 2017. This is a meeting of all those Managers on the site who are present on site that day along with someone from HR. He followed that up in an email (180) to the Operations Managers who attend the weekly meetings and also to the Operations Managers from Laboratories and Logistics asking them all to consider and let him know of any roles within their areas that might be suitable for the claimant. All the responses he received confirmed that no such role was available. At one stage it appeared to the Tribunal that Mr Hodgson had limited his enquiries to Operational Managers on the site and that he had not considered, more widely, other areas (for example in administration, in which sedentary jobs might have been available) but it became clear in later evidence that he had, indeed, made such enquiries across the site. On this point also regarding enquiries made across the site, at this time, the HR Manager who had attended the meeting on 12 October 2017 wrote to the respondent's Recruitment Account Manager-GMS enquiring what vacancies there were for redeployment options for the claimant who required a sedentary role or, alternatively, whether there were any existing vacancies that he felt could be adapted (182). He responded that there were none available or suitable whereupon the HR manager asked, "if any do become available anytime soon then you let me know to try and support this redeployment opportunity". [emphasis added]**

22. The claimant continued to have significant periods of absence. Occupational health advised again on 29 January 2018:

> **7.35 In a letter dated 29 January 2018 (207), OH advised that the claimant should attend work for two hours daily that week (2-4pm) and the next, with an hourly increase every week thereafter until back to full-time hours in the week commencing 19 March. The advice continued that on her initial return the claimant should regain access to the IT systems and complete outstanding 'Mylearning' after which she could move on to pc/paperwork and gradually increase her physical activities. It concluded that it was difficult to determine whether the claimant would be able to return to the full remit of her Mover role and that if her symptoms remained unstable, redeployment options would need to be explored for a less physically demanding,**

> **office based role. At this time, however, the focus remained on the claimant returning to work initially on what might be termed 'light duties' albeit with a gradual increase in physical activities. There was no clear-cut recommendation that, at that time, the claimant should be moved permanently to a sedentary role. [emphasis added]**

23. The Claimant's absences continued, resulting in a further occupational health letter in March 2018:

> **7.38 The claimant confirmed in oral evidence that she was "only sporadically at work" from the end of January until April 2018. She had a further appointment with OH on 8 March 2018. In a letter of 12 March the opinion was expressed that the claimant needed to perform a sedentary role, if possible completing pc/paperwork that are not physically demanding until better control of her symptoms is achieved. Mr Hodgson ensured that this advice was followed and that the claimant was not carrying out any physical tasks at work. In the letter OH also expressed the opinion that unfortunately the claimant did not currently meet the required criteria for ill-health retirement. [emphasis added]**

24. In January 2018 the claimant was absent from work. Her GP suggested a return to work with amended duties:

> **7.34 On 18 January 2018, the claimant provided a statement of fitness for work in which her GP had set out that she might be fit for work on a phased return basis and with amended duties (206). Mr Hodgson met the claimant on 22 January 2018 to discuss her return and then spoke to her on 23 January (268). The claimant was very clear that she wished to return to work but Mr Hodgson was concerned that it might be too early and that could potentially hinder her recovery. …**

25. After a further period of absence, the claimant returned to work briefly on 23 April 2018:

> **7.42 The claimant returned to work on 23 April 2018 and met with OH who produced a report on 24 April (245). In this report (unlike the earlier reports in which the focus was on the claimant's return to her Mover role, albeit that she should return on a phased basis and initially undertaking light duties while gradually increasing physical duties, and would benefit from redeployment into a sedentary role) the advice was now more clear-cut to the effect that she should perform sedentary tasks such as pc work, document checking or paperwork as "anything more physically demanding is likely to increase her symptoms". Notwithstanding that shift in emphasis, however, the reality is that after this date the claimant never returned to work until her dismissal and maintained throughout that period until the meeting that resulted in her dismissal that there were no alternative roles on site to which she could return; this point is returned to in more detail below. [emphasis added]**

26. The claimant met with Mr Hodgson on 24 April 2018. She did not return to work thereafter. The Tribunal noted that the claimant became increasingly pessimistic about the prospect of being able to return to work in any capacity, and focussed on the possibility of ill

health retirement, that presumably required that she be unfit for any role that could be provided for her.

27. The claimant was invited to a formal meeting under the respondent's Disability/Long Term Ill Health Policy on 12 July 2018. In preparation for the meeting the Tribunal described Mr Hodgson checking the responses he had received to the email he had sent in November 2017:

> **7.54 … At this time Mr Hodgson also checked all responses he had received in respect of his email of 7 November looking for a suitable potential redeployment opportunity and he wrote again to one manager who responded that he did not have any suitable roles.**

28. The Tribunal recorded that:

> **7.55 The claimant's consultant rheumatologist wrote again on 2 July 2018 having assessed her on 14 June. He remarked that her prognosis remained difficult to predict and it was "difficult to say with certainty whether or not we will have adequate control of her joint disease in the next 12 months" and that her arthritis "may well affect her ability to work for your organisation."**

29. The Tribunal made findings about the meeting and outcome:

> **7.56 The second formal meeting was rescheduled for 12 July 2018. The claimant was again accompanied by her trade union representative and Mr Hodgson was accompanied by two HR officers (282). Amongst the matters that were discussed were the following: the claimant's ill health retirement application would not be supported by OH but she could nevertheless proceed with the application herself; she said that she would pump herself up with steroids to get back to work if she was going to be sacked; she suggested that adjustments that could be looked at (not having raised these suggestions before) were whether lifts could be installed in C Block where she worked along with disability access and a mobility scooter could be adapted for her to use to move pallets around; Mr Hodgson reminded the claimant that during her earlier phased return she had been unable to meet the return to work plan even while restricted to the non-physical aspects of the role; the claimant confirmed that there were no redeployment opportunities available and that her Mover role could not be adapted; the claimant asked again about redundancy but received the same answer that her role was not redundant whereupon she suggested a move to a Process Support role where redundancy was likely but Mr Hodgson responded that this was not an appropriate solution; the claimant complained that not one reasonable adjustment was made to her role but then agreed that the OH advice regarding phased returns to work had been followed; although accepting that she had been told by her managers only to do what she could manage the claimant considered that it was impossible to self-limit; the claimant stated that she was interested in the FLL role and questioned why it had not been given to her but Mr Hodgson responded that she had no management experience and had never expressed an interest in the role which, in any event, still involved physical activity and was not sedentary. In oral evidence Mr Hodgson confirmed these various reasons as to why the claimant had not been considered for an FLL role but added further factors of the claimant never having undergone any managerial training, not being suitable for the role, that the FLL role**

was not purely administrative but regularly involved physical work and her attendance record.

7.57 During an adjournment, Mr Hodgson discussed the case with the two HR officers and informed them that he had decided to terminate the claimant's employment given her condition, the medical advice and the lack of suitable alternative roles. He returned to the meeting and informed the claimant of his decision and that she would receive three months' notice to terminate her employment on 12 October 2018 on grounds of capability. He told her that that during that time she would not be required to attend at work, would receive her full wages and was still able to apply for any suitable internal vacancy. Mr Hodgson confirmed his decision in a letter to the claimant dated 20 July 2018 … [emphasis added]

30. There are a number of key points that emerge from the Tribunal's findings of fact about the circumstances at the time the decision was taken to dismiss the claimant:

(1) The claimant maintained in the period prior to the meeting that there were no alternative roles to which she could return

(2) The claimant was told that her ill health retirement application would not be supported

(3) The claimant then stated that she would return to work and would "pump herself up with steroids to get back to work if she was going to be sacked"

(4) Occupational health advice was that the claimant needed sedentary work

(5) The claimant stated that she was interested in the FLL role and questioned why it had not been given to her

(6) Mr Hodgson gave a number of reasons why he considered the claimant was not suitable for the FLL role:

a. The claimant had no management experience

b. The claimant had never expressed an interest in the role

c. The role involved physical activity and was not sedentary – it was not purely administrative but regularly involved physical work

d. The claimant had not undergone any managerial training

e. The claimant was not suitable for the role

f. The claimant's attendance record.

31. Reading the judgment as a whole, it is clear that the Tribunal accepted that Mr Hodgson's reasons were genuine and his opinion about the claimant was correct.

32. The claimant appealed against her dismissal. An appeal hearing was held on 22 August 2018. The appeal was dismissed by letter sent to the claimant on 31 August 2018.

The original claim

33. The claimant submitted her claim form on 24 September 2018. She was unrepresented at the time. She put her claim succinctly and clearly:

> **I was dismissed from work on the 12th of July 2018 under the long term illness/capability procedure. I have been given no alternative employment opportunities despite highlighting some roles I could [have] carried out. On a number of occasions fellow colleagues have been given roles that would [possibly have] suited my health condition without any thought to my disability. [T]here is also no disability access on site.**

34. The claim as written by the claimant describes a situation that is by no means unusual. The claims are obvious. The claimant states she has been dismissed as a result of her disability related absences and contends that the dismissal could have been avoided if she had been given an alternative available role and/or disability access had been provided. This obviously suggests claims of failure to make reasonable adjustments and discrimination because of something arising in consequence of disability. But, of course, such claims have to be fitted into the statutory framework. One would expect this to have been done at the preliminary hearing for case management, but the claimant was directed to provide further information. That was when things took a wrong turn and sight was lost of the simple claim that the claimant was seeking to have adjudicated.

35. The claimant in this case, while acting in person, had not, unsurprisingly, identified PCPs. It should have been possible to analyse the PCPs at the preliminary hearing for case management at which the parties were represented. The claimant was required to provide additional information. At the final hearing a list of issues was agreed, but the PCPs identified and other elements of the claim for failure to make reasonable adjustments and discrimination because of something arising in consequence of disability were confused, as I shall consider in more detail in my analysis, and resulted in the focus being lost on this relatively simple claim.

The law

36. The duty to make reasonable adjustments is provided for in section 20 Equality Act 2010 ("EqA 2010"):

> **20 Duty to make adjustments**
>
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid. [emphasis added]**

37. Surprisingly, despite the mention of the lack of disability access in the claim form, no claim was framed in terms of physical features. An attempt to raise a claim about safety shoes,

A that might have constituted auxiliary aids, came too late. Either type of claim would have had the benefit of not resting on the identification of a PCP.

B 38. The approach that Tribunals should take to PCPs was considered by HHJ Eady QC in **Carreras v United First Partners Research** UKEAT/0266/15/RN:

> **[30] As noted by Laing J, when putting this matter through to a Full Hearing, the ET essentially dismissed the disability discrimination claim because it found that an expectation or assumption that the Claimant should work late was not the pleaded PCP.**
>
> C **[31] The identification of the PCP was an important aspect of the ET's task; the starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments (see Environment Agency v Rowan [2008] IRLR 20 EAT, para 27). In approaching the statutory definition in this regard, the protective nature of the legislation means a liberal rather than an overly technical or narrow approach is to be adopted (Langstaff J, para 18 of Harvey); that is consistent with the Code, which states (para 6.10) that the phrase "provision, criterion or**
> D **practice" is to be widely construed.**
>
> **[32] It is important to be clear, however, as to how the PCP is to be described in any particular case (and I note the observations of Lewison LJ and Underhill LJ on this issue in Paulley). And there has to be a causative link between the PCP and the disadvantage; it is this that will inform the determination of what adjustments a Respondent was obliged to make.**

E 39. Identifying the correct PCP can be difficult for litigants in person and even for lawyers. Nonetheless, it is clear that an appropriate PCP can be framed in a case in which a disabled person is not able to perform the functions of her role and seeks an adjustment of being moved into an
F alternative role. This is clear from the early landmark authority, **Archibald v Fife Council** [2004] ICR 954 (HL(SC)), a case decided under the Disability Discrimination Act 1995 in which the term equivalent to PCP was "arrangements" (which included "conditions"). Lord Hope of
G Craighead considered the matter as follows:

> **11. Mrs Archibald was employed by the council as a manual worker. It was an implied "condition" or an "arrangement" of her employment within the meaning of section 6(2)(b) that she should at all times be physically fit to do her job as a road sweeper. She met this requirement when she entered the council's employment on 6 May 1997. She underwent minor surgery in April 1999 as a result of which she became disabled. As a result she was no longer physically fit to do this job. This exposed her to another**
> H **implied "condition" or "arrangement" of her employment, which was that if she was physically unable do the job she was employed to do she was liable to be dismissed.**

> **12. Her disability placed her at a substantial disadvantage in comparison with others in the same employment who were not at risk of being dismissed on the ground that, because of disability, they were unable to do the job they were employed to do. These persons, a limited class, were her "comparators". There was nothing that the council could have done by way of adjustment to the manual labour job to cure that fact that she was unable to do that job due to her disability. But she was not so disadvantaged that she could not conceivably have been employed by them at all. If she had been given a job to do which she was physically able to do, the disadvantage which she was under in comparison with others in the same employment who were not at risk of being dismissed on the ground of disability would have been removed.**
>
> **13. So the question comes to be whether there were steps which the council could have taken by way of adjustment to the conditions of her employment to remove the disadvantage which she was under because she was at risk of dismissal because she was unable to do the job she was employed to do because of her disability. …**
>
> **18. The employment tribunal did not explore the question whether it would have been reasonable for the council simply to have transferred Mrs Archibald to a sedentary job for which she was suitable or whether the council's policy requirement for a competitive interview should have been dispensed with in her case. …**
>
> **20. The tribunal did not consider whether the policy requirement ought to have been adjusted in Mrs Archibald's case to remove the disadvantage which she faced due to the fact that she was at risk of being dismissed because she was not longer able to do her job as a road sweeper. That disadvantage could have been removed by transferring her to a sedentary post for which she was suitable from her previous post as a manual labourer. If that had been done, her disability would no longer have exposed her to the risk of dismissal on the ground that she was not physically able to do the job that she was employed to do.**
>
> **21. This is the point which lies at the centre of the issues that the tribunal will need to consider when the case is remitted to them and they are examining the steps that the council could reasonably have taken in all the circumstances by way of adjustment to the arrangements which exposed Mrs Archibald to the risk of dismissal on the ground of her disability.**

40. Lord Rodger of Earlsferry considered the possible difficulty in identifying the arrangement that is applied when a person becomes incapable of performing their duties, but considered they could be overcome by relying on the Code of Practice then in force:

> **40. … At first sight, the position is rather less clear where, as in the present case, an employee becomes disabled and, simply for that reason, is unable to carry out the essential functions of the job she is employed to do. As Lord McCluskey noted obiter, at para 43, the disabled person's disadvantage might seem to derive from the onset of her disability rather than from any arrangements made by her employer. Such an interpretation of section 6(1) would, however, overlook the provisions of the Code of Practice which was issued by the Secretary of State under section 53(1) of the Act and was subject to negative resolution of either House of Parliament under section 54(4). Section 53(6) provides that, where any provision of the code appears to the court to be relevant to any question arising in proceedings under the Act, "it shall be taken into account in determining that question." The key question to be decided in this case is whether an employer may be under a section 6 duty to an employee who becomes unfit to carry out the main, or essential, functions of her job. It appears to me that examples in paragraphs 4.20 and 6.21 of the Code of Practice are indeed relevant to that question. The former says:**

"If an employee becomes disabled, or has a disability which worsens so she cannot work in the same place or under the same arrangements and there is no reasonable adjustment which would enable the employee to continue doing the current job, then she might have to be considered for any suitable alternative posts which are available. (Such a case might also involve reasonable retraining.)"

Paragraph 6.21 includes this example:

"It would be justifiable to terminate the employment of an employee whose disability makes it impossible for him any longer to perform the main functions of his job, if an adjustment such as a move to a vacant post elsewhere in the business is not practicable or otherwise not reasonable for the employer to have to make."

These passages show, unmistakably, that the code proceeds on the view that an employer may have to make a reasonable adjustment under section 6 in the case of an employee whose disability makes it impossible for her any longer to perform the main, or essential, functions of her job.

41. Taking account of these passages in the Code of Practice, I therefore conclude that, for the purposes of section 6(1), the terms, conditions and arrangements relating to the essential functions of the disabled person's employment are indeed "arrangements made by the employer" which place the disabled person at a substantial disadvantage by comparison with persons who are not disabled if she becomes unable to carry out those functions.

42. If that is how section 6(1) is to be interpreted, what is the substantial disadvantage that the disabled person suffers in that situation by comparison with persons who are not disabled? It cannot be that she is required to perform the essential functions of the job, since that requirement is placed on everyone who holds the same job. Here, all road sweepers of Mrs Archibald's grade have to walk and sweep. In fact, however, the terms of the disabled person's contract of employment do not mean that, once she becomes disabled, she is forced to perform the essential functions of her job despite being unfit to do so. Here, Mrs Archibald never swept a road after she became unfit. What actually happens if an employee becomes so disabled that she cannot perform the essential functions of her job is that, under her contract of employment, she is liable to be dismissed. That is the substantial disadvantage she suffers. The contractual term, whether express or implied, which provides for her dismissal in these circumstances constitutes the relevant "arrangement" for the purposes of section 6(1). That arrangement places the disabled person at a substantial disadvantage by comparison with persons who are not disabled, because she is liable to be dismissed on the ground of disability whereas they are not. The appropriate comparators are therefore other employees of the employer who are not disabled, can therefore carry out the essential functions of their jobs and are, accordingly, not liable to be dismissed on the ground of disability.

41. Baroness Hale of Richmond considered the "arrangements" issue as follows:

62. The task before us is essentially one of statutory construction. Section 6(1) applies to 'any arrangements' made by or on behalf of an employer. These arrangements have to relate either to the arrangements for determining to whom employment will be offered, or to 'any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded' (section 6(2)). Subject to that, the term 'arrangements' is undefined. It could clearly relate to the council's redeployment policy, but in this case that did not put Mrs Archibald at a substantial disadvantage compared with anyone else. It could equally apply to the terms on which Mrs Archibald held her road sweeping job. An employer's arrangements for dividing up the work he needs to have done into different jobs are just as capable of being 'arrangements' as are an employer's arrangements for deciding who gets what job or how much each is paid. Some employers might combine cooking and bottle−washing

> **in one job while others might treat them quite differently. The job descriptions for all their posts are 'arrangements' which they make in relation to the terms, conditions and arrangements on which they offer employment Also included in those arrangements is the liability of anyone who becomes incapable of fulfilling the job description to be dismissed.**

42. Thus, using the language of the EqA 2010, it is clear that the requirement to undertake the duties of a job can be a PCP that can put a disabled person at a substantial disadvantage because they become incapable of performing them and so are at risk of dismissal, and that a reasonable adjustment can be moving the disabled person into an alternative role. The application of an employer's policies that place a disabled person at a significantly increased risk of dismissal in such circumstance can also be a PCP, the application of which places the disabled person at a substantial disadvantage, and may require an adjustment of moving the disabled person into another role. Similarly, if the inability of the disabled person to undertake the duties of her role results in her being absent from work, and she is dismissed as a result of the absences, but this could reasonably have been avoided by transfer into an alterative role, the dismissal is likely to be because of something arising in consequence of disability (the absence) that is not capable of justification (because a reasonable adjustment could have avoided it).

43. A requirement for an expression of interest, application and/or interview for an alternative role can constitute a PCP. In **London Borough of Southwark v Charles** UKEAT/0008/14/RN Mitting J considered a requirement of those in a pool for redeployment to attend an interview for a post that was contended to be a reasonable adjustment:

> **22. The Tribunal were plainly entitled to find that the practice of the Respondents in requiring those in the redeployment pool to attend for interview for the post for which they were applying was a practice, even though it may not have been a criterion or a provision. The Tribunal were also entitled to find that it put the Claimant at a substantial disadvantage because he could not attend an interview so, following upon the Respondent's practice, he could not demonstrate to them that he was qualified for any of the jobs for which he might have applied and, in particular, the job of Noise Support Officer, for which he had applied and been unsuccessful and in respect of which he had indicated a qualified expression of interest.**

44. Where such a PCP is applied it will, of course, still be necessary to show that it placed the disabled person at a substantial disadvantage. The question of whether it was necessary to make an adjustment by dispensing with the requirement will be a matter of reasonableness in all the circumstances of the case.

45. The duty to make reasonable adjustments applies to the employer. While it may assist, there is no requirement on the disabled person to suggest what adjustments should be made: **Cosgrove v Caesar and Howie** [2001] IRLR 653. However, as discussed above, the disabled person may often know what adjustment might have prevented their dismissal and so will set it out in the claim or when particularising it.

46. Discrimination because of something arising in consequence of disability is defined in section 15 EqA 2010:

> **15 Discrimination arising from disability**
>
> **(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**

47. Simler P considered the core components of a claim under section 15 EqA in **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090:

> **62. … the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence. (See City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746).**

48. Thus if an employee is dismissed because she is unable to undertake the duties of her role and/or because of ill health absence that results from a disability, each will be something that arises in consequence of disability and dismissal will be contrary to section 15 unless it is justified as being a proportionate means of achieving a legitimate aim. It is unlikely that justification can be made out if there was a reasonable adjustment that would have permitted the employee to remain in employment, such as being moved to an alternative role.

49. None of this is very complex. Something has surely gone awry if a disabled person who says that she could not carry out the duties of her role and was dismissed as a result, although she says that she could have undertaken an adjusted role, is found not to have identified a workable claim under the EqA 2010 because, for example, the correct PCP was not identified.

The focus of this appeal

50. This appeal is now entirely focused on the assertion that the claimant should have been redeployed to the FLL role. This can be analysed as a claim of failure to make a reasonable adjustment and, to the extent necessary, if any, as a claim for discrimination because of something arising in consequence of disability. It is not hard to see how the duties of the claimant's role as a Mover and/or the application of the absence management procedure to her could amount to PCPs, the disadvantage being the risk of dismissal due to absence and/or the inability to carry out the duties of her role, and the reasonable adjustment contended for being slotted into the FLL role. If necessary the claim could also be framed on the basis that the claimant's absence from work and/or inability to undertake her job duties each were something arising in consequence of disability, and that her resulting dismissal could not be justified in the absence of the reasonable adjustment of transfer to the FLL role having been made. This analysis is compatible with the

very brief description the claimant had given in her claim form when acting as a litigant in person, although the FLL was not specifically identified as an appropriate alternative role.

The claim as particularised and set out in the list of issues

51. Unfortunately, the waters became muddied when the claimant provided additional information and subsequently when the list of issues was agreed for the final hearing. The claimant was legally represented at the preliminary hearing for case management and the final hearing. The employment tribunal cannot be blamed for focussing its analysis on the way in which the claim was formulated in the list of issues. When engaged in case management it is easy to become beguiled by a list of issues that is reasonably concise and well set out. A list of issues is a tool to assist the tribunal to do its job and it is always worth considering carefully whether it actually works. Where the parties are represented it is the representatives that bear the principle responsibility for ensuring that the list of issues is up to the job.

52. In the list of issues the reasonable adjustment claim was put as follows:

> **FAILURE TO MAKE REASONABLE ADJUSTMENTS**
>
> **9. C relies on the following PCPs:**
>
> > **a) Failure to institute return to work interviews following sickness absence (2015-2018)?**
> >
> > **b) Requiring a certain level of attendance failing which disciplinary sanctions (including dismissal) would be imposed?**
> >
> > **c) A failure to follow the recommendations of OH (failure to substantively follow /implement advice dated 11 June 2017 and 14 July 2017 to redeploy C to a sedentary role)?**
>
> **10. Did the above happen and if so, do they amount to PCPs?**
>
> **11. If so, did the PCPs place C at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? C relies on the following alleged instances of substantial disadvantage:**
>
> > **a) Her levels of sickness absence were more likely and prolonged.**

b) She was prevented from returning to work and carrying out effective service (on 24 April 2018).

c) She suffered a loss of earnings as a result of prolonged sickness absence.

d) She was subjected to disciplinary sanction, i.e. dismissal.

12. If so, did R fail to take such steps as it was reasonable to have taken to avoid the disadvantage? C relies on the following reasonable adjustments:

a) Having an effective return to work interview procedure in place and implementing it.

b) Adjusting the disciplinary policy in cases concerning disability-related sick leave so as to remove sanctions when this is the cause of the absence or not taking such absence into account when considering sanctions. Alternatively, adjusting the trigger points for sanctions in cases of disability-related sick leave so as to increase the number of days absence applicable before sanctions are imposed.

c) Implementing the recommendations of OH.

13. C avers that the above would have removed the alleged substantial disadvantage as:

a) She would not have been subjected to disciplinary sanction and dismissed.

b) She would have been able to return to work and carry out effective service had the recommendations of OH been implemented.

c) Her financial losses would have been reduced.

d) R would have had a better understanding of the difficulties faced as a result of her disabilities, her current health status and the steps required in order to alleviate any difficulties in the workplace, had they implemented return to work interviews.

e) Her sickness absence would have been reduced.

53. While at first glance the list of issues seems acceptable, when it is thought through elements do not work. For example, PCPs will nearly always be of some general application. It is hard to see how "failure to institute return to work interviews" or "failure to follow the recommendations of OH" were PCPs of general application rather than treatment that was specific to the claimant and was contended to be detrimental.

54. If one seeks to extract from the list of issues those that are relevant to the claim based on the failure to transfer the claimant to the FLL role, there is a PCP of "Requiring a certain level of attendance failing which disciplinary sanctions (including dismissal) would be imposed" (Issue

11b). It is asserted that the claimant was subject to the disciplinary sanction of dismissal (Issue 11d). Transferring the claimant to the FLL role is not asserted as a reasonable adjustment in the list of issues. The closest is "Implementing the recommendations of OH" (Issue 12c). The nature of the occupational health advice is expanded upon, although in the issue in which it is asserted that failure to follow occupational health advice was a PCP, as being "to redeploy C to a sedentary role". However one looks at it there was no specific mention of the FLL role in the list of issues. While it is for the employer to assess what reasonable adjustments should be made, and an employment tribunal is not limited to considering only those adjustments that the claimant asserted should have been made, generally where a party is legally represented the tribunal can expect that the representative will have highlighted the adjustments contended for. In this case the respondent contends that the FLL role was not mentioned in the list of issues as it was peripheral to the core arguments being run by the claimant. The reasonable adjustment asserted by the claimant at the hearing in relation to the PCP of "Requiring a certain level of attendance failing which disciplinary sanctions (including dismissal) would be imposed" appears to have been adjustment to the relevant policy including trigger points (Issue 12b) rather than following OH advice (Issue 12c). As we shall see, that was the way in which the Tribunal understood the claim.

55. The section 15 claim was set out in the list of issues as follows:

> **DISCRIMINATION ARISING FROM DISABILITY**
>
> **4. R accepts that at all relevant times C was a disabled person by reason of rheumatoid arthritis and that it had knowledge of her disability.**
>
> **5. Did R treat C as follows:**
>
> **a) Fail to redeploy her permanently to a less physical role in accordance with OH advice.**
>
> **b) Fail to conduct return to work interviews following periods of disability-related sickness absence.**
>
> **c) Send her home from work on the basis that she was allegedly unfit because she was using a walking stick.**

d) Assess her as unfit to return to work without any reference to OH or other medical opinion.

e) Dismiss her for disability-related sickness absence.

6. If so, was this treatment unfavourable?

7. If so, was it because of something arising in consequence of C's disability? C relies on:

a) Disability-related sickness absence.

b) The effects of her disability (both actual and assumed) on her physical disabilities.

8. If so, can R show that the treatment was a proportionate means of achieving a legitimate end? R relies on the legitimate aim of requiting its staff to maintain consistent levels of attendance at work.

56. As with the claim for reasonable adjustments, some of the issues do not stand up to close examination. For example it is hard to see what "The effects of her disability (both actual and assumed) on her physical disabilities." (Issue 7d) means, let alone how it constitutes something arising in consequence of disability. So far as is relevant to the claims relied upon in this appeal "Disability-related sickness absence" is asserted as something arising in consequence of disability and dismissal "for disability-related sickness absence" as the unfavourable treatment.

The determinations of the employment tribunal relevant to this appeal

57. The majority of the Tribunal (the employment judge and one member) followed the structure of the list of issues, many of which are not relevant to this appeal. Because the list of issues is muddled there is a similarly confusing structure in the judgment. However, it would be harsh to criticise the Tribunal too much for following the structure that was advanced in an agreed list of issues when both parties were represented.

A **Reasonable adjustments**

58. The Tribunal identified the only workable PCP as being "Requiring a certain level of attendance failing which disciplinary sanctions (including dismissal) would be imposed?" (Issue 9b):

B

> **69 The second PCP contended for is, however, a PCP upon which the claimant can rely. That has been accepted on behalf of the respondent as has the fact that it would put the claimant "at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled". The Tribunal so finds. Thus, the duty is 'triggered' for the respondent "to take such steps as it is reasonable to have to take to avoid the disadvantage": section 20(3) of the 2010 Act.**

C

59. The majority then went on to consider substantial advantage and the adjustment it understood was contended for in relation to the disadvantage cause by application of the identified PCP:

D

> **70 The substantial disadvantage relied upon by the claimant in respect of that PCP is, "She was subjected to disciplinary sanction, i.e. dismissal" while the reasonable adjustment she relies upon is as follows:**
>
> > **"Adjusting the disciplinary policy in cases concerning disability-related sick leave so as to remove sanctions when this is the cause of the absence or not taking such absence into account when considering sanctions. Alternatively, adjusting the trigger points for sanctions in cases of disability-related sick leave so as to increase the number of days applicable before sanctions are imposed."**

E

60. It is clear that the Tribunal did not understand the claimant to be asserting that following occupational health advice by transferring her to a sedentary role was an adjustment the claimant was relying upon in respect of the application of this PCP.

F

G

61. The member of the Tribunal in the minority considered that there had been failings in the approach adopted by the Respondent:

> **Reasoning related to the minority judgement**
>
> **89 The respondent failed to address its legal responsibilities in this matter for the reasons set out below.**

H

> **90 Mr Raine and Mr Hodgson admitted in not having any training in equality matters.**

91 Mr Raine admitted not carrying out RTW interviews; it being noted that in his witness statement he had stated that he did not have to do so in relation to short periods of absence, which was retracted at the beginning of the hearing. Throughout Mr Raine's evidence he responded by stating "he would have done" or that "he could not remember", which rendered his evidence questionable.

92 The first OH report in June informed the line manager that the claimant would be covered by the Equality Act and therefore reasonable adjustments would be required but nothing was done until September when the claimant was informed to "work on her own initiative". Another manager who was unaware of this informal instruction told the claimant that as she was the only one there she would have to carry out the full duties.

93 The respondent's failure to take the matter seriously added to the claimant's problems, which in turn increased her level of absences.

94 It was not until almost a year later that another OH report suggested a redeployment that Mr Raine handed responsibility to Mr Hodgson. His response was to ask if any departments had vacancies. As none were forthcoming his advice was that the claimant look for vacancies and apply for them. Alternatively, a temporary position was offered to the claimant but with the caveat that she would not have a job to return to after it ended.

95 These responses did not amount to a reasonable adjustment.

62. This reasoning related to the process of considering the possibility of adjustments, not the question that the statute requires to be answered, whether there were steps that the respondent should reasonably have taken that could have prevented the PCP placing the claimant at a substantial disadvantage. The minority member did not identify a role into which the claimant should have been transferred and did not mention the FLL role.

The reasonable adjustment ground of appeal

63. It is only the second of the two grounds of appeal that refers to reasonable adjustments: "The Tribunal erred in dismissing the Appellant's claims under sections 15 and 20, Equality Act 2010, when concluding that because the Appellant had not formally applied for an FLL role, the question of whether she should have been redeployed to such a role was purely hypothetical." Insofar as that ground relates to reasonable adjustment, it fails because a requirement to formally apply for the FLL role was not relied upon as a PCP nor was transfer to the FLL role relied upon

as the reasonable adjustment that should have been made. I have no reason to believe that the employment tribunal did not determine the reasonable adjustment claim as it was argued. I do not consider that the Tribunal erred in law in failing to determine a claim that was not put to it. However, I also consider that it is clear from the approach the Tribunal adopted to the section 20 claim that it did not consider that transferring the claimant to the FLL role was a reasonable step that should have been taken to avoid dismissal so that dismissal was not justified, nor did it consider that it was unreasonable to expect the claimant to have demonstrated some interest in the FLL role if she was to be considered for transfer to it.

Discrimination because of something arising in consequence of disability

64. The reasoning of the majority is not entirely easy to follow because it followed the structure of the agreed list of issues. For example, failure "to redeploy [the claimant] permanently to a less physical role in accordance with OH advice" was asserted as unfavourable treatment because of something arising in consequence of disability. It is hard to see how it could be said that something that arose from disability, such as the claimant's absence, was the reason why the claimant was not transferred to a less physical role. More logically transfer to a less physical role was a potential adjustment that could have prevented the dismissal. As a result of the structure of the list of issues, the reasoning of the tribunal on the issues relevant to the appeal is not all contained in the same sections of the judgment.

65. The most relevant section to this appeal, in considering dismissal as unfavourable treatment that was because of the claimant's absence, is from paragraph 50:

> **50 In relation to this asserted treatment, the respondent has accepted, first, that the claimant's absence arose in consequence of her disability and, secondly, that her dismissal amounts to unfavourable treatment.**

51 The respondent's representative submitted, however, that the claimant had not shown that the unfavourable treatment of dismissal arose in consequence of her disability because she did not meaningfully seek to avoid her dismissal by way of redeployment. [The] Tribunal rejects that submission.

52 Thus, in connection with this asserted treatment, and addressing the above points in Pnaiser and using the notation there:

> **(a) The Tribunal is satisfied that there was unfavourable treatment (namely the claimant's dismissal) and that was effected by Mr Hodgson on behalf of the respondent.**
>
> **(b) The cause of or reason for that treatment (focusing on the reason in the mind of Mr Hodgson) was the claimant's significant sickness absence, both intermittent and long-term, which was caused by her disability.**
>
> **[c] The Tribunal is therefore satisfied that the reason for the unfavourable treatment was something arising in consequence of her disability (ie. her rheumatoid arthritis): see Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14.**

Justification

53 That is not an end to the matter, of course, as it is provided in section 15(1)(b) of the 2010 Act that there will not be discrimination in the circumstances where the respondent can "show that the treatment is a proportionate means of achieving a legitimate aim."

54 In this connection, the Tribunal adopts the two stage approach suggested at paragraph 4.27 of the Equality and Human Rights: Code of Practice on Employment (2011) ("the Code") (albeit there relating to the question of indirect discrimination) namely: "Is the aim ….. one that represents a real, objective consideration? If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?"

55 The Tribunal has also had regard to the guidance contained in the Code that the aim pursued should be legal, not discriminatory and must represent a real, objective consideration, which can include reasonable business needs and economic efficiency. To be proportionate, it should be "an 'appropriate and necessary' means of achieving a legitimate aim" which should not be achievable "by less discriminatory means". Finally, as to the meaning of "disadvantage", "It is enough that the worker can reasonably say that they would have preferred to be treated differently."

56 We also apply the decision in Hardys & Hansons v Lax [2005] IRLR 726 that in considering the principle of proportionality, our task is to strike an objective balance between the reasonable needs of the respondent against the discriminatory effect of its measure in order to assess whether the former outweigh the latter; that is an objective test. There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases unfair dismissal[.]

57 The Tribunal is satisfied that in this respect the aim of the respondent was to ensure that its staff maintained consistent levels of attendance at work, which is the purpose of the AMP and the Disability Policy, and the Tribunal is further satisfied, in terms of the Code, that that "represents a real, objective consideration". As was said in Carranza, "it was legitimate for an employer to aim for a consistent attendance at work".

58 Moving onto the question of proportionality, in oral evidence the claimant accepted that she was managed in accordance with, first, the AMP and later the Disability

Policy and she made no complaint about the application of either of those policies in themselves. The issue of the delayed return to work meeting in September 2016 apart, the Tribunal is satisfied that the respondent did apply those policies appropriately, particularly so when matters relating to the claimant came to be managed by Mr Hodgson who was assiduous in his approach to both the informal and formal meetings. At the conclusion of the first formal meeting on 24 April 2018 it was clear to the claimant that unless she was unable to return to work in her contractual role or by redeployment to an alternative role she faced the prospect of dismissal. That is apparent from the note that the claimant "believes that she is unfit to do her current role but that is unfair to give her notice and that she would challenge this." (252). Following that meeting, the respondent instigated the formal 12-week redeployment process in accordance with the Disability Policy but to no avail. Then, in the letter of 15 June 2018 inviting the claimant to the second formal meeting, she was warned that in the circumstances, "the outcome of this meeting could result in your dismissal" (262). At the meeting, having discussed the claimant's current health, the OH advice on the claimant's prognosis and her ability to meet the requirements of her role, the nature of her job, the needs of the business for her role to be carried out, the reasonable adjustments made and the progress in identifying a suitable alternative role, that was indeed the outcome (288). The employment of the claimant was to end on 12 October 2018 unless an alternative role could be found for her during her notice period.

59 A particular point arises in this regard in that at various times during the evidence from the respondent's witnesses at the Tribunal hearing reference was made to the claimant applying for vacancies. The Tribunal considered this point carefully given that it has long been established in decisions such as Archibald v Fife Council [2004] IRLR 651 that where an employee is unable to continue in his or her current job as a result of a disability, the duty to make reasonable adjustments will often extend to taking positive steps to facilitate the employee's redeployment: ie. to treat the disabled person more favourably than other, non-disabled, employees who are interested in being appointed to a particular post. From the oral evidence of the witnesses, particularly Mr Hodgson, however, it was apparent that in that sense the respondent was only looking to the claimant to express an interest in vacancies, which the claimant confirmed she had not done. Had she done so, although she might then have been interviewed, the focus of that interview would have been on ensuring that the claimant was able to do the job rather than it being a competitive interview with other candidates in the normal sense. That much is borne out by the evidence of Mr Hodgson who, in answer to a question from a Tribunal member, gave an example of JB who suffered from a restriction that prevented her performing her usual role and expressed an interest in a vacant role and, although she had not interviewed as well as another person, she had been appointed in preference. On a related point, the Tribunal accepted the evidence of Mr Hodgson, which was unchallenged, that the claimant is the only person he had ever dismissed under the Disability Policy as in all other cases the respondent had been able to adjust individual roles or redeploy the person successfully.

60 At paragraph 4.26 of the Code it is stated that "it is up to the employer to produce evidence to support their assertion". On the basis of the findings summarised above, the Tribunal is satisfied that the respondent has done that.

61 In all the above circumstances, therefore the Tribunal is satisfied (again with reference to the Code) that the means the respondent used to achieve its legitimate aim was proportionate: it was "appropriate and necessary in all the circumstances".

62 In conclusion of this aspect of the claimant's claim in respect of discrimination arising from disability, for the reasons set out above, the Tribunal is satisfied that the claimant's complaint that the respondent discriminated against her by treating her unfavourably because of something arising in consequence of her disability as described in Section 15 of the 2010 Act, and discriminated against her contrary to

Section 39 of the 2010 Act by dismissing her and subjecting her to other detriment is not well-founded.

66. It is apparent that the Tribunal did consider the possibility of the claimant moving to an alternative role as relevant to the question of whether dismissal was a proportionate means of achieving a legitimate aim. There was no specific reference to the FLL role in this section, but it was not the focus of the claimant's argument before the Tribunal. The Tribunal did consider the FLL role in the section in which it considered the alleged unfavourable treatment of failing to redeploy the claimant "permanently to a less physical role in accordance with OH advice":

> **31 The claimant's position in respect of ability to return to work in any role did not change during the few months after the first formal meeting. In a meeting with Mr Hodgson on 22 May she told him that she "now felt unable to work in any capacity" (266) and, similarly, during a conversation they had on 1 June, she stated that she could not "think of any role on site that she could complete" (265). It was at this meeting that Mr Hodgson identified a clear shift in the approach of the claim from being very strong in her expectations of returning to work in some capacity to recognising that this was unlikely; and the claimant had agreed.**
>
> **32 This continued into the second formal meeting on 12 July 2018 when the claimant stated that there were no opportunities available and there was not any alternative role which would support her condition in a better way (284). Indeed, the claimant's evidence was that she had not applied for any alternative roles by way of redeployment and, although in her witness statement the claimant raised comparisons with other persons whom she says had managed to gain roles that might have been offered to her, the Tribunal accepts the evidence of Mr Hodgson Ms Angus that these were not true comparisons.**
>
> **33 In that respect the remark made by Mr Hodgson in oral evidence that one of the reasons why the claimant had not been considered for an FLL role was her attendance record requires attention. In isolation, that could be said to be indicative of discrimination arising from disability but, considering Mr Hodgson's fuller explanation (ie. that the claimant had no management experience, had never undergone any managerial training, had never expressed an interest in the role, was not suitable for the role, it was not purely administrative but regularly involved physical work and was not sedentary) and the totality of the evidence before the Tribunal in the round, the Tribunal does not consider that that remark can or should be considered in isolation. In any event, the matter is to an extent hypothetical as it is not the case that the claimant had ever registered any interest in the FLL role (or even in attending the Assessment Centre) and had been overlooked or refused it because of her disability; that might have amounted to discrimination arising from disability.**
>
> **34 In summary of this asserted treatment of the respondent failing "to redeploy the claimant permanently to a less physical role in accordance with OH advice", for the reasons set out above the Tribunal is not satisfied that the clear-cut OH advice was to redeploy the claimant permanently to a less physical role and even when that opinion was expressed and did become clearer, especially in the shape of the Jobfit Plus report there was no failure on the part of the respondent whose managers did everything they could to explore redeployment opportunities timeously but the claimant did not cooperate in that and, especially in the later stages, steadfastly refused to consider any return to work in any capacity, her focus being on ill-health retirement.**

The discrimination because of something arising in consequence of disability grounds of appeal

67. Both grounds of appeal refer to the section 15 claim. Ground 1 asserts that the Tribunal erred in failing to consider whether excluding the claimant from consideration for the FLL role because of her poor attendance record involved a breach of section 15 EqA 2010, and Ground 2 asserts that the Tribunal erred in dismissing the section 15 and 20 claims because it concluded that redeployment to the FLL role was purely hypothetical in circumstances in which the claimant had not formally applied for an FLL role.

68. I do not consider that these grounds of appeal reflect the manner in which the case was put to the Tribunal. Transfer to the FLL role was not expressly raised as a reasonable adjustment. Even if it had been, it is clear that the Tribunal did not consider it was a realistic alternative. There were a number of reasons for this. Up to the dismissal meeting the focus of the claimant had been on ill health retirement and she had asserted that there were no alternative roles to which she could return. A number of the reasons why Mr Hodgson considered the claimant was not suitable for the FLL role are not subject to challenge in the two grounds of appeal that were permitted to proceed. The Tribunal accepted his evidence that the claimant had no management experience and the FLL role involved physical activity and was not sedentary – it was not purely administrative but regularly involved physical work, as a result of which the claimant was not suitable for the role. These reasons were sufficient of themselves to demonstrate that the FLL role was not a realistic alternative to dismissal. Accordingly, even if it had been the basis of the claim as put to the Tribunal it would have failed.

69. It is also not the case that the respondent required a formal application for the FLL role. While Mr Hodgson considered the fact that the claimant had never expressed an interest in the

FLL role supported his assessment that it was not suitable for her, the evidence was not that, had the role been considered suitable, the claimant would have been required to make a formal application. The possibility of a move to the FLL role was purely hypothetical because the claimant was not suitable for it, rather than because she did not apply for it.

70. Mr Hodgson did state that the claimant would not have been considered for appointment to the FLL role, which was a promotion, because of her absence record. The absence record was something arising in consequence of disability. Accordingly, it was arguable that to the extent that absence was a factor in the claimant not being moved to the FLL role there could have been a breach of section 15 even if, for other reasons, the role was not suitable, although no significant loss could flow from such a breach. The absence record would be unlikely to be a legitimate reason why moving the claimant to the FLL role could not have been a reasonable adjustment if it would have prevented the absences continuing. However, the claim was not advanced in the Tribunal on that basis. The comment about the claimant's absence came out in Mr Hodgson's oral evidence. The FLL role had not been a feature of the claimant's case at the time that witness statements were exchanged. The claimant could have applied to amend to raise a section 15 claim on this basis once Mr Hodgson had given his evidence at the hearing, but did not. As stated above, transfer to the FLL role was not specifically asserted as a reasonable adjustment and there were, in any event, other reasons why the tribunal found as a fact that the claimant was not suitable for the role so that transfer to it would necessarily not have been a reasonable adjustment.

71. In conclusion, the employment tribunal cannot properly be criticised for determining the claim on the basis it was put to them in an agreed list of issues at a hearing at which both parties were represented. The particularisation and agreed list of issues did much to obscure the straightforward underlying claim and resulted in a structure to the judgment that is difficult to

follow in places. In the end, I do not consider that this resulted in an injustice to the claimant because the Tribunal found as a fact that the FLL role was not suitable for her. That was the case irrespective of whether she needed to express an interest in the role or would not be considered for a promotion because of her absence record.

72. The appeal is dismissed.