



THE EMPLOYMENT TRIBUNALS

Claimant: Miss J Beveridge

Respondent: Durham University

Hybrid hearing heard at Newcastle upon Tyne Hearing Centre

On: 13th, 14th & 15th September 2021

Deliberations: 20th September 2021

Before: Employment Judge Martin

Representation: Mrs A Tarn
Mr S Carter

Claimant: In Person (supported by Mr Sewell, Friend)

Respondent: Mr P Michell (Counsel)

This case was partly heard by Cloud Video Platform (CVP). It was heard as a hybrid hearing with the witnesses all giving evidence in person. The parties consented to the case being heard as a hybrid hearing.

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is not well-founded and is hereby dismissed.
2. The claimant's complaint of disability discrimination is also not well-founded and is hereby dismissed.

REASONS

Introduction

1. The claimant gave evidence on her own behalf. Mr Peter Carn, manager of Archaeology Services, Professor Robin Skeates, the Archeology Department and Professor Michael Bentley of the Geography Department gave evidence on behalf of the respondent. The tribunal was provided with an agreed bundle of

documents to which a couple of additional documents were added during the course of the hearing.

The law

2. The law which the tribunal considered was as follows:-

Section 98 (1) Employment Rights Act 1996 “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.”

Section 98 (2) “A reason falls within this subsection if it--

- (a) relates to the capability.....of the employee for performing work of the kind which he was employed to do.”

Section 98 (4) “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.”

Section 15 (1) Equality Act 2010 “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.”

Section 15 (2) “Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

Section 20 Duty to make adjustments. Section 20 (2) “The duty comprises the following three requirements:-

Section 20 (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.”

Section 21 (1) Equality Act 2010 “A failure to comply with the first.... requirement is a failure to comply with a duty to make reasonable adjustments.”

Section 21 (2) “A discriminates against a disabled person if A fails to comply with that duty in relation to that person.”

3. The case of **Taylor V Alidair Ltd 1978 IRLR82** where the Court of Appeal held that in the case of capability, the employer must have a reasonable belief that the employee is incapable of undertaking the role which he or she was employed to take and that must be based on reasonable grounds. In that regard the employer was required to undertake consultation with the employee; obtain medical advice; and consider alternative employment.
4. The case of **Spencer v Paragon Wallpapers Limited 1976 IRLR373** where it was held that the basic question to be determined in capability dismissals is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer.
5. The case of **Garricks (Caterers) Limited v Nolan IRLR 259** where it was held that employers cannot be expected to go to unreasonable lengths in seeking to accommodate someone who is not able to carry out his job to the full extent. What is reasonable is very largely a question of fact and degree for the tribunal.
6. The case of **Coxhall v Goodyear GB 2002 IRLR742** held that there can in certain circumstances be a duty on an employer to dismiss an employee to protect him from physical danger.
7. The tribunal was also referred to and considered the case of **Merseyside and North Wales Electricity Board v Taylor 1975 IRLR60** which held that, when considering whether it is reasonable or unreasonable to dismiss an employee because of his incapacity, the employer cannot be called upon to create a special job for an employee however long serving he may have been. That case was reinforced in the case of **Taylor Plan Catering (Scotland) v McInally 1980 IRLR53**.
8. The tribunal also considered the case of **Hardy and Hansons PLC v Lax 2005 IRLR 1565**. In that case the Court of Appeal held that “The principle of proportionality requires the tribunal to take account of the reasonable needs of the business, but at the end of the day it was for the tribunal to make its own judgment as to whether the rule imposed was 'reasonably necessary'. It is not enough that the view is one which a reasonable employer could take.”
9. The case of **Buchanan v Commissioner of Police of the Metropolis 2016 IRLR 918** where it was established that the focus is on whether the treatment i.e. dismissal was proportionate as opposed to the procedure adopted.
10. The case of **McCulloch v ICI 2008 IRLR 846** where the Court of Appeal set out a four state test to determine justification, namely: 1) the burden of proof is on the respondent to establish justification; 2) the tribunal must be satisfied that the measures must “correspond to a real need... are appropriate with a view to achieving the objectives pursued and are necessary to that end”. The reference to “necessary” has subsequently been held to mean “reasonably necessary”; 3)

the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it; 4) it is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter.

11. The tribunal was also referred to and consider the case of **Hensman v Ministry of Defence UKEAT/0067** in particular paragraph 44 where it was held that in assessing proportionality a tribunal has to have regard to the business needs of the employer particularly where there are legitimate aims to be served.
12. The tribunal was also referred to and considered the case of **City of York Council v Grossett UKEAT/0015/16** and in particular paragraph 21 thereof where it was held that the test of justification is an objective one and the tribunal must have in mind the respondent's workplace practices and business considerations which may allow for a number of permissible responses in undertaking any balancing exercise.
13. The tribunal was also referred to the case of **Birtenshaw v Oldfield 2019 IRLR946** where the EAT held that in assessing proportionality the tribunal has to consider what is reasonably necessary to achieve the legitimate aim.
14. The tribunal was also referred to and considered the case of **Chief Constable of South Yorkshire Police v Jelic 2010 IRLR744** where it was held that there is no obligation on an employer to create a post specifically for a disabled person.
15. The tribunal also considered the case of **Tarbuck v Sainsburys Supermarkets Limited 2006 IRLR664** where it was held that there is no obligation on an employer to create a post specifically which is not otherwise necessary merely to create a job for a disabled person. It went on to say that could not therefore be an adjustment that they were required to make as part of their statutory obligation.
16. The case of **Cordell v Foreign and Commonwealth Office 2002 ICR280** where it was held that relevant steps were reasonable for the purposes of making an adjustment. This includes several relevant considerations about the size of the adjustment and the financial cost of the adjustment.

The issues

17. The issues which the tribunal had to consider were as follows:-

In respect of the complaint of unfair dismissal the tribunal had to consider the reason for dismissal. It was pleaded as capability. In that regard the tribunal had to consider whether the respondent reasonably believed that the claimant was incapable and whether that was based on reasonable grounds.

18. The tribunal also had to consider whether the respondent followed a fair procedure and whether dismissal was a reasonable response in circumstances of the case.
19. In relation to the complaints of disability discrimination the tribunal noted that the respondent accepted that the claimant was a disabled person as defined under Section 6 of the Equality Act 2010.
20. In relation to the complaint of discrimination arising from disability, the tribunal had to consider whether the respondent treated the claimant unfavourably by dismissing her with effect from 31st January 2019. The tribunal then had to consider whether the claimant was dismissed because of “something arising in consequence of her disability. The “something” arising in consequence of her disability was her inability to fulfil the full range of duties of her post. In that regard, the tribunal had to consider whether that was a consequence of her disability. None of those issues were really in contention in relation to these proceedings.
21. The real issue which the tribunal had to consider was whether the respondent could show that the treatment i.e. the claimant’s dismissal was a proportionate means of achieving a legitimate aim. The aims relied upon was ensuring that employees were able to carry out their duties or most of the duties of their role.
22. In relation to the complaint of reasonable adjustments, the tribunal noted that the provision, criterion or practice (PCP) relied upon was the requirement that employees be able to fulfil the full range of duties of their post. The substantial disadvantage to the claimant was effectively her dismissal.
23. The tribunal also had to consider whether the respondent knew or ought reasonably to have known that the claimant was likely to be placed at the disadvantage by that PCP which again was not really an issue in these proceedings.
24. The real issue in these proceedings was whether or not the respondent failed to take such steps as were reasonable to take to avoid the disadvantage to the claimant. The claimant alleges that the reasonable steps which the respondent should have taken which it failed to take was, firstly, to provide her with appropriate computer equipment earlier than the respondent in fact did provide it which was in July 2018 and, secondly, and more significantly, to adjust the duties of her role so as to enable her to undertake a range of duties (albeit reduced) as set out in further and better particulars provided by her in these proceedings. This included identification of finds; soil sampling, retraining to do environmental analysis; training to abrade artefacts; taking building recording; digitising archaeological plans; writing up archaeological site reports; oasis database and general office based work.

Findings of fact

25. The claimant was employed by the respondent as a project archaeologist. She initially commenced employment with the respondent in 2003 and then took a

number of fixed term contracts. She was offered a permanent contract in January 2010.

26. The claimant was employed as a project archaeologist. That job principally consisted of undertaking archaeological fieldwork including excavation, recording and surveying at the site. The parties both agree that the claimant's role was predominantly based in the field. The only job description which appears to have been provided to the claimant was when she was employed on the temporary fixed term contract in 2013, which sets out details of the duties of the role and is at page 68. It refers to archaeological excavation, recording and surveying and conducting project work. It also refers to conducting post excavation works and general office duties.
27. There was some debate about the percentage of time the claimant spent undertaking field work. Mr Carne said that the role was effectively 80% fieldwork with 20% spent on report writing and lab work, albeit that it was agreed by all parties that those percentages may vary from time to time. Initially the claimant suggested that the work might sometimes be approximately 50/50. However, in her witness statement and evidence to the tribunal, she acknowledged that the percentages were indeed in the region of 80% fieldwork and 20% report writing/lab work. She had produced details of the time split from her previous years before 2014, which are consistent with those percentages. It should be noted that 2010 is the only year where she spent more than 50% of the time in the lab. Mr Carne, in his evidence, explained that this was due to the reduction in work as a result of the recession in 2009. In 2014, she spent in fact substantially less time in the lab up to sustaining her injury. Between 2011 and 2019 the percentage was somewhere in the region of 20-30%.
28. In relation to the 20% spent outside fieldwork: - 10% of it related to work in the lab which was again split between soil sampling and washing of artefacts. The other 10% was effectively engaged in report writing of the work undertaken on the site.
29. The respondent has an ill-health and absence policy which is set out at pages 74 – 79 of the bundle. At page 77 it sets out the procedure for long-term ill-health. It commences with an informal consideration of the long-term ill-health or absence and includes looking at the nature of the employee's medical condition and absence as well as what changes can be made to the employee's role. It also anticipates a referral to occupational health. It then goes on to deal with the formal consideration of any long-term ill-health absence and the appeal process which is at pages 78 – 79 of the bundle.
30. The respondent also has a redeployment policy. That policy is set out at pages 80 – 84 of the bundle. The policy states that there is a priority on redeployment of those members of staff who are at risk of redundancy and those, who for medical reasons, can no longer carry out their current role. It also refers to pay protection being provided for a period of twelve months - page 83 of the bundle. It also states at page 83 that, if redeployment is for a period of less than one year and not extended, notice will then be issued and the individual is once more put under threat of redundancy.

31. In November 2014 the claimant sustained a back injury. She informed her manager Mr Carne, page 85 of the bundle. She then continued to update Mr Carne of her sickness absence. He acknowledged her regular updates by e-mail which is noted at pages 86 – 90 of the bundle. At that stage, she was receiving physiotherapy and was hoping to return to normal. She moved into the laboratory, because at that stage she was unable to go out and work on site. On 12th March 2015, she indicated that she believed that she was fit to go out on site (page 91 of the bundle), but she then suffered an injury again and reported the matter to Mr Carne. He then referred her onto the respondent's occupational health advisors (page 92 of the bundle). Over the next few months, the claimant continued to keep Mr Carne updated on her medical condition and treatment, page 93 – 99 of the bundle. At that stage Mr Carne had moved the claimant into the laboratory. He was simply acknowledging the claimant's updates on her condition.
32. In August 2015, the claimant indicated that she was also having problems with soil processing in the laboratory (page 100 – 101). She therefore no longer continued to undertake soil processing in the laboratory which accounted for approximately 5% of her role.
33. The claimant was then referred onto occupational health in September 2015, who produced a report after seeing the claimant in October 2015. That report is at page 111 of the bundle. In that report, occupational health acknowledged that the claimant is experiencing quite significant symptoms affecting her right shoulder which is affecting her ability to undertake the usual physically demanding tasks relating to her role. It refers to a referral for an MRI scan and the physiotherapy which she had been receiving. In the report, occupational health note that the claimant is undertaking amended duties and refers to a chair which has been provided to her, which she confirms is beneficial to her. Occupational health talk about the limitations on the claimant and advise her to alternate her tasks and not to spend prolonged time at the computer. There is no reference in that letter to any adjustments to be made in relation to computer work. In her evidence to the tribunal, the claimant did not suggest, when she was questioned on cross examination about the matter, that she had indicated to occupational health that there were any issues relating to sitting at the computer or that any adjustments could be made in that regard.
34. Thereafter, from August 2015 to January 2017, the claimant received a number of different treatments to her shoulder which included physiotherapy and steroid injections.
35. During this period the claimant was assigned to alternate duties working in the laboratory as, at this stage, she could not undertake physical work or repetitive tasks. She therefore could not go out on site to process soil samples. The claimant accepted that was the case in her evidence to the tribunal. She was working in the laboratory documenting finds and washing artefacts.
36. At this stage, the claimant was still hoping to be able to ultimately go back out on site.

37. The claimant regularly kept Mr Carne updated on her medical condition and treatments as is noted at pages 102, 109, 110, 112 – 127, 129 and 131. Mr Carne, her manager, acknowledged those updates, albeit that he did not comment on any specific events or recommendations at this stage, other than to move her to work in the laboratory.
38. In January 2017, the claimant underwent surgery on her shoulder. At this stage both the claimant and the respondent were hopeful that the claimant was likely to recover and be able to return to her role as a project archaeologist.
39. At this stage, the claimant was being retained to undertake work in the laboratory only and was not able to go out on site. The respondent says that the work which the claimant was undertaking in the laboratory was not funded and that ultimately most of it really amounted to giving the claimant something to do. It has produced timesheets categorising the work undertaken by the claimant over the period 2015 to 2018 which is at pages 377A to 377B. The commercial work which was funded is coloured yellow and consisted of various jobs which were being worked in the laboratory by the claimant over this period. The green coding represents work being undertaken in the laboratory on different projects by the claimant which was not funded, so it might include volunteer work or student work. It also consisted of archiving, tidying and lab maintenance. The blue coding consisted of a project called Binchester which was an ongoing site which was not funded. It involved work to send artefacts off to specialists. In 2015, it is noted that 60% of the claimant's work was based on commercial work (yellow coding). In 2016 and 2017 that figure had dropped to 10% overall. During 2016 and 2017 the claimant was predominantly working on Binchester. By that stage 80% of her work was on the Binchester project over those two years.
40. In her evidence the claimant said she believed that the work she was doing in the laboratory was work which needed to be done. Mr Carne said in his evidence that, although some work needed to be done on the Binchester project, it did not require a great deal of work because the artefacts were being sent to specialists who were going to be doing the work on the artefacts. He said the work was administrative and simply involved assigning that work to particular specialists. The claimant said that she needed to undertake a lot of work in order to make sure that the artefacts were being sent to the right specialist. Mr Carne said that most of that work was really just duplication and was not required. The claimant in her evidence to the tribunal was somewhat troubled that the respondent suggested that she was undertaking work which was not required and that they were just keeping her busy. It does not appear that that was ever made clear to the claimant during the course of the last few years of her employment.
41. After the claimant had undergone surgery, she was then referred back to occupational health in March 2017. The report from occupational health was received in April 2017. That report is at page 144 of the bundle. It states that the claimant is only capable of limited activities including documentation of finds and some washing of articles. It states that she will need to refrain from field work or any work which requires repetitive stretching of the right arm or any moving and

handling activity. The report indicated they were hoping for full healing six months after surgery.

42. The claimant continued to keep Mr Carne updated on her health and treatment as is noted at pages 146 – 150. The claimant was then seen by her consultant in June 2017. It was noted that the claimant by him that the claimant had not regained the strength pre-operative. He also notes that her symptoms are still persistent, although it was agreed that she will be referred back in a few months' time - page 151 of the bundle.
43. The claimant was also seen by the respondent's occupational health advisors in June 2017 who state that the claimant has full range of movement and that her strength is improving but that she still has functional limitations. Occupational health note that repetitive movements causes her problems. They note that she is managing at work undertaking documentation of finds and washing of articles. It was noted that full healing may take up to twelve months before her full function is known - page 152 of the bundle.
44. The claimant continued during 2017 to undertake work in the laboratory. At this stage, the work she was undertaking was principally in relation to the Binchester project. The respondent says that this work was not commercially viable albeit that the claimant said that the work still needed to be done.
45. In August 2017 the claimant was seen again by her consultant orthopaedic surgeon, who stated that he was not sure that any real benefit was achieved from the surgery - page 158 of the bundle. The claimant was also referred to occupational health whose report is at page 162 if the bundle. In that report occupational health indicate that, because the claimant's restrictions are now likely to be long term, she has been referred to the consultant occupational physician. The claimant herself acknowledged to Mr Carne, as noted at page 160 that, although the consultant was pleased with her recovery, it does not appear that there has been any improvement in her original problem and it seems unlikely that there will be any improvement.
46. In October 2017, the respondent looked to start the ill-health absence procedure. Mr Carne arranged an informal meeting with the claimant for October 2017. The claimant seemed to acknowledge that there may be a risk to her role when she became aware of the further referral to occupational health - page 166 of the bundle.
47. The claimant attended an informal meeting with Mr Carne when he informed her that the respondent was commencing formal long-term ill-health procedure. At that meeting, he indicated that the claimant had been undertaking reduced work but that was only a temporary adjustment and had been put in place to enable the claimant to recover as the respondent and the claimant had hoped that she would ultimately be able to recover. At that meeting, he referred to the occupational health and consultant's reports. The claimant says that she was invited to an informal meeting and was told that the respondent was proceeding down a formal route. She said that she had not necessarily at that stage appreciated that the adjustments to her role had been temporary. She indicated

in her evidence that she did not think that Mr Carne had ever indicated that those adjustments had been temporary as such.

48. A formal meeting took place under the respondent's ill-health procedure on 7th November. The claimant was accompanied by her trade union representative. The minutes of that meeting are at page 174 – 178 of the bundle. At that meeting, a discussion took place about the claimant's medical condition and the situation regarding the claimant's shoulder injury and the support which had been provided and the potential next stages. There was a discussion about the occupational health report and about what work the claimant was capable of undertaking. The Claimant acknowledged in that meeting and in her evidence that surgery had not made a huge difference- page 175 of the bundle. She confirmed that, in relation to repetitive work, she could do light washing of artefacts and scrubbing. She also indicated that sometimes she did not know there was a problem until sometime later. She also said that she did not have any discomfort when working at the computer other than reaching over and picking things up - page 176.
49. The meeting concluded with the Mr Carne indicating that they would await the report from occupational health in December and review the matter thereafter - page 177.
50. The respondent wrote to the claimant following that meeting in which they refer to the occupational health and consultant's report and work which the claimant was capable of undertaking. They indicate they will await the further occupational health report. It was noted that the claimant had provided a list of tasks which she thought she was able to perform. She said that list of tasks was provided to Mr Carne but was not discussed at the meeting. The list is at page 169 of the bundle. The list of tasks refers to finds identification, organising finds processing, operation of archives to the relevant museum, training to do environmental identification, environmental residues, working on Binchester finds, supervising volunteer finds, processing delicate finds, using the electronic dispersive xray machines and training to abrade artefacts. It also refers to general office based work which includes digitising, setting up site reports and desk based assessments and using oasis database. She subsequently added to that report environmental analysis in November 2017 - page 182.
51. The claimant was then assessed by the respondent's occupational health advisors in December 2017, who notes that she is due to be reviewed by her specialist consultant in February 2018. Occupational health note the rehabilitation may be between eighteen to twenty-four months. They confirm that they believe the condition would amount to a disability under the Equality Act 2010. The occupational health physician also states that the claimant is unlikely to be able to undertake excavation on sites, but would be able to undertake alternative tasks like environmental analysis, works finds, logging, abrading and xraying. They also state that the claimant is able to undertake alternative tasks including computer work. They do not suggest any adjustments need to be made in that regard (page 184). The occupational health physician also refers to a potential work based assessment and indicates that adjustments might include

taking regular breaks; prolonged period of immobility and flexibility to attend any appointments. The report is at page 183 – 186 of the; bundle.

52. A further meeting took place with the claimant in January 2018. At that meeting the claimant was represented by her trade union. It was noted that recovery may take eighteen to twenty-four months and that the claimant would be unlikely to be able to undertake field work. At the meeting, the claimant confirmed that she could not undertake digging at present. Mr Carne said he explained to the claimant that, if washing of artefacts caused the claimant a problem, then she should refrain from doing that work. There was also a discussion about the duties which the claimant was undertaking which Mr Carne said some of which were the responsibility of other colleagues. It was noted that the claimant could not be moved to undertake those on a permanent basis. Mr Carne said that there were no positions which were entirely lab based and that it would not be possible to create an entirely new role. The claimant suggested she continue with the reduced duties for a further period of time. The respondent indicated that it would have to consider that the timescales involved. At this meeting, the respondent made the claimant aware of the respondent's redeployment register. The claimant was encouraged to access that register. The respondent agreed to review the matter further after the claimant received a further report from her specialist. The letter sent to the claimant following that meeting is at pages 190 – 191 of the bundle.
53. Following that meeting the claimant clarified the position with regard to scrubbing of pots and the impact of that activity on her, 192.
54. The claimant was reviewed by her orthopaedic specialist in February 2018. His report is at page 196 of the bundle. It states that her symptoms are really much the same as they were preoperatively. He also states that he does not expect to see any further significant improvement.
55. The claimant was subsequently referred onto the respondent's occupational health physician. The claimant was assessed on 10th April 2018. The occupational health physician's report is at page 200 – 201 of the bundle. He stated in his report that currently the claimant's underlying health condition post-surgery means that unfortunately any repeated twisting or rotating of the right shoulder will aggravate her condition. He said that any breaking up of the day to rest periods would not assist the situation. He went on to state that, as it currently stands, the claimant's underlying health condition is not pending any further medical treatments and as such her health condition is likely to remain in the foreseeable future in the long term. He states that unfortunately any movements or duties that require her to twist or repeatedly rotate her right shoulder would aggravate and cause her pain and discomfort. He states that in his view the claimant is not able to carry out the full duties of her job description. There are no further medical treatments so the situation is likely to be permanent. He said that he had discussed the matter with the claimant who would not be able to carry out the following duties of her role: archaeology excavation, conducting watching briefs, progressing environmental samples and geographical survey or any roles which involve repeated twisting and rotating her right shoulder. He said therefore any restrictions on her duties are likely to be on

a permanent basis. He went on to state that her underlying health condition is long term and is likely to amount to a disability. He suggested a referral onto Access to Work who might be able to assist with a workplace assessment. Dr Wong went on to say that her functional limitations are likely to remain now for the foreseeable long term and that the best case scenario is if they are able to consider adjustments long term and/or alternative work long term or some further suggestions are made by Access to Work. That report is at page 200 – 201 of the bundle.

56. At or around this time the respondent was undertaking a major reorganisation within the university. All employees were informed about this reorganisation. In their evidence, the respondent's witnesses indicated that, as a result of the reorganisation of posts within the university, new positions were simply being advertised on a fixed term basis of twelve months and that no posts were being advertised at this stage on the redeployment register as long term posts. None of the respondent's witnesses were aware whether the claimant had been made aware of that latter fact, albeit they said that the position had changed subsequently and the claimant had herself initially been employed on a number of fixed term contracts which had been extended and had ultimately led to a permanent role.
57. In May 2018 the claimant was invited to a further meeting under the respondent's long-term absence procedure. The claimant attended the long-term ill-health absence meeting with her trade union representative. The notes of the meeting are at page 208 – 212 of the bundle. The meeting was conducted by Mr Carne and a representative from HR. The meeting was held to discuss the further reports received from the claimant's specialist NHS consultant and occupational health.
58. At that meeting, the claimant confirmed that she could not do any repetitive movements and that there were no treatments available. She accepted at page 209 that she could not do the vast majority of the responsibilities outlined in her job description. She said that she had been processing items in the lab and washing and cleaning. She confirmed that she could not undertake digging, soil processing or carrying heavy loads, page 210. A discussion took place about whether the claimant would go on the redeployment register. She expressed concern that all the posts were fixed term. It was explained that they may be extended and was advised to go on the redeployment register. HR informed her that it could not guarantee that she would get a permanent role but advised her to actually look at going on the redeployment register - page 210 of the bundle. It was agreed that the claimant would undertake an Access at Work assessment. A discussion took place about the claimant writing up the reports in the field. It was explained that that was not a full-time role and that it was not appropriate for someone not in the field undertaking the dig to undertake that role. This was confirmed by Mr Carne in evidence. The claimant suggested taking up different parts of different roles. At the end of the meeting the claimant did agree to go on the redeployment register.
59. An Access to Work assessment did take place in May 2018. In the report, Access to Work also made it clear that the claimant found the manual aspects of

her roles such as soil processing and excavation difficult to do and the recommendation was that she no longer went into the field - page 218. In that report, it recommended that a particular keyboard be provided to the claimant, which was obtained by the respondent shortly after the report was received - page 218 – 219. That computer monitor was obtained for the claimant shortly after the report was received by Mr Carne.

60. The respondent wrote to the claimant following that meeting. The letter is at page 227 – 228. In the letter it referred to the reports from both the occupational health physician and the claimants own Consultant and their conclusion that the claimant was unable to undertake duties listed in her job description. It was agreed that the respondent would contact Access to Work and make arrangements to add the claimant on to the redeployment register and provide her with some training for CV writing. In the letter the respondent made it clear that the temporary adjustments to the claimant's role could not continue on a permanent basis and that they would be referring the matter on for further consideration - page 228.
61. The claimant was invited to a further meeting to discuss her ill-health absence. This was a formal meeting to consider whether she was unable to perform her duties as listed in her job description due to ill-health. The letter inviting her to that meeting is at page 280 – 281. In that letter it is made clear that one of the possible outcomes of the meeting could be dismissal. Prior the meeting Mr Carne prepared a management report with supporting documents which was to be considered by the panel. A copy of that report and documents were sent to the claimant.
62. The panel hearing took place on 25th September 2018. The claimant was represented by her trade union representative. The panel was chaired by Professor Skeates and two panel members. Professor Skeates was the Head of the archaeological department. The notes of the meeting are at pages 291 – 302.
63. At the outset of the meeting, it was explained that the purpose of the meeting was to consider whether the claimant was able to perform her duties due to ill-health. Professor Skeates explained the evidence which would be considered in that regard by the panel. Mr Carne presented the management case. The claimant and her representative were given the opportunity to present their case and ask questions. At the meeting it was confirmed that the claimant was unable to do the majority of her role. Mr Carne said that the work that the claimant had been doing consisted of a large body of catalogue finds which would not have been assigned to somebody else to do. He said that the work was not income generating. He also confirmed that consideration had been given to moving things around so that some people could do more of one thing and less of another rather than creating a role. He said that that was not possible with the way that the archaeology services were organised which he confirmed in his evidence to the tribunal. A discussion took place about the percentages of work involved in the claimant's job description. Mr Carne said it would not be possible to create a role just involved in writing up field reports. He said that should be done by the person who had undertaken the work in the field which he also

confirmed in his evidence to the tribunal. He said that the recommendations from occupational health had been followed for the last three years but were on a temporary basis - page 296. A discussion took place about whether or not the work could be done on a part-time basis. That was not considered to be an option. In any event the claimant confirmed in evidence to the tribunal that part-time work was not something that she could consider due to her financial commitments. During the course of the meeting, the claimant did not suggest a new specific role be created for her nor did she suggest that she undertook someone else's role - 295 of the bundle. She said that there were other things that she could usefully do or be trained up to do which were largely those matters referred to in the list at page 169 of the bundle, which was further slightly elaborated on in the further particulars provided in these proceedings at page 55 – 57 of the bundle.

64. The claimant accepted the medical assessment of her capabilities, namely that she would require significant and permanent restrictions - page 299 of the bundle. During the course of the meeting, a number of questions were asked by panel members before they considered their decision. During the course of the meeting the claimant was again advised to seek redeployment from the redeployment register - pages 298 and 301. In her evidence to the tribunal, the claimant said that she did not want to apply for redeployment because they were only fixed-term contracts for a year which would not assist her with her financial situation. She said she had not made any enquiries at that stage about anything on the register and would not do anything short term unless it was absolutely necessary.
65. The panel adjourned to consider its decision and then produced a report of their findings. In conclusion, the outcome would be that the claimant would be dismissed from her employment on the grounds of capability but that she would first be given the opportunity to consider applying for ill-health retirement. The report is at page 304 – 306 of the bundle.
66. The respondent then wrote to the claimant to inform her of the outcome of the formal meeting under their ill-health and absence process. The letter superseded an earlier letter and is at page 314 – 315 of the bundle. In that letter the respondent confirmed that the panel has concluded that the claimant is no longer able to carry out her role and that it is no longer reasonable to continue her employment with the respondent. The panel concludes that she is unable to perform 90% of her role, which consists of field and some lab work and that there is no suitable or necessary role for her to perform in the department. The panel also notes that the claimant had been referred to the redeployment register but had not pursued any roles due to the fact that they were fixed term roles.
67. The letter stated that the claimant was dismissed by reason of ill-health but it would be subject to her being considered for ill-health retirement. They said they would be delaying the decision to enable her to have the opportunity to apply for ill health retirement and to apply for redeployment under the redeployment policy. She was given a right of appeal.

68. The claimant appealed against the decision. Her letter of appeal is at page 317 – 320 of the bundle. The basis of her appeal was that the duties of a project architect were not necessarily properly defined. She suggested in that appeal email that her duties in the lab were more than 20%. She also went on to explain the work which she had been doing since 2015 and which she considered that she could do.
69. An appeal hearing took place on 3rd December 2018. The panel was chaired by Professor Bentley and two other panel members. The claimant attended the meeting with her trade union representative. At the meeting the claimant acknowledged that she accepted that she was medically incapable of undertaking her role. The issue was whether or not the respondent had been reasonable in making adjustments and alternative arrangements for her work which she confirmed was the basis of her appeal - page 324. The notes of the panel hearing are at page 324 – 329 of the bundle. The appeal hearing followed a similar process to the panel hearing whereby the claimant was given the opportunity to present her appeal and the respondent was given the opportunity to respond or ask questions. During the course of the meeting a discussion took place about the work which the claimant was doing and the work which was available in the lab and who was contracted to do that work. A discussions took place about various roles within archaeology department services and the roles which they undertook.
70. A report was issued following the appeal hearing - page 341 – 345.
71. The respondent wrote to the claimant following the appeal hearing to dismiss her appeal. The panel concluded that the claimant was not able to undertake the majority of her role They concluded that the Binchester role was not core business and that the department could not create or continue unfunded work and roles. It was noted that temporary adjustments had been made to the claimant's role for a very long time to enable her to work in the lab for a period of time but she was simply undertaking adhoc based in the lab since her injury. They noted that the respondent had done this with the best of intentions to allow her time to recover as recommended by the medical experts on the basis that they were hoping that she would be able to return to her full substantive position but she could not undertake the majority of her role.
72. In his evidence to the tribunal, Professor Bentley concluded that the claimant had been given work to do to keep her busy on the basis that both the claimant and Mr Carne had hoped that the claimant would be able to return to her job ultimately and that the adjustments were short term. He said that the respondent needed flexibility in the team and to be able to assign lab work when field work was quiet. He suggested they would lose some of the flexibility within the team if that did not happen which which mean people would be under employed and it would have a negative impact on their skills. He concluded that the claimant would only be able to do a very limited number of things roles in the department, but that there was no role available for her.
73. The claimant did apply for ill-health retirement but decided that, for financial reasons, not to take ill-health retirement. In her evidence to the tribunal, she also

indicated that she did look at the redeployment register, but she did not consider that there were any jobs suitable for her. It was clear she always had reservations about the jobs being for fixed term for twelve months.

74. On 29th January 2019 the respondent wrote to the claimant to reaffirm the decision to dismiss her from her role on the grounds of ill-health capability. It was noted that the claimant had had the opportunity to explore the option of ill-health retirement and concluded that it was not the best option for her and that her last day of employment would be 31st January 2019.
75. In her evidence to the tribunal, the claimant indicated that there were various roles that she could have done in the lab and could have been trained to do. This included finds and preparation of archives, supervising volunteers, processing of finds, writing up reports, desk based assessments and general admin as set out in the list produced by her at page 169, which is largely replicated in the particulars provided by her at pages 55 – 57 of the bundle. Mr Carne said that most of the jobs which the claimant was suggesting she could undertake were either already being done by others. He said in the case of finds identification and environmental work that was being done by Doctor Carrie Armstrong as part of her work which including processing of finds and preparation of archives. He said environmental identification was done by Jenny Jones. Both of these two were more senior than the claimant. He also said that sorting out of environmental residues, volunteer finds, and processing of delicate finds was also done by Doctor Armstrong. Xray and air abrasion work was done by Vicky Garlick, again at a more senior role. He said digitising work was done by technicians. In relation to the writing up of reports, Mr Carne said it was necessary for the person that was in the field to write up the report and it was not appropriate for somebody who had not been in the field to write up the report. He said that another member of staff undertook the desk based assessments and that the building recording was done by Richard Annis, who was also a higher grade to the claimant. He said that most of the work proposed by the claimant was either done by somebody else in the lab or the work was not required to be done. He said that occasionally there may be additional resources required to do some of this work but it was ad hoc work and was allocated on an as and when basis.
76. In his evidence to the tribunal, Mr Carne said that most of the work which the claimant had been undertaking had been done to fill her time whilst she was unable to go on site until she was able to go back to it. He said that the Binchester work had taken most of her time in 2016 and 2017, but most of that work was not actually required as it would be redone by the actual specialists. Some of the work was just duplication. Mr Carne said that the Binchester work was almost concluded in 2018. He said that the claimant had done some commercial work - about almost 50% at that stage but there was not even a part time job available as such because this work could and should be done principally by the project archaeologists when they came in from the field in between different projects. Mr Carne said it was not possible for the claimant to continue in the current position because the job was not sustainable. He had allowed the claimant to work in the lab while they were awaiting the medical assessment as to whether she could return to her substantive role. He said the

work in the lab was simply being undertaken by her to fill in the time before she would be in a position to return to the field work, but the latter could not and which did not ultimately happen. In answer to questions, Mr Carne said that there were no projects on a similar scale to Binchester in the pipeline. In his evidence to the Tribunal, Professor Skeates, as Head of the Archaeology department, said that any jobs in that department would be out on the redeployment register.

Submissions

77. The respondent filed written submissions and referred to a number of cases, many of which are referred to above. He submitted that the dismissal was fair and that decision to dismiss was proportionate and that there were no reasonable adjustments which the respondent could make.
78. The claimant gave oral submissions. She submitted that she considered the decision to be unfair and that she felt that she had been discriminated against by the respondent because of her disability and that the respondent should have made reasonable adjustments as suggested by her.
79. The claimant was given leave to file any further written submissions in response to the case law relied upon by the respondent but did not do so.

Conclusions

80. This tribunal finds that the reason for dismissal was capability. Capability is a fair reason for dismissal under Section 98 (2) of the Employment Rights Act 1996.
81. The tribunal accepts that the respondent did act reasonably in dismissing the claimant for her capability. They obtained up to date medical advice over a significant period of time from their occupational health advisors and the claimant's specialist consultant. The claimant does not dispute that medical advice.
82. The tribunal did have some concerns about whether or not the respondent properly consulted with her about the role which she was undertaking over the three year period when they were keeping the matter under review and in particular the temporary nature of that role. However the tribunal concluded that it was implicitly implied that the role was temporary and the claimant clearly understood the situation by the way she kept her manager updated on her condition and he continued throughout (albeit not overtly) to keep the situation under review. Therefore, it was clearly implied from that that the role was being regularly reviewed and effectively temporary until the position could be clarified regarding her return to her substantive role.
83. The tribunal does however consider that the claimant was fully consulted about the decision to dismiss her. The respondent explain the position fully to her at several meetings. They deferred the last meeting to give her the opportunity to consider the matter and apply for ill-health and redeployment. Furthermore, the tribunal accepts that the respondents did fully consider all the proposals made by

the claimant about the roles which she could undertake in the lab at both the formal capability hearing and the appeal hearing.

84. Further the respondent did consider alternative employment. Several times they asked her to consider accessing the redeployment register which she was reluctant to do. They gave her a further opportunity to do so and effectively stayed her dismissal to enable her to do so. Furthermore the tribunal accepts Mr Carne's evidence that he did consider whether the claimant could do elements of all or any roles in the lab and concluded that she could not. The tribunal also accepts Professor Skeates evidence that roles within the archaeology department generally would have been made available to the claimant through the redeployment register
85. The tribunal concludes that the process which was followed was more than fair. The respondent waited until they had medical advice to conclude that the claimant was not able to undertake the role which she was employed to do. They gave the claimant every opportunity to apply for both ill-health retirement and have the opportunity to access the redeployment register.
86. For those reasons the tribunal consider that dismissal was a reasonable response in the circumstances of the case.
87. Accordingly the claimant's complaint of unfair dismissal is not well-founded and is hereby dismissed.
88. The tribunal find, as conceded by the respondent, that the claimant was a disabled person as defined under Section 6 of the Equality Act 2010.
87. The respondent effectively conceded that the claimant's dismissal could be unfavourable treatment, so there was no issue in that regard. They also did not dispute that the "something arising in consequence of her disability" was her inability to undertake the full duties of her role due to her right shoulder, which it is acknowledged amounts to a disability as defined under the Act. The aim relied upon by the respondent is a legitimate aim. Therefore the only issue which had to be considered by the tribunal was the question of whether it was proportionate for the respondent to dismiss the claimant in furtherance of their aim to have employees who can undertake most of the duties associated with their role.
88. This tribunal considers that it was a proportionate means of achieving that legitimate aim. The respondent allowed a significant period for recovery and effectively sought other work for the claimant in the lab over that significant period, principally on the Binchester project which was a non-commercial project and on which she worked for almost 2 years but which was ending. The respondent considered all areas of work which the claimant indicated that she could or should be trained to do. The respondent did not have any requirement for anyone to undertake that work because other people were effectively employed to do that work. The respondent considered all other options with the claimant including redeployment with pay protection. The respondent also gave her the opportunity to leave by way of ill-health retirement instead of dismissing her.

89. This tribunal concludes that it was proportionate to dismiss the claimant because, for over three years, they had tried to keep her position open and allocated her work which was, in many ways, not necessary. Further, before dismissing her, they had considered other options like ill-health retirement. Accordingly, the only alternative available to them by that stage was dismissal. Therefore, dismissal was a proportionate means of achieving the aim of ensuring that they had employees able to carry out the duties of the role for which they were employed.
90. In relation to the question of reasonable adjustments, the provision, criterion or practice (PCP) relied upon was the requirement for the claimant to undertake the duties of the role for which she was employed. The substantial disadvantage to her was her dismissal.
91. The real issue for the tribunal in this case was to consider whether the respondent had considered reasonable adjustments. The claimant was unable to perform the vast majority of her role, over 85%. The respondent did consider, through Mr Carne, if there were any other jobs available in the lab, as suggested by the claimant, which largely included parts of other people's roles. He also considered creating a new role but concluded that there were no jobs which were required to be done and that it was not feasible to create such a role for the claimant to undertake in the lab. There was just not sufficient work which she could actually undertake. The list of tasks which she said she could do were either being undertaken as part of someone else's role (usually at a higher grade) or were roles not actually required to be undertaken, namely much of the work on Binchester and other non-commercial projects. Indeed, we accept Mr Carne's evidence that there was not even sufficient of this work for a part time role, which in any event the claimant herself was not prepared to accept.
92. The tribunal has concluded that, although it had some concerns about the claimant undertaking ad hoc tasks in the lab for a very significant period whilst the respondent awaited medical assessment on the claimant's condition to find out whether she would ever be able to return to her substantive role, the tribunal nevertheless accepts that these were effectively ad hoc tasks which were created for the claimant to effectively keep her engaged until she recovered and was able to return to her substantive post. Most significantly, during most of the time that the claimant was undertaking these ad hoc tasks she was working for almost two years namely most of the time on the Binchester project which was now coming to an end there were no other projects on a similar scale in the pipeline. Therefore, there was effectively not likely to be any certainly much less work in the lab that she would be able to do on a full-time or even part-time basis.
93. In respect of any reasonable adjustments relating to the provision of computer equipment, the tribunal does not accept that the claimant raised any concerns about any difficulties in using the computer equipment. Indeed, she herself indicated that she did not have any discomfort in November 2017. Furthermore, occupational health did not raise any issues about the computer equipment. The matter only arose after the referral to Access to Work. As soon as the matter was raised in the Access to Work report, Mr Carne obtained the necessary equipment which was required. Accordingly this tribunal does not consider that

the respondent failed to make reasonable adjustments. Indeed, they made such adjustments as soon as they were requested.

94. For those reasons the claimant's complaint of disability discrimination is also not well-founded and is hereby dismissed.

EMPLOYMENT JUDGE MARTIN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
15 October 2021**

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