Case No: 2300170/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**
BEFORE:	**EMPLOYMENT JUDGE K ANDREWS**
MEMBERS:	**Mr P Adkin** **Mr S Corkerton**

BETWEEN:

Ms E Fatoye-Adeloye

Claimant

and

Guy's & St Thomas's NHS Foundation Trust

Respondent

ON:	**4 – 11 October 2021 and** **12 October 2021 in chambers**

Appearances:
For the Claimant: **Mr A Ohringer, Counsel**
For the Respondent: **Miss Y Genn, Counsel**

RESERVED LIABILITY JUDGMENT

The unanimous decision of the Tribunal is that the claimant was unfairly dismissed and subjected to discrimination arising from her disability. Further, the respondent breached its duty to make a reasonable adjustment.

A remedy hearing will take place on 9 March 2022. Directions for that hearing appear below.

REASONS

1. In this matter the claimant complains that she was unfairly dismissed and has been the subject of disability discrimination. The specific claims and issues arising therein were agreed at a preliminary hearing before Employment Judge Smith on 6 September 2021 as follows (amended by the subsequent full concession of the fact of the claimant's disability by the respondent):

1. Discrimination arising from disability (Equality Act 2010 section 15)

1.1 Did the Respondent treat the Claimant unfavourably by dismissing her on 12 August 2018?

1.2 Did the following things arise in consequence of the Claimant's disability namely her sickness absence and her inability to fulfil the requirements of her contractual position ("the somethings")

1.3 Did the Respondent dismiss the Claimant because of the above somethings?

1.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent contends that the treatment was a proportionate means of achieving a legitimate aim namely the provision of a safe service to its patients and other staff and it was proportionate to terminate the Claimant's employment as she was unable to provide satisfactory attendance to meet those aims.

1.5 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

2. Ordinary unfair dismissal

2.1 What was the reason or principal reason for dismissal? The Respondent says the reason was capability.

2.2 If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.2.1 The Respondent genuinely believed the Claimant was no longer capable of performing their duties;

2.2.2 The Respondent adequately consulted the Claimant;

2.2.3 The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

2.2.4 Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant;

2.2.5 Dismissal was within the range of reasonable responses.

2.3 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

3. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

4. Reasonable adjustment number one

4.1 Did the Respondent require the Claimant to work in a role which involved manual handling and/or prolonged standing or walking?

4.2 Was this a PCP for the purposes of section 20 EQA 10, which the Respondent applied to the Claimant?

4.3 If so, did this place the Claimant at a substantial disadvantage compared with persons who are not disabled? The Claimant contends that because of her disability she had to limit her physical exertion.

4.4 Did the Respondent know, or should it reasonably have known, that the Claimant was likely to be placed at a substantial disadvantage?

4.5 If so, did the Respondent fail to make reasonable adjustments to avoid the disadvantage? The Claimant contends that a reasonable adjustment would have been to redeploy her to a sedentary/administrative role.

5. Reasonable adjustment number two

5.1 Did the Respondent require the Claimant to engage in a competitive interview/application process for the roles which she applied for namely therapies administrator, patient access coordinator (x two), the first interview being on 20 October 2017, the second on 05 December 2017 and the third on 05 February 2018.

5.2 Was this a PCP for the purposes of section 20 EQA 10 which the Respondent applied to the Claimant?

5.3 If so, did this place the Claimant at a substantial disadvantage compared with persons who are not disable?. The Claimant contends she suffered stress and anxiety in interview situations as a result of her disability.

5.4 Did the Respondent know, or should reasonably have known, that the Claimant was likely to be placed at a substantial disadvantage?

5.5 If so, did the Respondent failed to make reasonable adjustments to avoid that disadvantage? The Claimant contends that a reason adjustment would have been to have appointed the Claimant to one of the alternative roles without having to undergo a competitive exercise.

6. Time

6.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 26 July 2018 may not have been brought in time.

6.2 Were the reasonable adjustment complaints made within the time limit in section 123 EQA10? The Tribunal will decide:

6.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

6.2.2 If not, was there conduct extending over a period?

6.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

6.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

6.2.4.1 Why were the complaints not made to the Tribunal in time?

6.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?'

Evidence & Adjustments to the Hearing

2. Given the claimant's disability a number of adjustments for the conduct of this Hearing had already been agreed at the preliminary hearing referred to above. Those arrangements were again reviewed and agreed at the

commencement of this Hearing. Accordingly the claimant was accompanied throughout by Ms R Spotswood, intermediary, and we are grateful to her for her assistance. Regular breaks were taken and we sat for a shorter day than usual on days 2 and 3 when the claimant gave her evidence. With no criticism of the claimant, it was at times difficult to follow her evidence but we are satisfied that with Mr Ohringer's able representation we understood her case and it was put to the respondent's witnesses.

3. The Hearing was conducted by a mixture of video and in person at the request of the respondent both because of the medical needs of one witness and also operational pressure on the remaining respondent witnesses. The claimant together with both representatives, the intermediary and the Tribunal panel were in attendance in person throughout the Hearing.

4. In addition to the claimant's evidence we heard for the respondent from:
   a. Ms D Romero, Matron;
   b. Ms J Bines, retired Matron/Senior Nurse;
   c. Ms R Harrod, Local Employment Coordinator;
   d. Mr J Hill, Head of Nursing for A&E; and
   e. Ms C Mackay, Director of Nursing for Adults;

   and had an agreed bundle of documents before us.

5. Both Counsel provided written submissions, supplemented orally, on the conclusion of the evidence.

Relevant Law

6. Discrimination arising from disability: section 15 of the Equality Act 2010 ('the 2010 Act') states:

> (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.
>
> (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.

7. 'Unfavourable treatment' is not defined in the Act, although the Equality and Human Rights Commission's Code of Practice on Employment 2011 ('the EHRC Code') states that it means that the disabled person must have been put at a disadvantage (para 5.7). The meaning of 'unfavourable' was considered in Trustees of Swansea University Pension & Assurance Scheme & anor v Williams ([2015] IRLR 885) and described as having the sense of placing a hurdle in front of, or creating a particular difficulty for or disadvantaging a person.

8. The core components of a claim under section 15 were considered in Sheikholeslami v University of Edinburgh [2018] IRLR 1090 as follows:

'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).'

9. There is no requirement that A be aware that the 'something' has occurred in consequence of B's disability. In Risby v LB of Waltham Forest (UKEAT/0318/15), the EAT confirmed that only a loose connection is required between the 'something' and the unfavourable treatment. And further in Baldeh v Churches Housing Association of Dudley District Limited (UKEAT/0290/18/JOJ) that it is sufficient for the 'something arising in consequence' of the disability to have a 'significant influence' on the unfavourable treatment. The fact that there may have been other causes as well is not an answer to the claim.

10. In MacCulloch v ICI [2008] IRLR 846 four legal principles were set out with regard to determining justification of discrimination arising from disability (approved by the Court of Appeal in Lockwood v DWP [2013] EWCA Civ 1195):

"(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].

(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or 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" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.

(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 (Hardy & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], per Thomas LJ at [54]–[55], and per Gage LJ at [60]).

(4) It is for the ET 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. There is no "range of reasonable response" test in this context: Hardy & Hansons plc v Lax [2005] IRLR 726, CA."

11. The EAT in Yorke v Glaxosmithkline (UKEAT/0235/20/BA) has confirmed that where an employee has been dismissed because of absences resulting from a disability:

'48…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.'

12. Breach of the duty to make reasonable adjustments: section 20 and schedule 8(20) of the 2010 Act set out the duty to make adjustments. If an employer applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial (more than minor or trivial) disadvantage in comparison with persons who are not disabled, that employer has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not arise if the respondent did not know, and could not reasonably be expected to know, that the claimant was disabled and was likely to be placed at that disadvantage (Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10).

13. PCP is not defined in the legislation, but is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements and may in certain cases include one-off decisions. It has been confirmed however in Ishola v TFL ([2020] EWCA Civ 112) that PCP carries the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again and although a one-off decision or act can be a practice, it is not necessarily one.

14. Interpreting the duty does not contain a strict causation test but requires a comparative exercise to test whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have any disability. If so, the test whether it was reasonable to make a particular adjustment is an objective question for the Tribunal to answer (Tarbuck v Sainsbury's Supermarkets 2006 UKEAT) with a focus on what is practical and will lead to a real prospect of alleviating the disadvantage caused by the PCP (Leeds Teaching Hospital NHS Trust v Foster UKEAT/0052/10).

15. In Environment Agency v Rowan ([2008] IRLR 20), the EAT held that in a claim of failure to make reasonable adjustments the Tribunal must identify the PCP applied, the identity of the non-disabled comparators where appropriate and the nature and extent of the substantial disadvantage suffered by the claimant.

16. In assessing what adjustments are reasonable we refer to the EHCR Code's list of factors to take into account (para 6.28) and the House of Lords decision in Archibald v Fife Council ([2004] UKHL 32) which made it clear that the duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability and can therefore entail a measure of positive discrimination. It also emphasised that what is a reasonable adjustment is fact sensitive but that it can include moving an employee into a vacancy including one at a slightly higher grade. Also in Yorke, above, HHJ Tayler said 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. Equally on the facts in Wade v Sheffield Hallam University (UKEAT/0194/12) there was no requirement to waive the obligation on the disabled claimant to undergo a competitive process in relation to an internal vacancy. It all depends on the circumstances.

17. Once a claimant has shown that the duty is engaged and has identified adjustments which would alleviate the relevant disadvantage, the burden passes to the respondent to show why the adjustments would have been ineffective or not reasonable (Project Management Institute v Latif [2007] IRLR 579).

18. Time limits: any complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act complained of or such other period as the Tribunal thinks just and equitable (section 123 of the 2010 Act).

19. Where there is a series of distinct acts of alleged discrimination the time limit begins to run when each act is completed, whereas if there is conduct extending over a period the time limit begins at the end of that period (section 123(3)(a)). Where an employer operates a discriminatory regime, rule, practice or principle then that will amount to an act extending over a period (Barclays Bank plc v Kapur ([1991] ICR 208 HL). When deciding if there is such conduct, it is the substance of the complaints in question — as opposed to the existence of a policy or regime — that is relevant and whether they can be said to be part of one continuing act by the employer (Hendricks v Commissioner of Police for the Metropolis [2002] EWCA Civ 1686). In considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents (Aziz v FDA [2010] EWCA Civ 304, CA).

20. Unfair dismissal: the dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the Employment Rights Act 1996. Those potentially fair reasons include capability, the reason relied upon by the respondent, which is to be assessed by reference to skill, aptitude, health or any other physical or mental quality (section 98(2)(a) and (3)(a)).

21. If the respondent establishes a potentially fair reason then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test, the burden of proof is neutral.

22. In considering whether the respondent has acted reasonably in treating the claimant's capability as sufficient reason for dismissing him the Tribunal looks to whether the respondent's decision fell within the band of reasonable responses to the claimant's capability which a reasonable employer could adopt (Iceland Frozen Food v Jones 1983 ICR17). That case also confirms

that the correct approach is to consider all the circumstances of the case, both substantive and procedural.

23. In coming to this decision the Tribunal must not substitute its own view for that of the respondent.

24. In considering capability dismissals arising from long term sickness absence, guidance from case law can be distilled into three key principles:
    a. each case is to be judged according to its own specific circumstances but in cases concerning long term absences the issue often amounts to whether the employer can be expected to wait any longer for the situation to improve;
    b. the employer should consult with the employee before making its decision; and
    c. the employer should take steps to discover the true medical position however the decision whether to dismiss is managerial not medical.

25. Underpinning all these factors is that a reasonable procedure should be followed by the respondent. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602).

26. The fact that an employee's incapacity arises from a disability for the purposes of the 2010 Act does not mean that a dismissal for a reason related to this must be unfair (Royal Liverpool Children's NHS Trust v Dunsby [2006] IRLR 351 EAT). However a dismissal which has been found to be discriminatory under section 15 of the 2010 Act would also constitute an unfair dismissal (O'Brien v Bolton St Catherine's Academy [2017] ICR 737).

Findings of Fact

27. Having assessed all the evidence, both oral and written, and the submissions made by the parties we find on the balance of probabilities the following to be the relevant facts.

28. The respondent is the largest NHS Trust in London. At the relevant time it had c17,000 employees across a number of sites. It has a Sickness and Absence Policy & Procedure which includes details of its redeployment policy. There is no stand alone redeployment policy – it simply appears in other relevant polices as required.

29. The process for the management of sickness absence consists of a series of steps. The first is a 'first sickness advisory meeting' which whilst a formal meeting is described to be a two-way discussion between the employee and manager with a focus on the health and well-being of the individual, with the intention of improving their attendance and being conducted in a supportive and respectful manner. One of the specific reasons for the meeting is identified as discussing any reasonable adjustments that may help the

employee to return to work and maximise their attendance as well as considering whether a referral to occupational health (OH) is required.

30. Step two is a 'final sickness advisory hearing' by a senior manager at which the future employment of the individual is considered. A management case report is prepared highlighting the steps and support that have been offered and implemented including OH advice and any other information to assist decision-making. If the level of absence is such that it prevents the fulfilment of the individual's obligations and the senior manager is satisfied that all reasonable measures have been taken to resolve the issue, which may include redeployment into suitable alternative employment, termination of employment may be considered.

31. In particular the policy states at paragraph 11:

'11.1 In managing sickness absence, the Trust will always take into account the provisions of the Equality Act 2010.

11.2 Under the Act, employers must ensure they do not discriminate against disabled people, and employers have a duty to make reasonable adjustments to working practices and premises.

11.3 Equality law recognises that bringing about equality for disabled people may mean changing the way in which employment is structured, the removal of physical barriers and/or providing extra support for a disabled worker. This is the duty to make reasonable adjustments.'

and at paragraph 12:

'12.1 Under the Equality Act (2010), if there is an underlying medical condition contributing to sickness absence, managers have a duty to consider whether there are reasonable adjustments that could be made to the job to allow a disabled person to carry out their work…

12.2 The types of reasonable adjustments may include: …

- Redeployment -— moving someone to a more suitable role when an opportunity arises'

12.3 Please note that these are examples and not an exhaustive list. Managers should think creatively and engage with their employee as to the best solutions for the individual's needs and maximising their attendance.'

and at paragraph 16.9:

'As soon as it is clear that an employee will not be able to return to their substantive post, the following options should be explored:

- adjustments (temporary or permanent including redeployment)
- the possibility of retirement on ill-health grounds
- termination of contract.'

32. At paragraph 19 the redeployment policy is set out as follows:

19.1 Redeployment to another post within the Trust could be a consideration as part of Equality Act (2010) adjustments in facilitating an employee's return to work.

19.2 Staff on the redeployment register are entitled to priority consideration before other candidates for any vacant post for which they meet the basic person specification. Management will set a timescale for the redeployment process with advice from Workforce Relations (HR). The redeployment period will, in most circumstances, last for no longer than 12 weeks.

19.3 In instances where a formal sickness management case has been heard, and a decision has been made to dismiss an employee on the grounds of capability due to ill health, the remaining part of any redeployment period will run concurrently with their contractual notice.

19.4 Following appointment to a new role after a redeployment period, reasonable adjustments may need to be made to the new role.

19.5 Redeployment trial periods - Redeployment is subject to a four week trial period. The purpose of a redeployment trial period is for both the manager and the individual to assess the suitability of the post as alternative employment. Where an individual assumes a trial period both the notice period and the redeployment period are suspended (and resumed should the trial period be deemed unsuccessful). The manager will reissue the employee with a revised notice of termination, which will take into account the four week redeployment trial period.

19.6 During the redeployment period, and throughout any work trials, the employee's ' substantive employing department will continue to pay remuneration due. Where an employee assumes a trial period, they will be paid in accordance with the pay band of the role they have taken.

19.7 Pay protection does not apply where an employee accepts a role at a lower banded pay.

19.8 Where staff have the potential ability but not the immediate experience to undertake full duties of the role, they will be provided with an appropriate skills development plan or training. This will be provided when it is reasonable, practical and cost effective and where the member of staff demonstrates a willingness to learn and can apply the new skills within an agreed timeframe.

19.9 The trial period will normally last for four weeks but may be extended by mutual agreement where a member of staff requires additional training and development.

- If the trial period is unsuccessful, as determined by the individual and/or the manager, the employee (dependent on circumstances), will be placed back onto the redeployment register for the remaining time within the 12 weeks redeployment period. The employee's notice period will continue from the day the trial period ended.

19.10 At the end of the redeployment period, or any trial period, the manager will make contact with the employee and arrange a meeting to confirm the outcome of the process which will be confirmed in writing.

33. In addition the respondent has unwritten arrangements as to how the redeployment policy is implemented in practice. In particular:

    a. 'priority consideration' (para 19.2) involves the employee attending an informal interview with the relevant recruiting manager but if the employee meets the job and person specification requirements, the manager must accept them;

b. redeployment can only be to a job at the same or lower band. Redeployment to a higher band role can only be through usual internal recruitment;

c. redeployment can also only be to a permanent role which Ms Harrod took to mean due to last for at least a year – maternity leave cover would not therefore qualify; and

d. a final review meeting will be held halfway through the 12 week redeployment period. If at that stage dismissal is considered appropriate that will be confirmed at the end of the 12 week period assuming no suitable alternative vacancy has been identified.

34. As well as the redeployment policy, there is a business as usual transfer scheme whereby any employee can apply to transfer to any internally advertised vacancy on a like for like basis (with regard to clinical/non-clinical and band) but will have to participate in any associated competitive application process.

35. The only way an employee can move to a new role outside of their own directorate is through the redeployment policy or through competitive internal transfer/recruitment, regardless of any OH reports.

36. The claimant commenced employment with the respondent as a clinical support worker in October 2013. In March 2014 she became a senior nursing assistant at band 3 within the respondent's pay structure. She was based on Alex ward one of three wards in the Older Persons Unit (OPU). The nature of the ward and the claimant's duties meant that her role required her to be able to stand and be mobile for long periods of time while conducting manual handling duties. Ms Wellings was the ward manager and therefore the claimant's line manager. Ms Romero was the matron with overall responsibility for the OPU. Alex ward was routinely closed for periods of time each summer due to a seasonal lower demand for its services. On closure the employees working on it would be moved to other wards/duties.

37. The claimant commenced a period of sick leave on 24 October 2015 and in November 2015 had surgery in Germany to remove a pituitary gland tumour. She remained off sick until the end of March 2016 which was followed by a period of leave and she returned to work in the middle of April 2016 though also had another period of leave in May 2016.

38. On the claimant's return to work and whilst an OH report was awaited (the claimant having attended an appointment on 26 April 2016), it was agreed that she would return to her usual role but only for three 7½ hour shifts per week due to her health limitations.

39. On 25 May 2016 Ms Romero met the claimant to discuss her working arrangements and how she could be supported on the ward. In an email on the same day she set out five options for the claimant to consider including further sick leave, working full-time, redeployment, applying for other roles

in the Trust through the general recruitment process and temporary flexible working arrangements. In the meantime the claimant was advised to stick to her rota until she heard further from Ms Romero.

40. On or around 31 May 2016 the respondent received the OH report dated 28 April 2016 (a draft having been first sent to the claimant). It concluded that the claimant was fit to continue in her role but that she needed to adhere to the infection control policy and her reduced vision in her left eye made it difficult for her to undertake duties such as heavy lifting and manual handling. A stress risk assessment was also advised and that any agreed action plan should be reviewed at regular intervals. The claimant was advised to contact the Access to Work service and the report noted that in light of her difficulties, the claimant would like to be considered for permanent redeployment to a role/department that was less physically demanding and she had been advised to discuss that with Ms Wellings and HR. The report also concluded that the claimant was likely to have the protection of the 2010 Act which would require the consideration of reasonable adjustments within the context of her work.

41. On 31 May 2016 Ms Romero met the claimant and completed a work related stress risk assessment with her. It was agreed that the claimant would try short shifts, predominantly lates, for at least a month including at least one weekend or a Saturday or Sunday. That trial was to take effect on 1 June 2016. It also recorded some limitations on manual handling and risk of infection.

42. Ms Romero met the claimant again on 7 July 2016 and emailed her the same day confirming that her rota had been adjusted so that each week she would have at least a day off during weekdays and Saturday or Sunday off each week. She noted that despite these adjustments the claimant was still not working her full contractual hours which would be carried over to the next rota as she had requested. She recorded that both the claimant and Ms Wellings should reflect on effective communication and further advised the claimant to check vacancies within the respondent and to explore a transfer once she had found a suitable clinical area to support her restrictions.

43. Ms Romero emailed the claimant on 2 August 2016 noting that difficulties were being experienced by both parties with that arrangement. The outcome was that Ms Romero rota'd the claimant from 15 August with a mix of shifts and different days off but noted that in doing so she was still struggling to fit in the claimant's full-time work hours and give her enough rest. Ms Romero suggested that if this arrangement did not suit the claimant then she should complete a request for a flexible working pattern

44. The claimant started a 2 week sick period on 8 August 2016 and on 10 August 2016 sent a lengthy reply to Ms Romero's emails of 7 July and 2 August commenting in detail on the position thus far as she saw it and that she had already indicated that she was expecting the way forward to be 'changing to another directorate'. She requested a meeting with HR and confirmed that she continued to have limitations on her ability to work.

45. The claimant attended a further OH appointment on 6 September 2016. The consequent report confirmed that the claimant:
    a. reported headaches and dizziness attributed to her pituitary condition that worsened following physically strenuous, heavy lifting and manual handling activities;
    b. had blurred vision;
    c. had been referred to the employee assistance programme and the stress risk assessment should be re-reviewed at regular intervals; and
    d. was medically fit to continue in her role although noting that she was on a specific shift pattern with light duties and that it would be helpful for her to refrain from manual handling etc if that could be accommodated. The claimant had been advised to discuss this with Ms Romero to see whether it could be a permanent adjustment. She was also advised to discuss the possibility of permanent redeployment with Ms Romero and HR.

46. Ms Romero met the claimant on 7 December 2016 to discuss the risk assessment. The claimant wanted to use her own risk assessment form rather than the one that had been previously completed. Ms Romero subsequently confirmed in an email on 19 December 2016 that the claimant would do a self-assessment and once completed a meeting would be held to discuss her current role on the ward in the light of the latest OH guidance. Also that a meeting would be arranged to discuss consideration of redeployment as requested by the claimant once an HR adviser had been identified.

47. The claimant replied by email on the same day saying, amongst other things, that she was only performing certain tasks on the ward, was coping and did not need any work-related stress assessment or health and safety risk assessment.

48. The claimant was off sick due to an URTI for two weeks at the end of January/beginning February 2017. At a return to work interview on 14 February 2017 with Ms Romero the claimant said that she wanted to be transferred to another ward or unit suitable to her current condition 'i.e. short shifts, no nights, no heavy clinical work etc'. She also said that she wanted to speak to someone senior in HR and Ms Murray, Ms Romero's manager. The parties disagreed about whether the claimant was willing at this stage to see OH – the claimant says she was and the respondent that she was not.

49. On 19 February 2017 Ms Romero effectively passed the matter to Ms Murray as she felt she could not effectively communicate with the claimant and she had done all she could. As she said in her evidence, she needed help. She briefed Ms Murray in an email in which she also said that the claimant wanted to speak to someone senior in HR (as of course she had been advised by OH to do back in. April 2016).

50. In an email exchange that followed between Ms Romero, Ms Wellings and Ms Murray, Ms Wellings confirmed that she had spoken to HR who said they

would not speak to the claimant as they were there for the support of management and did not talk to staff members. She reported that she had told the claimant this but she had not accepted that position.

51. Ms Murray met the claimant on 3 March 2017 and emailed her three days later confirming the content of their discussion, that she would be authorised to attend a medical terminology course (which she subsequently did achieving a merit in an exam in June 2017) and attaching a copy of the redeployment policy. At a further meeting in May 2017 Ms Murray told the claimant that she had contacted HR who had explained that redeployment was only accessible through formal sickness management and they discussed the advantages and disadvantages of that.

52. The claimant found Ms Murray to be very helpful in assisting her with various applications for other jobs that she was making at this time and arranging helpful training.

53. On 19 July 2017 Ms Bines, who had returned to the respondent following her previous retirement in order to assist them manage a number of complex staff matters, invited the claimant to attend a step one advisory meeting to discuss her level of absence in the previous 12 months in accordance with the sickness absence policy.

54. In agreement with the claimant that meeting was postponed to 17 August 2017 so that she could be accompanied by Dr Ernst, a consultant with the respondent. Ms Bines also changed the status of the meeting to simply an advisory meeting, meaning that it was informal and outside the process.

55. In the meantime, Alex ward closed from 1 August – 6 September and the claimant was transferred to the Older Person's Assessment Unit (OPAU), an outpatients unit. Following a discussion with the matron of that unit, amended shifts and duties were agreed that appeared to accommodate her limitations.

56. Ms Bines wrote to the claimant on 22 August 2017 confirming the outcome of the sickness advisory meeting. This was a detailed letter. The key points were:

    a. The claimant had described problems that she was having in working on the OPAU (for example, manual handling, a need for extra breaks and increased frequency of passing urine) and it was agreed that a further referral to OH would be made (which Ms Bines did on 18 August);

    b. The claimant had explained that she had been asking for a change in her job role and had applied for a job in the haemodialysis unit. She had also applied for a job in ECH private patients and a band 4 Transfer of Care Navigator job but unsuccessfully. She had completed the medical terminology course and clinical coding course to improve her job prospects.

c. A discussion regarding whether the claimant could be placed on the redeployment register. The claimant said that she wanted an alternative role, ideally an administrative one, but wanted to be transferred rather than go through the formal redeployment process as she was aware of the risk of not securing anything suitable within the 12 week timeframe. Ms Bines confirmed that if she was not on the redeployment list, seeking another post meant continuing through the usual recruitment pathway or Trust transfer scheme. Alternatively if she was on the redeployment process she would get priority for any suitable alternative posts but there was a risk to her continued employment if a suitable post was not found within the 12 weeks. Ms Bines asked the claimant to consider the benefits of a supported 12 week period to find a suitable alternative post and Dr Ernst supported that suggestion.

57. On 5 September 2017 Ms Bines met the claimant in the OPAU. She said that she did not wish to remain in the unit because of her concerns about the risk of infection and that she wished to return to Alex ward. Ms Bines agreed to discuss that with Ms Romero and also to look into whether an alternative placement could be found for the claimant.

58. In the event Ms Bines put in place a series of shadowing arrangements for the claimant in nonclinical roles between 25 September and 14 November 2017. The aim of this was to help the claimant broaden her skill set and knowledge and therefore secure alternative employment. After a difficult meeting between them on 19 September 2017 at which it was apparent that the claimant was unhappy with the way she was being managed by Ms Bines, it was agreed that Ms Romero would confirm the shadowing arrangements with the claimant which she did. It is apparent from Ms Bines's later note summarising the shadowing placements that there were issues with almost all of them in terms of what the claimant was or was not willing and/or able to do.

59. On or around 18 October 2017 Ms Bines received an OH report. This confirmed that:

> 'As previously outlined, it would be advisable [the claimant] does not take part in heavy lifting work activities. Further, she describes symptoms of unsteadiness after walking for five minutes, or standing for longer than 30 minutes. If these recommendations can be accommodated in the long term, then she would be able to continue in a nursing role. However, [the claimant] would like to be considered for a permanent re-deployment/an alternative role, which does not involve physically demanding activities, prolonged walking or standing, such as desk based duties. I advised [the claimant] to discuss with you a possible job opportunity that would be able to implement these permanent adjustments.'

60. On 20 October 2017 the claimant attended a competitive interview for the role of Therapies Administrator for which she had applied through usual internal recruitment. She was unsuccessful.

61. On 26 October 2017 Ms Bines wrote to the claimant inviting her to a formal sickness advisory meeting on 15 November 2017. The claimant failed to attend that meeting and it was rearranged for a week later. The claimant

emailed Ms Romero on 16 November 2017 saying that she would not be attending the meeting with Ms Bines. She clearly was not happy with the approach taken by Ms Bines towards her. The claimant again did not attend the scheduled meeting and Ms Bines wrote to her with a further rearranged date of 28 November 2017. The claimant emailed Ms Bines on 24 November 2017 saying she would not be attending the meeting. She was offered a further rearrangement to 6 December 2017. On 3 December 2017 the claimant emailed Ms Bines with a detailed account of her disagreement with Ms Bines's management of her. She stated that she would not be attending the meeting on 6 December 2017 and instead asked for a meeting with Ms Romero.

62. From early December 2017 the claimant commenced a placement with the Practice Development Nurse's (PDN) office arranged by Ms Bines and Ms Romero.

63. On 5 December 2017 the claimant attended a competitive interview for the role of Patient Access Coordinator for which she had applied through usual internal recruitment. Ms Bines arranged for one of the PDNs to assist the claimant with interview preparation but the claimant was unsuccessful.

64. Ms Jensen, Head of Nursing, emailed the claimant on 6 December 2017 confirming that management of her health situation had been delegated to Ms Bines and encouraged her to engage with her. Ms Bines also wrote to the claimant on the same day informing her that the meeting had been rearranged to 13 December 2017 and that it was important that she should attend and that if she did not, a decision as to her ongoing working arrangements could be made in her absence.

65. The claimant did not attend and accordingly Ms Bines proceeded in her absence and wrote to her on 14 December 2017 informing her that in light of the OH report of 18 October 2017, that she was not fit to undertake her nursing role and that there were no reasonable adjustments management could implement to facilitate a return to that role, it was agreed that redeployment to a desk based job was suitable. She then summarised the shadowing and other roles that had been arranged for the claimant since 17 August 2017 and that the claimant had been asked to look weekly at internal vacancies and had been supported with various job applications and interviews but that it would now be necessary to consider termination of her contract on the grounds of capability due to ill health and a hearing would be convened to consider that matter in due course. She confirmed that in the interim searches would continue for a suitable alternative post and that she would be provided with details of any suitable vacancies for a minimum of 12 weeks beginning on 2 January 2018. The claimant was encouraged to take a proactive approach in the process and contact Ms Harrod to complete the necessary registration on the redeployment register.

66. The claimant was off sick from 18 December 2017 for three weeks due to stress at work. Whilst on sick leave the claimant completed the redeployment registration form and sent it to Ms Harrod. In that form she confirmed that she was disabled and set out the limitations on her abilities.

67. The claimant returned to work on 8 January 2018 and was referred to OH.

68. The claimant and Ms Harrod met on 9 January 2018, twice more in January once in February and then on 2 March 2018. The claimant completed the formal redeployment registration form in which she confirmed that she was disabled and gave details mainly of the resulting limitations on her physical abilities. She did also refer to:

    'On top of these I noticed due to series of emotional stressful situation given to me at work particularly because of not understanding t he nature of the illness i am suffering from after the surgery, causes me these symptoms as well.'

69. It is apparent that the claimant was dissatisfied with the support she was receiving from Ms Harrod and she emailed her on 23 March and 9 April 2018 requesting an update on what opportunities were available for her. Ms Harrod did not reply. In January 2018 Ms Bines had also offered to meet the claimant fortnightly but the claimant replied that that was unnecessary as she was receiving support from Ms Harrod. Ms Bines replied that she would remain available to help if needed but unfortunately the claimant did not contact her again when she was not getting any response from Ms Harrod.

70. In the meantime on 5 February 2018 the claimant had attended a competitive interview for another Patient Access Coordinator role for which she had applied through internal recruitment. She was unsuccessful. The parties disagreed about the status of this role. The respondent says it was a maternity leave cover but the claimant says it was a permanent role.

71. A final review meeting was arranged for 20 February 2018 with Mr Ray, Deputy General Manager. In preparation for that meeting Ms Bines produced a statement of management case, a comprehensive document that set out the background and efforts made to secure another role for the claimant together with a recommendation that consideration be given to terminating her employment on grounds of ill-health. All relevant policies, reports and emails were appended.

72. That meeting commenced on 20 February but was adjourned almost immediately as Mr Ray became unwell. It was then rearranged more than once but finally for 14 May 2018 to be conducted by Mr Hill who wrote to the claimant inviting her to the sickness review hearing.

73. Mr Hill spoke to the claimant on 9 May 2018 and as a result he converted the 14 May meeting to an informal meeting at which it was agreed that the claimant could no longer undertake her nursing role and needed to be redeployed. The final review hearing was then rescheduled for 1 June 2018 to which she was formally invited by letter dated 24 May 2018 and informed that the purpose of the meeting would be to consider termination of her contract on the ground of incapability due to ill health.

74. At that hearing on 1 June 2018, which lasted nearly 3 hours including breaks, Ms Bines presented the management case and the claimant presented her detailed response to it including putting questions and

challenges to Ms Bines. Mr Hill concluded that Ms Bines could not demonstrate in full the support the claimant had had from the redeployment team. He informed the claimant therefore that he would give her five more weeks on the redeployment register and that she should use those five weeks to continue to explore redeployment and arrange any further shadowing that she wished to have. He also suggested another OH referral so that they could get more up-to-date advice and stated that the hearing would reconvene on 9 July 2018 and that if she had not found another suitable job by then she would be dismissed with four weeks notice on the grounds of ill-health.

75. Not unreasonably, given the significance of the matters discussed, the claimant wrote to Mr Hill on 12 June 2018 requesting an outcome letter from that meeting. He replied on 5 July 2018 stating that she would not get an outcome letter until the conclusion of the process. Enclosed with that reply was also a formal invitation to the final review hearing scheduled for 19 July 2018 (the redeployment period was extended by a further week to take into account this delay).

76. In the meantime the claimant had contacted Ms Harrod and they arranged to meet on 6 June 2018 to discuss her options. At that meeting Ms Harrod noted that they discussed the need for interviews and that if the claimant was saying that she could not attend interviews then she would need OH advice to that effect.

77. Ms Romero, further to Mr Hill's suggestion, referred the claimant to OH for an assessment of her underlying health condition and to advise on possible adjustments during the interview process as well as at work. The claimant attended the OH clinic on 21 June 2018.

78. Between 6 June and 12 July 2018 Ms Harrod informed the claimant of a number of roles. The claimant pursued some of these (some she immediately rejected as unsuitable) but later withdrew from the process (sometimes after interview) once she found out more about the role. During this period Ms Harrod also gave support and training to the claimant on interview technique given that she would be required to attend informal ones as part of the redeployment process. Whilst this was arguably to the claimant's benefit, Ms Harrod was aware that the claimant had specific medical concerns about interviews and had been referred to OH in this regard.

79. On 12 July 2018 Ms Harrod emailed Ms Bines an account of the support that had been given to the claimant over the previous 5 weeks and the jobs she had applied for (some of which she had been shortlisted for but was unsuccessful at interview) or been put forward for. In fact the only role the claimant had been put forward for by Ms Harrod was a Cancer Data Admin Assistant role, a predominantly desk based role. Ms Harrod had put her forward on 26 February 2018 for priority consideration but the redeployment team received no reply from the recruiting manager. In May 2018 either that role remained unfilled or another role with the same name had become available and the claimant was again put forward for it for priority

consideration. Again the recruiting manager did not reply. In her evidence Ms Harrod said that this particular recruiting manager was known for not replying yet there was no evidence of the manager having been chased or the issue escalated either in February or May.

80. The final review meeting was held on 16 July 2018. The claimant informed Mr Hill that she had applied for numerous roles at both her own and higher grades but they had been unsuitable or she had been unsuccessful. Mr Hill confirmed that as she had been unsuccessful in her search for a new role her employment would be terminated with four weeks notice which she was not required to work in order to continue her search for employment.)n 18 July 2018 Mr Hill wrote a lengthy letter to the claimant setting out the background, the process followed, confirming his decision and informing her of her right to appeal. In that letter he referred to the claimant having self referred to OH but not having a report to present. In fact the claimant had been referred by her manager. Mr Hill's evidence was that he considered adjourning the hearing to wait for the OH report however he felt that it would make no material outcome 'given the timeline of the case'.

81. The resulting OH report was in fact sent to management on 19 July 2018. Specifically with regard to possible adjustments during the interview process the report noted the claimant said that:

> '…during job interviews, as a result of an increased stress level she can experience suddenly headaches and becomes forgetful…despite practising interviews at home she feels that these symptoms are accountable for not being successful in interviews…'

and advised that:

> '… she has additional time and regular breaks throughout the interview process. In addition it would be. helpful if she could refer to bullet points during the interview process.
>
> … when developing a headache in response to the interview stress, she suddenly is unable to remember the question or the answers. Therefore, it would be beneficial that when she experiences a headache that she has a break. if feasible you may wish to consider that she has a facilitator during the interview process'

82. Solicitors acting for the claimant submitted a lengthy letter of appeal dated 6 August 2018. The grounds of appeal were summarised as:

> 'In summary the Trust is in breach of equalities law which extends to providing reasonable adjustments for a disabled worker during the redeployment process the employer has failed to discharge its duty to make reasonable adjustments in the following ways.
>
> 1. Not beginning redeployment support processes from the time of the first OH report clinic date 26 April 2016 and second OH report dated 6 September 2016.
>
> 2. To redeploy our client without a competitive applications process at all.
>
> 3. Adjusting the application and interview processes and to ensure that our client was not significantly disadvantage because of the process.
>
> 4. Failing to explain its reasoning for not making appropriate adjustments during the application and interview process.

Accordingly, the Trust has failed under its legal duty to carry out redeployment and the dismissal would be unfair.'

83. The appeal was dealt with by Ms Mackay who was provided with copies of the management statement of case and the claimant's appeal. The claimant was invited to an appeal hearing but after correspondence from the respondent to her direct and also to her solicitors, it was agreed that the appeal would proceed in her absence which it did on 31 October 2018.

84. At that hearing Mr Hill presented the management case and Ms Harrod gave evidence about the redeployment process and in particular the part that interviews played within it. Following the hearing Ms Harrod provided a list of roles that the claimant had been considered for during the redeployment process.

85. Ms Mackay wrote to the claimant on 14 November 2018 setting out in detail her reasons why she rejected her appeal. As far as the July 2018 OH report was concerned, Ms Mackay said in her letter that Ms Howard had said that the advice provided by OH reflected the advice she had given the claimant and further that that report had not been provided by the claimant to management or as part of her appeal and therefore she had only been able to consider this issue based on Ms Harrod's evidence. We note that in her evidence Ms Mackay said that she thought she had the latest OH report before her but the terms of her outcome letter make it clear that she did not even though it had been provided to management in July.

Conclusions

86. First reasonable adjustment claim: it is clear that the respondent required the claimant to work in a role which involved manual handling and/or prolonged standing or walking (her contractual role as a senior nursing assistant) and that this amounted to a PCP applied to her. Further it is clear that this put the claimant at a substantial disadvantage compared with persons who are not disabled in that it adversely impacted on her health and it put her at risk of, and eventually led to, dismissal. The respondent was on notice from as early as May 2016 in the first OH report that the claimant's condition was likely to amount to a disability and therefore be covered by the 2010 Act and that she was seeking a move of role to a sedentary/administrative role with no heightened infection risk. Even though OH reports in May and September 2016 said she was medically fit to do her role they also said that significant adjustments to her job were advisable. In any event that must without doubt have been apparent after the OH report from October 2017 which referred to very specific restrictions on the claimant's physical abilities. The respondent also clearly knew that a possible outcome of its redeployment process was dismissal. The duty to make reasonable adjustments was therefore engaged.

87. It is of course reasonable for any large employer to have policies that regulate how it will seek to redeploy employees in these and other situations and to seek to achieve a level of consistency of treatment and fair dealing between employees. The respondent's policies, however, were such that

prior to the claimant being on the redeployment process there was very little flexibility given to her managers to try to find her suitably adjusted role – limited to within their own directorate - despite what the sickness and absence policy says at paragraphs 11, 12 and 16. The only other option available to the claimant was to apply for other roles alongside all other candidates which, to her credit, she did and on more than one occasion was shortlisted for interview.

88. Ms Romero in particular made significant and laudable efforts to adjust the claimant's contractual role to seek to accommodate her but was limited to her own directorate and by the very significant limitations presented by the claimant's medical position. Once Alex ward closed from 1 August 2017 various other roles and opportunities were trialled or provided to the claimant mainly under the direction of Ms Bines. Again significant efforts were made by Ms Bines (and others) on behalf of the claimant during this phase. Significant adjustments were made to the role she undertook in the OPAU and many different opportunities were provided to her during the shadowing process. These efforts were again restricted by the 'own directorate' policy.

89. In the course of her evidence the claimant made serious allegations against Ms Bines. She accused her of, for example, purposely leaving her in the OPAU when she knew it was not suitable for her, having an agenda against her and deliberately doing the opposite of what she was saying in correspondence, deliberately scheduling meetings on days that she knew the claimant had arranged training which therefore had to be cancelled and compiling a case against her rather than genuinely trying to support her as the correspondence would seem to show. We find these allegations to be entirely unjustified and conclude that Ms Bines carried out her role in a professional way. Even though we conclude below that the respondent did breach its duty, we do not find that there was any motivation of a personal nature on the part of any of the respondent's witnesses.

90. Unfortunately despite all of these efforts on the part of the respondent, and also significant efforts on the part of the claimant who remained active throughout this period and was clearly keen to try and maximise her chances of finding a suitable role, no permanent suitable alternative was identified for her. This was at least in significant part due to the complexity of the limitations on the claimant's ability in conjunction with the operational needs of the respondent.

91. Consequently the respondent's policy required her to enter the formal redeployment process for there to be a wider consideration of alternative roles but even then with fixed parameters and a fixed timescale came into play regarding the search for a suitable alternative role with what can only be described as, at best, patchy support from the redeployment team.

92. As a result although individual managers throughout the period from the claimant's return to work from her original long-term sick absence to consideration of dismissal undoubtedly did much to support her try to find a suitable alternative role, they were restricted by the respondent's own

policies from proactively identifying a sedentary/administrative role somewhere in the Trust (assuming one was available) either at her own or another band that was suitable both in terms of the claimant's medical requirements and her skill set, and moving her into it without the need for a competitive process. In other words, they were prevented from so adjusting the PCP of requiring the claimant to perform her substantive role.

93. Given the size of the respondent and the variety of roles within it and the likely number of vacancies that rose from mid-2016 through to the claimant's dismissal, there must have been a real prospect that such an unfettered search would have resulted in the claimant remaining in employment. Further we know that the claimant, when applying competitively for other roles, was shortlisted for interview on a number of occasions but was then unsuccessful. The fact that she was shortlisted shows that she at least met the basic requirements for the job and must indicate that there was a real prospect that she could do that job.

94. Accordingly the burden of proof shifts to the respondent to show that such an adjustment would not be reasonable and we find that they have not shown that. Not least because of the lack of evidence as to why the Cancer Data Admin Assistant job was not pursued on behalf of the claimant as it should have been and why consideration could not be given to placing the claimant into a maternity leave cover role. Even apart from those specific examples the respondent's argument boils down to the fact that their policies do not provide for such an unfettered search. The internal policy restrictions preventing such adjustments were just that - internal policies - that the respondent had within its gift to change. It is a large employer and we had no evidence before us as to why the policy could not be changed. All managers involved simply accepted that that was what the policy said and therefore it had to be applied. Ms Bines said in her evidence that slotting a disabled employee into a role would be unfair on other people's opportunities. That misses the point of the reasonable adjustments provisions and the element of positive discrimination that they allow for. In all those circumstances it would have been reasonable to adjust the approach to at least attempt to move the claimant into a sedentary administrative job without the restrictions of the respondent's own internal policies.

95. It seems unfortunate to us that HR refused to speak to the claimant when she requested it (at the suggestion of OH) but rather assumed that the union were there to perform that role. If such a conversation had taken place at that early stage then it may be that the claimant's particular circumstances would have been recognised (not least that she was being dealt with under the sickness absence policy even though she was attending for work – not in itself unreasonable as it was the nearest relevant policy but an indication of the unusual circumstances) and a sensible decision made as to how to proceed.

96. As to whether this claim was brought in time, we quickly conclude that this was conduct extending over a period of time that ended after 26 July 2018 and accordingly was in time. The relevant conduct was the respondent's

management of the claimant's various absences and inability to perform her contractual role which started on her return to work in March 2016 and continued though to her dismissal on 12 August 2018.

97. The first claim of a breach of the duty to make reasonable adjustments therefore succeeds.

98. Second reasonable adjustment claim: this claim is put specifically by reference to the claimant's applications in October and December 2017 and February 2018. It is clear that the respondent required the claimant to engage in a competitive interview/application process for those roles and this was a PCP that, based on the medical evidence from OH in July 2018, placed the claimant at a substantial disadvantage compared with persons who are not disabled.

99. At the time of those interviews, however, the respondent had not received that report and had had no other advice from any medical professional that the claimant was at this substantial disadvantage. It is true that the claimant had referred to the underlying condition and her symptoms (e.g. experiencing headaches in times of stress and specifically during interviews) but she had not expressly drawn any link between these matters and her underlying disability to the respondent's attention. In particular she did not expressly refer to this in her redeployment registration form. Notwithstanding the individual managers' clinical experience, on this occasion it would not have been sufficiently apparent to them in order to find that they had the necessary knowledge. Accordingly the duty to adjust this PCP was not engaged and this claim fails.

100. There is an interplay between the first and second reasonable adjustment claims that requires comment. Although we have found that the second reasonable adjustment claim has failed that is because of the specific disadvantage and knowledge points that arise on that claim. Our conclusion on the first reasonable adjustment claim stands without the need for knowledge by the respondent of the claimant's particular difficulties with interviews. We find that her general medical situation justified a non-competitive transfer.

101. Discrimination arising from disability: the respondent treated the claimant unfavourably by dismissing her on 12 August 2018. That dismissal was due to her sickness absence and her inability to fulfil the requirements of her contractual position which in turn arose in consequence of her disability.

102. Accordingly the question to be answered is whether that treatment was a proportionate means of achieving a legitimate aim. The respondent relies upon the aim of provision of safe service to its patients and other staff which clearly is legitimate. As to whether it was proportionate to terminate the claimant's contract as she was unable to provide satisfactory attendance, we find that it was not for the same reasons that we above found that the first reasonable adjustment claim succeeds. In circumstances where the respondent has failed in its duty to adjust its PCP of requiring her to work in

a role that placed her at a substantial disadvantage it cannot then be proportionate to put her in a process that led to her dismissal because of her failure to work in that role.

103. The discrimination arising from disability claim therefore succeeds.

104. Unfair dismissal: given our findings above with regard to a breach of the duty to make reasonable adjustments and discrimination arising from disability, the dismissal could not stand as fair and the claim of unfair dismissal also succeeds.

105. In addition we have other concerns about the dismissal which lead us to conclude that in any event it would have been unfair.

106. Clearly the reason for the dismissal was capability. The respondent, through Mr Hill and Ms Mackay, genuinely believed (and were right to believe) that the claimant was no longer capable of performing her contractual duties. As the claimant accepted, the dismissal process followed by the respondent was reasonable (again even though she was not actually off sick, the sickness absence policy was the most appropriate to use). Further there had been very significant consultation between the respondent and the claimant prior to her dismissal both as part of the formal dismissal process and previously during both informal and formal management of her health position. However, despite Mr Hill specifically adjourning the dismissal meeting in part to obtain an updated OH report, he then made his decision prior to receipt of that report. In our view it would have been better for Mr Hill to await the result of that medical report but, in all the circumstances, we would be substituting our own view if we were to say that that in itself made the decision unfair.

107. What Mr Hill did fail to do, however, and Ms Mackay did not address and therefore remedy at appeal stage, was sufficiently investigate the position regarding a possible alternative job that the claimant could have been moved into. At the time Mr Hill made his decision there were two outstanding roles that the claimant had been put forward for. One was Patient Access Administrator in orthopaedics. When he made his decision he was aware that that process was ongoing and the claimant's suitability was being assessed. Mr Hill relied upon the fact that when he gave notice to the claimant any pending applications would be taken into account and it was therefore quite possible that during her four week notice period that job would have been assessed as suitable and she could have moved into it and the dismissal would not have taken effect. In the event the claimant herself withdrew from that process as she considered the job was not suitable having spoken to the manager.

108. The position regarding the second job, however, was different. This was the Cancer Data Admin Assistant role which Mr Hill knew, when he dismissed the claimant, she had been put forward for (and there were possibly two roles) and the responsible recruiting manager, who was known for not replying, had simply failed to reply and there was no evidence of them being chased. Mr Hill accepted in his evidence that in the event of the

recruiting manager not replying he would be the escalation point. There was therefore no reasonable prospect that that situation would be resolved one way or the other during the four week notice period and it was unreasonable for Mr Hill not to pursue that before he made his decision.

109. Further, and this overlaps with our findings above regarding the reasonable adjustment and arising from claims, because Mr Hill was following the strict parameters of the redeployment process, he failed to investigate whether there were other sorts of jobs available that the claimant could have performed. For example any that were not permanent (e.g. maternity leave cover) or at a different grade (for example band 4 jobs). Ms Mackay did not address this issue in her appeal process. She considered only the four specific grounds of appeal raised by the claimant as she was entitled to do.

110. For these reasons therefore at the time Mr Hill made his decision to dismiss there had not been a reasonable investigation in respect of alternative jobs as well as the dismissal being discriminatory and the claim of unfair dismissal succeeds.

Remedy Hearing

111. A remedy hearing has been listed for **9 March 2022** commencing at **10am** at London South Employment Tribunal, Montague Ct, 101 London Rd, Croydon, CR0 2RF. It is hoped that the parties may be able to reach agreement without the need for a further hearing. If so, they shall please inform the Tribunal as soon as possible. Otherwise, the following directions apply.

112. On or before **19 January 2022** the claimant shall send to the respondent a statement setting out the remedy she seeks and her efforts to mitigate her loss together with copies of any supporting documents and an updated schedule of loss.

113. On or before **9 February 2022** the respondent shall send to the claimant any witness statements that it wishes to rely upon in relation to remedy together with copies of any additional documents relevant to the issue.

114. On or before **2 March 2022** the respondent shall send to the claimant a bundle of documents for the remedy hearing and bring sufficient copies of that bundle to the remedy hearing for use by the Tribunal and lodge an electronic copy. Both parties shall bring 3 copies of their witness statements to the hearing and lodge an electronic copy.

_____
Employment Judge K Andrews
Date: 7 December 2021