EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mrs V Nimoni		**London Borough of Croydon**

Heard at: London South Employment Tribunal
On: 27 & 28 September & 23, 24, 25 and 26 November 2021 In chambers on 20 December 2021

Before: Employment Judge Hyams-Parish
Members: Ms E Thompson and Mr C Wilby

Representation:
For the Claimant: In person (assisted by Ms F Nimoni, the claimant's daughter)

For the Respondent: Mr D Green (Counsel)

RESERVED JUDGMENT

It is the **unanimous** judgment of the employment tribunal that:

(a) The claim of unfair dismissal is well founded and succeeds.

(b) The claim of discrimination arising from disability is well founded and succeeds.

(c) The claim of harassment fails and is dismissed.

(d) The claim of failing to make reasonable adjustments is well founded and succeeds.

(e) The claim of indirect discrimination fails and is dismissed.

(f) There shall be a 20% reduction applied to the compensation awarded to the claimant on the grounds of contributory fault.

REASONS

A. CLAIMS AND ISSUES

1. By a claim form presented to the employment tribunal on 3 January 2020, the claimant brings the following claims against the respondent:

   - Unfair dismissal (s.98 Employment Rights Act 1996 ("ERA")).
   - Discrimination arising from disability (s.15 Equality Act ("EQA")).
   - Failing to make reasonable adjustments (s.20 EQA).
   - Harassment (s.26 EQA).
   - Indirect discrimination (s.19 EQA).

2. It was agreed by the parties at the outset of the hearing that the questions which the tribunal needed to answer in order to determine the claims are as follows:

Time limits (s.123 EQA)

1 What was the date of each discriminatory act?

2 Was the conduct by the respondent part of a continuing act ending on the date of the final act?

3 If so, what was that final act and when did it occur?

4 Whichever date at (1) or (3) is applicable, was the claim form presented within the applicable time limit?

5 If not, is it just and equitable to extend time?

Unfair dismissal (s.98 ERA)

6 Has the respondent proved a potentially fair reason to dismiss the claimant?

The reason relied on by the respondent is capability.

7 Did the respondent genuinely believe the claimant to be medically incapable of performing her role?

8 Was that belief based on reasonable grounds?

9 At the time of forming that belief, had the respondent carried out as much investigation as was reasonable in the circumstances?

10 Was the dismissal procedurally fair?

11 Did the dismissal of the claimant fall within the range of reasonable responses open for the respondent to take?

In answering this question, the tribunal will inevitably wish to look at what alternatives were explored by the respondent when deciding whether to dismiss.

12 If the dismissal was unfair, should any award be reduced on account of *Polkey* or contributory fault?

Discrimination arising from disability (s.15 EQA)

13 Did the respondent treat the claimant unfavourably?

The unfavourable treatment relied on by the claimant is her dismissal, including the process leading up to it. That process included the following:

(a) Requiring the claimant to attend a meeting arranged under the respondent's Managing Sickness Absence Policy on 30 October 2018?

(b) On 2 November 2018, sending a letter to the claimant informing her that dismissal was a potential outcome?

(c) On 22 January 2019, holding a further follow up review meeting under the respondent's Managing Sickness Absence Policy and informing the claimant of the potential outcomes in writing on 30 January 2019?

(d) On 2 April 2019, holding a further follow up review meeting under the respondent's Managing Sickness Absence Policy and informing the claimant of the potential outcomes in writing on 9 April 2019?

(e) Holding a final attendance review meeting on 2 July 2019, in accordance with the Managing Sickness Absence Policy?

14 What was the reason for the unfavourable treatment ("*the something*")?

The *something* relied on by the claimant is her inability/incapability to perform the role which she was employed to do.

15 Did the *something* arise in consequence of the claimant's disability?

16 Was the treatment a proportionate means of achieving a legitimate aim?

The legitimate aims relied on by the respondent are:

(a) That the Travel Training Team should fulfil the goals of the April 2018 restructure as efficiently as possible.

(b) The need to see that the respondent's vacancies were filled with capable and well-qualified candidates.

(c) The need to manage the respondent's workforce efficiently, in a cost effective manner, and to see that staff were capable of performing the roles they were in.

Harassment (s.26 EQA)

17 Did the respondent engage in unwanted conduct?

The unwanted conduct relied on by the claimant is as follows:

(a) JW ignoring the unacceptable mismanagement of her accident at work?

(b) MC dismissing the claimant's immediate concerns and telling the claimant she would have to wait until the team restructure consultation period to discuss any queries relating to her role?

(c) DS accusing the claimant of producing an Occupational Health ("OH") report that was not commissioned by the respondent?

(d) DS telling the team that no feedback was received during the consultation phase?

(e) JW failing to address the claimant's concerns and ignoring the outcome of her most recent OH report during their one to one meeting?

(f) HR and JW suggesting the claimant needed to gain experience in administrative skills?

(g) The director of HR failing to provide a formal reply to the claimant's grievance?

(h) VU failing to document what was said during a formal meeting attended by the claimant, HR and the claimant's union representatives on 19 February 2019?

(i) MC not inviting the claimant to a team meeting on 3 July 2019 and telling the claimant "*it wasn't an important meeting"*?

(j) SI failing to respond to the claimant's email complaint dated 4 July 2019?

18 Was the above unwanted conduct related to a relevant protected characteristic?

19 Did the unwanted conduct have the ***purpose*** of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

20 If it did not have that purpose, did it have that ***effect***, taking into account the perception of the claimant, the circumstances of the case, and whether it was reasonable for the conduct to have had that effect?

Failing to make reasonable adjustments

21 Did the respondent apply a provision, criterion or practice ("PCP") which put the claimant to a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

21.1 The PCPs relied on by the claimant are as follows:

(a) The restructuring proposal dated 28th April 2018, which stated that all Travel Trainers would directly assimilate into a new Travel Trainer role.

(b) The requirement that the claimant be fit enough to carry out the role which she was employed to do.

21.2 The substantial disadvantage relied on by the claimant is:

(a) She would have to walk for more than 15-20 minutes without rest which she could not do due to her disability and was therefore at risk of being dismissed due to ill health capability.

22 If the answer to 21 above is yes, did the respondent fail to make such adjustments as were *reasonable* to avoid such disadvantage?

22.1 The adjustments which the claimant says were reasonable and should have been made, but were not, are as follows:

(a) Redeploying the Claimant when the recommendation was made in the OH report dated 26th June 2017.

(b) Assimilating the claimant to the role of Travel Assistance Case Manager in the Travel Training team restructure document dated April 2018.

(c) Allowing the claimant to continue in her Travel Trainer role with amended desk-based duties.

(d) Not requiring the claimant to be assessed for roles by interview.

(e) Failing to assimilate or redeploy the claimant to a suitable role by virtue of its restructuring proposal.

(f) Transferring the claimant to fill any suitable desk-based vacancy at the respondent.

(g) Creating a new role for the claimant.

(h) Offering the claimant the permanent Housing Enforcement Assistant role she applied for, instead of only offering a six-month fixed-term contract.

(i) Shortlisting the claimant for the Customer Service Advisor role, even though it was a grade above her current pay grade.

(j) Not being selective in the roles offered to the claimant (as a way to ensure her dismissal would be on the grounds of ill-health capability and not redundancy).

(k) Redeploying the claimant to the role of Shared Lives Co-ordinator.

(l) Recruiting for the Business Support Officer role in the pollution team and redeploying the claimant to that role.

(m) Redeploying the claimant to the role of Administrator - Integrated Adult Mental Health.

(n) Allowing the claimant to apply for the Business Support Officer role in April 2019 and redeploying her to that role.

(o) Giving the claimant a trial period for any of the roles she applied for so she could prove her suitability and remain in employment.

(p) Giving the claimant training for aspects of the personal specifications she did not meet, so she could be redeployed to fill an existing vacancy.

(q) Failing to provide a standing desk within a reasonable time.

Indirect discrimination

23 Did the respondent apply a provision, criterion or practice to persons who do not share the claimant's protected characteristic?

The PCP which the claimant relies on is as follows:

(a) The restructuring proposal dated 24 April 2018, which stated that all Travel Trainers would directly assimilate into a new Travel Trainer role.

24 Did the PCP put, or would the PCP have put, people who share the Claimant's protected characteristic to a particular disadvantage compared to people who do not share it?

The disadvantage relied on by the claimant is:

(a) She would have to walk for more than 15-20 minutes without rest which she could not do due to her disability and was therefore at risk of being dismissed due to ill health capability.

25 Did it put, or would it have put, the claimant to that disadvantage?

26 Has the respondent shown that that PCP is a proportionate means of achieving a legitimate aim?

27 The legitimate aim relied on by the respondent is as follows:

(a) That the Travel Training team should fulfil the goals of the April 2018 restructure as efficiently as possible; and

(b) The need to see that the respondent's vacancies were filled with capable and well-qualified candidates.

(c) The need to manage the respondent's workforce efficiently, in a cost effective manner, and to see that staff were capable for the roles they were in.

B. THE HEARING

3. The parties had agreed a timetable which the tribunal was happy to adopt. This involved the hearing being split, but with a relatively short period in between each part. Whilst never ideal, the parties consented to proceeding in this way.

4. Aside from housekeeping and discussing the list of issues, there were no preliminary applications or issues to be determined by the tribunal at the start of the hearing.

5. The tribunal spent the first day of the hearing (27 September 2020) reading witness statements and relevant documents in the document bundle which extended to 1402 pages. Numbers in square brackets below are references to pages in the document bundle.

6. Witness statements were provided by the following:

(a) Valerije Nimoni ("the claimant")

(b) Jackie Wright ("JW"), Deputy Head of Service, Independent Travel, line manager.

(c) Daniel Shepherd ("DS"), Head of Independent Travel.

(d) Virginia Unciano ("VU"), HR Consultant.

(e) Ritika Singh ("RS"), HR Specialist Consultant.

(f) Sue Moorman ("SM"), Director of HR.

(g) Steve Illes ("SI"), Director of Public Realm, dismissing officer.

(h) Jennifer Sankar ("JS"), Head of HR, Place Development, appeal officer.

(i) Monica Clarke ("MC"), Travel Training Team Manager, interim line manager.

7. All of the above witnesses gave evidence at the hearing. The evidence was completed on the final day of the hearing.

8. Both parties provided helpful written submissions which were supplemented by short oral submissions at the hearing. The tribunal considered these submissions very carefully before reaching its conclusions below, including all of the case law referred to. If a particular case referred to in these submissions has not been specifically referred to below, this does not mean that the tribunal did not consider it.

9. The parties were informed that due to lack of time, judgment in this case would be reserved.

C. BACKGROUND FINDINGS OF FACT/CHRONOLOGY OF EVENTS

10. The tribunal decided all of the findings below on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that the tribunal failed to consider it. The tribunal only made those findings of fact necessary for it to determine claims brought by the claimant. It was not necessary to determine every fact in dispute where it was not relevant to the issues between the parties.

11. The respondent is a local authority that employs in the region of 3,573 employees.

12. The respondent provides a service for young people and adults with special needs and/or disabilities to help them travel independently, whether by using walking routes or public transport. This service benefits such people by helping them become more independent. It also means that the local authority can reduce the money it spends on providing transport for them. The service is provided by a team within the respondent referred to as the Travel Training Team. The service had previously been outsourced to a company called Croydon Care Solutions ("CCS"), but on 1 August 2016 was brought back in-house.

13. The claimant started her career as a Travel Trainer in 2011. She was initially engaged by CCS through an agency but in May 2015 became a permanent employee of CCS.

14. On 8 February 2016, the claimant was injured at work when she fell whilst on a bus. The accident caused injury to the claimant's neck, back and knees, leaving her less mobile than she had been before. Prior to the accident, the claimant had not experienced any mobility problems and was able to perform her role without difficulty.

15. The claimant was off work for a period of time due to the accident. She went back to work on 1 April 2016 on a phased return basis. During her absence, the claimant was referred to, and visited, OH. During this meeting, the claimant explained that her injuries meant that she had difficulty controlling her bladder, walking long distances and standing for long lengths of time. She also stated that she did not think she would be able to continue the physically-demanding role of a Travel Trainer.

16. An OH report from a consultation in May 2016 included the following extract [sic]:

> ***I am sorry to say that Valerije's symptoms of pain to her back have not improved. She has an appointment with the pain management team, on 24 May 2016. She explained that she is in pain constantly and that she finds It difficult to sit longer than 20 minutes without having to change her working posture, stand, stretch and walk around the office. She is not able to walk for longer than 15 minutes without having to sit and rest. Her sleeping pattern is poor and disrupted because she can't find a comfortable position in bed to allow her body to relax and alleviate her discomfort.***
>
> ***Being in constant pain is exhausting, distressing, it impacts on the individual's concentration levels, day to day activities and of course their quality of life. Valerije was visibly distressed this afternoon when we met and her physical and emotional energy is very low.***
>
> ***Valerije has been determined to attend work and carry out her duties as best as she could, since she returned to work, following her accident in February 2016. However, it is my clinical judgement that she is not fit to work her normal contractual hours. With this in mind I have made the recommendations below.***
>
> - ***Fit to work reduced hours.***
> - ***I recommend that Valerije works a three day week and no longer than five hours each day, for the next five weeks .***
> - ***I recommend a full ergonomic assessment Is carried out because Valerijie has told me that she is uncomfortable sitting in her current chair.***
> - ***OH review in five weeks to make further recommendations. I hope that I will have more relevant medical information to advise you, when Valerije has been assessed by the pain management team.***

17. On 1 August 2016, the claimant's employment transferred to the respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2016. Responsibility for the Independent Travel Training Service fell under JW at that point, and she assumed line management responsibility for the claimant.

18. It is clear that, certainly from the time of the transfer, the claimant was performing an office based role which was created for the claimant as she was unable to do her normal job. This adapted role involved the following duties:

    - Preparation of training materials for classroom based sessions/presentations and delivering sessions for adult clients, liaising with schools and internal colleagues.

    - Developing a train user guide for clients.

    - Sending reminder letters to parents/carers for travel training assessments.

    - Reviewing the needs of adult clients by reading personal care plans and deciding who would be eligible and appropriate for Travel Training.

    - Sending confirmation of pick up times and contractor names to parents/carers on behalf of Croydon Transport Services.

    - Participating in promotional events for the travel training team and giving presentations to professionals.

    - Updating client spreadsheets.

    - Scanning and uploading applications onto sharepoint.

    - Carrying out class based sessions with pupils.

    - Carrying out a project at a specific school.

19. Whilst the role was specifically created for the claimant, and would not otherwise have been occupied by anyone else, what the claimant did in this adapted role benefited the wider Travel Trainer Service.

20. On 22 August 2016, JW was provided with consent from the claimant to access her OH reports. A further consent was then provided by the claimant at the end of September 2016 for her OH records to be transferred to the respondent from the organisation that had produced previous reports.

21. Nothing appears to have happened between the end of September and mid December 2016. The claimant was then absent from work for an unrelated condition, between 15 December 2016 and 8 March 2017. JW did a home visit to the claimant in January 2017.

22. On 15 May 2017, JW sent an email to MB (Assessment and Independent Planning Manager) inquiring whether the claimant had been offered legal support regarding her accident at work in February 2016, and whether the accident had been reported to the Health and Safety Executive ("HSE") [623]. On 22 May 2017, the claimant sent JW a copy of a witness statement prepared by a colleague, RB, who had witnessed the accident. JW asked the claimant whether she had obtained the bus number. JW was shocked that the bus company had not accepted liability. On 22 May 2017, JW met with the claimant to offer her support and discussed making a complaint to the bus company. JW drafted a reply on her behalf and suggested that she should seek help from her local MP.

23. On 1 June 2017, JW received an email from HB, who previously managed the Travel Training Team at CCS, stating that she didn't believe the claimant had been offered legal support. The claimant had been advised to inform the bus company and complete an accident form in case she needed it for legal reasons in the future. HB informed JW that no notification had been made to HSE.

24. In June 2017, a further OH report was obtained which made the following recommendation:

> ***….if operationally possible, I would recommend that she is given the opportunity to redeploy into a specific school rather than travelling round individuals. She also requires a DSE assessment. The links to this assessment is on the Health & Safety site on the intranet.***

25. Such an adjustment was not possible as Travel Trainers were not deployed into specific schools.

26. In July 2017, MC was appointed Travel Trainer Team manager on an interim basis, pending a proposed reorganisation of the service. As such, she also became interim line manager for the claimant.

27. In February 2018, DS began to formulate proposals for the restructuring of the respondent's travel service. The restructure related to a review of the Alternative Travel and Eligibility Service. The aim of the restructure was to achieve service improvements whilst delivering identified efficiencies and to support the respondent's Corporate Plan for 2015 to 2018, enabling growth and helping residents to be as independent as possible, in part by reducing reliance on provided transport. Part of the drive towards being more efficient meant bringing certain teams under the same manager.

28. The proposals anticipated that there would be no reduction in work as a result of the restructure. At the time, the service retained 3.5 full time equivalent long term agency posts and the aim of the proposal was to move these to permanent positions under the employment of the respondent. It was also envisaged that additional posts would be created which would focus on independent travel training.

29. At that point the existing permanent Travel Trainer posts (including the claimant's post) had been identified as Grade 3 posts within the respondent's structure. The respondent decided that this did not accurately reflect their responsibilities and was not in line with other roles. It was therefore proposed that Travel Trainers would be regraded to Grade 4 to reflect the additional responsibility for assessments. It was proposed to assimilate all Travel Trainers to new Grade 4 Travel Trainer posts, as there was an increased need for Travel Trainers as part of the reorganisation.

30. As part of the restructure, it was also proposed that a Travel Assistance Case Officer post (Grade 6) would be created. The name of this post was later changed to Travel Assistance Case Manager. The role was designed to meet increasing demand within the team, focus on eligibility, personal transport budgets and complaints.

31. On 24 April 2018, the new proposals were presented to trade union representatives and affected staff, including the claimant. This marked the commencement of a 30 day consultation period.

32. Staff were told that no-one would be made redundant as a result of the reorganisation. They were given a document which explained the proposals and the rationale for them. It outlined the process and timetable for consultation of staff in respect of any changes to their roles and set out the proposed process and timetable for implementation. Feedback and comments from staff and trade union representatives were sought.

33. At this stage, DS was simply concentrating on posts rather than people in those posts. Therefore at the point of designing the new structure, he did not factor into his decision making the fact that the claimant could no longer perform her existing Travel Trainer role. The tribunal did not think there to be anything inherently wrong with this approach. At this point, whilst the claimant had continued in the role, she was not performing her normal duties, but rather the adapted ones as referred to in paragraph 18 above.

34. The claimant requested a meeting with DS to discuss the restructure proposals, which took place on 9 May 2018. During that meeting, the claimant explained her individual circumstances, referred to the accident in February 2016 and explained the adapted role that she had been doing in the team since then. The claimant said she could not assimilate into the new structure as a Travel Trainer (i.e. performing the normal role of a

Travel Trainer). The claimant asked whether she could assimilate into the new Travel Assistance Case Manager role as part of the restructure. DS informed the claimant that he would consult HR and revert to her.

35. DS subsequently discussed the matter with VU and they decided that the claimant could not assimilate into the case manager role as it was a Grade 6 role, therefore two grades higher than her current regraded role.

36. By email dated 18 May 2018, DS informed the claimant that she could not assimilate into the new Grade 6 Travel Assistance Case Manager role as part of the restructure and that he wanted to refer her again to OH so that redeployment could be considered.

37. On 31 May 2018, a referral was made for the claimant by DS for an assessment by OH. He also contacted MC and JW to request information about the adjustments that had been made for her or any alternative roles that had been considered for the claimant following receipt of the OH report in June 2017. JW supplied this information on 1 June 2018.

38. A job matching exercise was carried out for the claimant in August 2018 to assess whether she could assimilate into the Travel Assistant Case Manager role. The exercise revealed only an 18% match. Under the respondent's Restructuring and Reorganisation Policy, a direct assimilation required an 80% job match between the job specifications of an employee's existing and new role. The respondent's view was that it would not have been reasonable to have assimilated the claimant from a Grade 4 to a Grade 6 role in those circumstances. The above policy states that where there is a match of between 50% and 80%, an employee can apply for the new role as part of a ring fenced process. The claimant was able to apply for the Travel Assistance Case Manager role as a redeployee. Recruitment to the post was therefore put on hold in order for her to do so.

39. On 7 September 2018, an OH assessment of the claimant was carried out by the respondent's OH provider. A report dated 14 September 2018 was produced [668]. It recommended the following:

> ***In my opinion, Ms Nimoni is currently unfit for her role as a Travel Trainer and is unlikely to be so for the foreseeable future. Her symptoms have not responded or improved significantly since 2016. I understand that she is waiting to see the Spinal Orthopaedic Team to see if there is an intervention that could help her pain. She is also currently awaiting an injection into the left knee. Ms Nimoni would be able to do a more sedentary role, such as an office-based role, as long as she was able to get up every 30 minutes to an hour to reposition the back for a few minutes. A role that does not involve prolonged walking or standing or excessive bending or lifting of items over 10kg would also be suitable. For further information regarding prognosis and if her symptoms are likely to respond to any intervention, we would need to contact her orthopaedic specialist.***

40. On 14 September 2018, DS sent an email to affected staff to update them as part of the consultation regarding the restructure proposals [667]. DS informed staff that the new structure would be implemented the week commencing 16 September 2018. DS confirmed that the claimant would assimilate into the new Grade 4 Travel Trainer roles, despite what he knew about the claimant's individual circumstances, and that other posts would be advertised the following week.

41. On 27 September 2018, the claimant was placed on the redeployment register. As such, she was given the opportunity to apply, and did apply, for the new (Grade 6) Travel Assistance Case Manager role.

42. The tribunal was shown the redeployment policy. That policy contained the following provisions:

> ***1. Scope***
>
> ***1.1 This procedure applies to all Council employees except teachers, lecturers and school-based staff, who have their own procedures.***
>
> ***2. Introduction***
>
> ***2.1 This procedure lays out the process to be followed when employees face termination of their employment on the grounds of redundancy, ill health, disability or other reasons. The procedure aims to maximise the opportunity for employees in such circumstances to obtain alternative employment whilst balancing this with the needs of the Council to deliver high quality value for money services.***
>
> ***5. Corporate redeployment - eligibility***
>
> ***5.1. If redeployment within the employing department is not possible employees will be admitted to the Council's Corporate Redeployment Register on the following criteria:***
>
> ***5.1.1. "Statutory" Reasons***
>
> ***(a) Permanent employees, or temporary employees with two year's continuous service with Croydon, who have been given notice of termination of employment on grounds of redundancy.***
>
> ***(b) Employees identified by the Council's Occupational Health Service (OHS) as being permanently unfit to undertake the duties of his/her post but fit to undertake alternative work and deemed unlikely to exceed the Council's trigger points for sickness absence in that work (see Managing Sickness Procedure for trigger points).***
>
> ***(c) Employees confirmed by the Council's OHS as being unable to carry out the duties of their post because of a disability and it has not been possible to make reasonable adjustments to allow continuation in post.***

> ***(d) Other statutory reasons where no suitable departmental vacancy is available. This includes employees returning from maternity or adoption leave or because of gender reassignment.***
>
> ***5.2.1 Employees seeking redeployment on 'statutory' grounds (para 5.1.1) may be considered for posts up to two grades higher than their current post provided they meet all the selection criteria on the shortlisting sheet.***
>
> ***Posts up to two grades lower than their current post will also be considered. This may be extended beyond two grades lower depending on the employee's stated preference on the redeployment form. Depending on the individual circumstances, this may also apply to those redeployed under paragraph 5.1.2(c). See section 10 for salary protection arrangements.***
>
> ***5.3 Employees will be placed on the corporate redeployment register for a maximum of 3 months.***

43. By an email dated 3 October 2018 [681], JW offered to meet with the claimant to discuss any questions about the redeployment process and to discuss the claimant's proposed application for the Travel Assistance Case Manager role.

44. On 10 October 2018, the claimant was interviewed for the Travel Assistance Case Manager post by JW and KM. She was not successful as she was not considered to have met the minimum criteria to be appointed to the post. As the role was a higher grade, the claimant was required to have met all of the selection criteria at interview. This was in accordance with the respondent's Redeployment Policy [317].

45. On 17 October 2018, VU met with the claimant to discuss the interview. At that meeting, the claimant said she thought she had done well at the interview but felt that they were not going to give her the job anyway. In feedback given to the claimant by KM, she was told that she had not been able to fully answer the questions.

46. By email dated 22 October 2018, DT (the claimant's Unison representative) wrote to JW and DS [723] requesting that the claimant be given an additional eight weeks in the redeployment pool and that support be given to her to apply for roles and improve her interview skills.

47. On 30 October 2018, a review meeting took place with the claimant under the respondent's Managing Sickness Absence Policy [437-443]. JW and VU attended on behalf of the respondent and the claimant attended with her union representative, DT.

48. By email dated 1 November 2018, VU sent to the claimant the role profile for a Business Support Officer (Grade 4) post [729]. VU suggested to the claimant that she contact RS for tips on completing the application form

and offered to review her completed application if she needed additional support.

49. On 2 November 2018, JW informed the claimant that she would be placed in the respondent's redeployment register for a period of 12 weeks in accordance with the respondent's Redeployment Policy [313]. The claimant was also informed that, if at the end of 12 weeks she had been unable to secure a post through redeployment, another review meeting would be arranged under the respondent's Managing Sickness Absence Policy which could lead to her employment being terminated on the grounds of medical capability.

50. On 5 November 2018, the claimant applied for the role of Assistant Shared Lives Co-ordinator (Grade 6) [744] and was invited for interview.

51. On 6 November 2018, the claimant attended a meeting with RS to discuss interview skills. RS extended the deadline for the Business Support Officer role (paragraph 48 above) in order to give the claimant more time to apply. By email dated 12 November 2018, RS reminded the claimant that she had still not applied for the above mentioned Business Support Officer post [page 766].

52. On 16 November 2018, the claimant applied for the post of Administrator-Integrated Adult Mental Health (Grade 5) [769]. On 19 November 2018, RS emailed TD, the recruiting manager for this post, to highlight the claimant's administrative skills. RS recommended that the claimant be interviewed for the post and given the opportunity to show her potential.

53. On 20 November 2018, a formal complaint was submitted to JN (Chief Executive Officer) and SM (HR Director) on behalf of the claimant by DT (the claimant's trade union representative) [803]. On 22 November 2018, SM acknowledged receipt of the complaint and said that she would respond fully once she had been briefed on the claimant's case.

54. On 20 November 2018, the claimant attended an interview skills training session held by Hays.

55. On 22 November 2018, the claimant emailed VU requesting an urgent meeting. Her email stated that she had just received information that was affecting her mentally and physically. VU met with the claimant the same day. During the meeting the claimant became distressed. After the meeting, VU provided the claimant with details of the respondent's Employment Assistance Programme and Croydon Talking Therapies. VU also provided a stress risk assessment Form for the claimant to complete and requested that she consent to a further referral to OH.

56. On 22 November 2018, the claimant was offered a temporary role as a Business Support Officer in the Pollution team. The opportunity was

offered to the claimant as a way of gaining experience in an administrative role as the roles that were likely to be suitable for the claimant for redeployment were administrative in nature. Despite concerns that the role was only temporary, the claimant accepted the post on 4 December 2018.

57. On 27 November 2018, the claimant was interviewed for the Assistant Shared Lives Co-ordinator (Grade 6) post (the role referred to at paragraph 50 above). She was unsuccessful. As the role was a higher grade, she was required to have met all the selection criteria at interview, but did not do so.

58. On 13 December 2018, the claimant was interviewed for the Administrator Integrated Adult Mental Health (Grade 5) post (referred to at paragraph 52 above). She was unsuccessful. As the role was a higher grade, the claimant was required to have met all the selection criteria at interview.

59. By 9 January 2019, the claimant was enjoying her temporary role (paragraph 56 above). VU enquired with the manager whether there was an opportunity for a permanent role within the team. At that stage the 12 week period of redeployment was due to end on 21 January 2019. VU continued to encourage the claimant to log on to the redeployment website and review opportunities. VU referred the claimant to some revenue officer posts which were between Grades 4-7.

60. On 16 January 2019, JW agreed to allow the claimant to continue in the temporary Business Support Officer role in the Pollution team until the end of March 2019.

61. On 22 January 2019, JW held a follow up review meeting with the claimant and her representative. The claimant was informed that she could continue in her temporary role until 31 March 2019 and that she would have access to the redeployment register to look for alternative roles within this time. She was informed that if she was unable to find a new role by 31 March 2019 then she would need to return to her substantive post. The claimant was informed, in accordance with the Managing Sickness Absence Policy, that a further attendance review meeting may be held and that she may be referred to a Final Attendance Review Meeting which could lead to her dismissal on the grounds of medical capability.

62. During 22 January 2019 meeting, it was discussed that LJ (a manager in the Pollution team) had informed the claimant that there could be a role for her in the team as she was happy with the work the claimant had been doing. VU told the claimant that LJ had been in contact with HR but it was "*not set in stone*" and was conditional upon the person in the position that was earmarked for the claimant being successful in securing a more senior role.

63. On 4 February 2019, the claimant applied for a full-time Housing Enforcement Assistant post (Grade 4-5) [870]. On 7 February 2019, RS sent a copy of the claimant's application for this post to VU, commenting that the claimant had not provided sufficient information to show that she had met the person specification. RS was clearly concerned that the claimant was not showing herself in the best possible light. In any event, RS discussed the claimant's application with the manager, together with the possibility that she be interviewed to assess her potential in the role.

64. On 7 February 2019, the claimant applied for a Customer Service Advisor role (Grade 5). The claimant was not shortlisted because she did not give sufficient evidence that she had met the person specification. Moreover, as the role was a grade higher than her current role, she needed to have demonstrated that she had met the essential criteria.

65. On 14 February 2019, the claimant was interviewed for a Housing Enforcement Assistant (Grade 4) role. She "partially met" seven out of eight questions she was assessed on and "met" one out of the eight questions. However the service manager was prepared to offer the claimant a temporary role for six months, but she would not have access to redeployment opportunities during this time. The claimant turned down this role as it was for a fixed term.

66. On 18 February 2019, LJ (Pollution Team manager) emailed VU about the prospect of recruiting to a permanent role of Business Support Officer within the pollution team. She said "*First, I need to recruit for the Pollution support officer and if the person currently acting up is successful I will then need to recruit for the assistant post. I am hoping to start the paper work next week, so it is not likely that we will be recruiting for the assistant post until April*"

67. As the end of the redeployment period was due to end on 31 March 2019 and the claimant was due to return to her existing post, JW invited the claimant to an attendance review meeting on 2 April 2019.

68. At the meeting on 2 April 2019, the claimant was informed that as an alternative role had not been found for her, she would be required to attend a final attendance review meeting at which a decision would be taken as to whether she should be dismissed on the grounds of capability.

69. On 12 April 2019, the claimant attended a consultation with OH. In a report dated 18 April 2019, the author stated as follows:

> ***Summary and Opinion***
>
> ***In my opinion, based on the information available to me and my assessment today, Ms Nimoni is currently unfit for her role as a Travel Trainer and is unlikely to be so for the foreseeable future. As I outlined in my previous report, her symptoms have not responded or***

> ***improved significantly since 2016 and since my last assessment, symptoms are much the same.***
>
> ***As outlined previously, Ms Nimoni would be fit to do a more sedentary role such as an office based role as she is doing currently. I understand in her current role, she is able to get up and re-position when required, for example every 30 minutes and able to stretch out her legs. The role that does not involve prolonged walking or standing or excessive bending or lifting of items would also be suitable. I understand that she has had an up to date work station assessment and has a sit to stand desk which she has found very helpful. There are no additional adjustments that I would recommend at present in addition to what I have outlined.***

70. On 12 April 2019, the claimant attempted to apply for a full time Business Support Officer (Grade 4) role in Children's Services, but was prevented from doing so online. The system provides a notification regarding previous unsuccessful applications. The claimant emailed VU to say that she had attempted to apply for the role but had been prevented from doing so because the system appeared to be suggesting that she had previously applied for it. VU confirmed the position that she could not apply again, if she had applied for that position within the previous six months. In fact, the claimant had not applied for the position at all, but VU had understood from correspondence from the claimant that she had.

71. On 16 April 2019, the claimant suffered a mini stroke and commenced a period of sickness absence.

72. On 3 May 2019, the claimant returned to work. At this point she resumed her adapted Travel Trainer role.

73. On 13 May 2019, the claimant was invited to a final attendance review meeting on 21 May 2019 [1021]. The claimant was told in the letter that an outcome could be dismissal on the grounds of capability due to ill-health.

74. The claimant attended a further meeting with OH on 14 May 2019. At the meeting, it was suggested that, due to the way the claimant was feeling at that point, that she take a couple of weeks off work.

75. In a report dated 14 May 2019, OH concluded as follows:

> ***In my opinion, based on my assessment and the information available to me, Ms Nimoni is currently unfit for her role as an Independent Travel Trainer and is unlikely to be so for the foreseeable future. In my opinion, she is currently unfit to undertake an alternative role as her symptoms of anxiety appear to have worsened since I last saw her and the perceived work related stressors are ongoing. I have advised her to see her GP over the next couple of days with regard to the pain down her right arm and also her ongoing symptoms related to anxiety and for consideration of counselling to help her process some of her ongoing symptoms which hopefully will help her to develop some coping strategies.***

76. On 16 May 2019, the claimant wrote to VU and JW informing them that she could not attend the attendance review meeting due to the "*negative effect*" on her health.

77. The attendance review meeting went ahead in the claimant's absence but it was halted when it became clear that SI (chair) did not have a copy of the OH report from the claimant's recent visit on 14 May 2019. The meeting was rescheduled to take place on 2 July 2019.

78. The claimant returned to work on 17 June 2019. Once again she returned to her adapted Travel Trainer role.

79. The claimant attended a final attendance review meeting on 2 July 2019 with her representative, DT. The meeting was chaired by SI.

80. During the meeting, the claimant was asked whether she was fit to work, there being reference to the OH report (paragraph 75 above). The notes of the meeting record the following [sic]:

> ***SI explained that looking at OH report this clearly recommends that VN is not fit to work. VN explains that this is only the case at the time of the visit and VN feels that the report is accurate as it was only based on what was presented on that date. SI raised that this refers to the foreseeable future and asked if VN agrees with that. VN said that she does not agree with that as she believes she is fit to work, just not physical work.***

81. In a letter to the claimant from SI dated 17 July 2019, she was informed that she was to be dismissed with four weeks' notice. In his letter, he wrote the following:

> ***Given the above and having considered the representations made to me by Jackie Wright and by yourself, and in view of the advice from Occupational Health, I am of the opinion that you can no longer carry out your current duties in the role of Travel Trainer. You are therefore incapable of fulfilling the terms of your employment contract with the Council. In line with OH advice, it is clear that you are unable to continue permanently in your current role and without exceeding the Council's sickness trigger points. Therefore in line with the Council's Procedure, you will be dismissed from the Council's service on the grounds of capability due to ill health.***

82. The claimant appealed against her dismissal. The appeal hearing took place on 9 August 2019.

83. In a letter dated 20 August 2019, the claimant was informed that her appeal had not been upheld. In the outcome letter, JHB said the following:

> ***We believe that you were afforded opportunities and we also found that your time on the redeployment register was for an extended***

> ***period, as it was hoped that a suitable role would be found for you and HR and management were working towards this aim. The panel understands and sympathises with your situation as we recognise the difficulties placed on you due to your accident and then your stroke. However we have had medical reports that confirm that you are unable to carry out the duties of the travel trainer post and any alternative work due to your anxiety.***

D. LEGAL PRINCIPLES

Unfair dismissal

84. The law relating to the right not to be unfairly dismissed is set out in s.98 ERA. Section 98 states:

> ***(1) In determining….whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it—***
>
> ***(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***
>
> ***(b) relates to the conduct of the employee,***
>
> ***(c) is that the employee was redundant, or***
>
> ***(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—***
>
> ***(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***
>
> ***(b) shall be determined in accordance with equity and the substantial merits of the case.***

85. What is clear from the above is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the tribunal must consider whether the employer acted fairly in

treating that reason as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness. It is a neutral burden shared by both parties.

86. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually justified the dismissal because that is a matter for the tribunal to assess when considering the question of fairness.

87. In a conduct case, it was established in ***British Home Stores v Burchell [1980] ICR 303 EAT*** that a dismissal for misconduct will only be fair if, at the time of dismissal:

- the employer believed the employee to be guilty of misconduct;
- the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
- at the time it held that belief, it had carried out as much investigation as was reasonable.

88. In ***Iceland Frozen Foods Ltd v Jones [1983] ICR 17 EAT***, it was said that the function of the employment tribunal in an unfair dismissal case is to decide whether in the particular circumstances the decision to dismiss the employee fell *within the band of reasonable responses* which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. In ***Sainsburys Supermarket Ltd v Hitt [2003] ICR 111 CA*** it was said that the band of reasonable responses applies to both the procedures adopted by the employer, as well as the dismissal itself.

89. Importantly, in ***London Ambulance NHS Trust v Small [2009] IRLR 563 CA*** the court warned that when determining the issue of liability, a tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful *not to substitute its own view* for that of the employer regarding the reasonableness of the dismissal for misconduct. It is therefore irrelevant whether or not the tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the tribunal must not "*substitute its view*" for that of the employer.

90. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought, compensation is awarded by means of a basic and compensatory award.

91. Section 123(1) ERA provides that the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of

the dismissal in so far as that loss is attributable to action taken by the employer. It is also well established that if the tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer, then it can reduce the compensatory award accordingly: (***Polkey v A E Dayton Services Limited [1988] ICR 142***.

92. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

> ***Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.***

93. A reduction to the compensatory award is primarily governed by section 123(6) as follows:

> ***Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding……***

94. The leading authority on deductions for contributory fault under section 123(6) ERA remains the decision of the Court of Appeal in ***Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111***. It said that the tribunal must be satisfied that the relevant action by the claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Harassment (s.26 EQA)

95. Section 26 EQA defines harassment as follows: -

> ***(1) A person (A) harasses another (B) if—***
>
> ***(a) A engages in unwanted conduct related to a relevant protected characteristic, and***
>
> ***(b) the conduct has the purpose or effect of—***
>
> ***(i) violating B's dignity, or***
>
> ***(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.***
>
> ***(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—***
>
> ***(a) the perception of B***

(b) the other circumstances of the case

(c) whether it is reasonable for the conduct to have that effect.

96. There are three essential elements of a harassment claim under s.26(1) EQA. There must be:

- unwanted conduct
- related to a relevant characteristic
- which had the *purpose* or *effect* of (i) violating the Claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant ("*the proscribed environment*").

97. In ***Land Registry v Grant [2011] EWCA Civ 769***, the court said that a tribunal should be careful not to cheapen the significance of the statutory wording; it must consider carefully whether the matters above violate the claimant's dignity or create the proscribed environment for them.

98. The term "*related to*" means there must still be some feature or features of the factual matrix identified by the tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged in the claim. A tribunal considering the question posed by s.26(1)(a) EQA must evaluate the evidence in the round, recognising that witnesses will not readily volunteer that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic cannot be conclusive of that question.

Failing to make reasonable adjustments

99. A claim for failure to make reasonable adjustments is to be considered in two parts. First the tribunal must be satisfied that there is a duty to make reasonable adjustments; and only then must the tribunal consider whether that duty has been breached. Section 20 EQA deals with when a duty arises, and states as follows:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

……

(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.***

100. Section 21 EQA states as follows:

> ***(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.***
>
> ***(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.***

101. In determining a claim of failing to make reasonable adjustments, the tribunal therefore must ask itself three questions:

(a) What was the PCP?

(b) Did that PCP put the claimant at a substantial disadvantage because of disability, compared to someone without that disability?

(c) Did the respondent take such steps that it was reasonable to take to avoid that disadvantage?

102. The key points here are that the disadvantage must be substantial, the effect of the adjustment must be to avoid that disadvantage and any adjustment must be reasonable for the respondent to make.

103. The burden is on the claimant to prove facts from which this tribunal could, in the absence of hearing from the respondent, conclude that the respondent has failed in that duty. The claimant therefore has to prove that a PCP was applied to them and that it placed them at a substantial disadvantage. The claimant must also provide evidence, at least in very broad terms, of an apparently reasonable adjustment that could have been made.

104. It is a defence available to an employer to say "*I did not know, and I could not reasonably have been expected to know*" of the substantial disadvantage complained of by the claimant.

105. To test whether the PCP is discriminatory or not, it must be capable of being applied to others. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words '*provision, criterion or practice*' all carry 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. Although a one-off decision or act can be a practice, it is not *necessarily* one: ***Ishola v Transport for London 2020 ICR 1204, CA.***

Discrimination arising from disability (s.15 EQA)

106. Section 15 EQA provides as follows:

> ***(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.***
>
> ***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.***

107. Section 15 EQA therefore requires an investigation into two distinct causative issues: (i) did the respondent treat the claimant unfavourably because of an (identified) "*something*"?; and (ii) did that something arise in consequence of the claimant's disability? The first issue involves an examination of the state of mind of the relevant person within the respondent ("A"), to establish whether the unfavourable treatment, which is in issue, occurred by reason of A's attitude to the relevant 'something'. The second issue is an objective matter, whether there is a causative link between the claimant's disability and the relevant 'something'. The causal connection required for the purposes of s.15 EQA between the 'something' and the underlying disability, allows for a broader approach than might normally be the case. The connection may involve several links; just because the disability is not the immediate cause of the 'something' does not mean to say that the requirement is not met. It is also clear from case law that it is only necessary for the respondent to have knowledge (actual or constructive) of the underlying disability; there is no added requirement that the respondent have knowledge of the causal link between the 'something' and the disability.

108. If section 15(1)(a) EQA is resolved in the claimant's favour, then the tribunal must go on to consider whether the respondent has proved that the unfavourable treatment is a proportionate means of achieving a legitimate aim. As stated expressly in the EAT judgment in ***City of York Council v Grosset UKEAT/0015/16*** the test of justification "*is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET"*. The Court of Appeal in ***Grosset [2018] EWCA Civ 1105*** upheld this reasoning, underlining that the test under s.15(1)(b) EQA is an objective one according to which the tribunal must make its own assessment.

109. In terms of the burden of proof, it is for the claimant to prove that they have been treated unfavourably by the respondent. It is also for the claimant to show that 'something' arose as a consequence of their disability and that

there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment. Where a prima facie case has been established, the employer will have three possible means of showing that it did not commit the act of discrimination. First, it can rely on s.15(2) EQA and prove that it did not know that the claimant was disabled. Secondly, the employer can prove that the reason for the unfavourable treatment was not the 'something' alleged by the claimant. Lastly, it can show that the treatment was a proportionate means of achieving a legitimate aim.

Indirect discrimination

110. The law relating to indirect discrimination is set out in s.19 EQA, which states:

> ***(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.***
>
> ***(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—***
>
> ***(a) A applies, or would apply, it to persons with whom B does not share the characteristic,***
>
> ***(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,***
>
> ***(c) it puts, or would put, B at that disadvantage, and***
>
> ***(d) A cannot show it to be a proportionate means of achieving a legitimate aim.***

111. Section 136 EQA, which applies to any proceedings brought under the EQA, requires the claimant to show 'prima facie evidence' from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of discrimination. Section 136 EQA goes on to provide that once the claimant has shown a prima facie case, the tribunal is obliged to uphold the claim of discrimination unless the respondent can show that no discrimination occurred.

112. The matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification.

113. On this basis, the burden therefore lies with the claimant to establish the first, second and third elements of the statutory definition of indirect discrimination. Only then does it fall to the employer to justify the PCP as a proportionate means of achieving a legitimate aim.

Time limits

114. Section 123 EQA deals with time limits for bringing discrimination claims in the employment tribunal and states the following:

> ***(1) [Subject to [sections 140A and 140B] on a complaint within section 120 may not be brought after the end of—***
>
> ***(a) the period of 3 months starting with the date of the act to which the complaint relates, or***
>
> ***(b) such other period as the employment tribunal thinks just and equitable.***
>
> ***……***
>
> ***(3) For the purposes of this section—***
>
> ***(a) conduct extending over a period is to be treated as done at the end of the period;***
>
> ***(b) failure to do something is to be treated as occurring when the person in question decided on it.***
>
> ***(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—***
>
> ***(a) when P does an act inconsistent with doing it, or***
>
> ***(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.***

115. In **British Coal Corporation v Keeble [1997] IRLR 336** the court gave guidance on the factors which may be taken into account when deciding whether it is just and equitable to extend time, quoting the factors set out in s.33(3) Limitation Act 1980. These include:

- The length of, and reasons for, the delay
- The extent to which the cogency of the evidence is likely to be affected by the delay
- The extent to which the party sued had co-operated with any requests for information

- The promptness with which the claimant acted once they knew of the possibility of taking action

- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action

116. Decisions since then have stressed that employment tribunals need not stick slavishly to these factors. Furthermore, whilst the reasons for any delay in presenting a claim need to be considered carefully by a tribunal, a crucial part of this exercise is considering the balance of prejudice between the parties, which means that the tribunal must weigh up the relative hardship caused to either party by extending the time limits.

117. Whilst employment tribunals have a wide discretion to allow an extension of time under the "*just and equitable*" test, the Court of Appeal said in ***Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA***, that "*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule*." The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

E. ANALYSIS, CONCLUSIONS AND ASSOCIATED FINDINGS OF FACT

118. The tribunal turned to each of the claims, applying the legal principles to the facts, in order to reach a decision.

Failing to make reasonable adjustments

119. The tribunal was not satisfied that the restructure proposal itself placed the claimant at a substantial disadvantage compared to those who are not disabled. It was a proposal document which considered roles within the team, rather than people in those roles. The tribunal was satisfied, however, that the requirement for the claimant to perform the role and duties of Travel Trainer, or rather that she be fit enough to do so, placed the claimant at a substantial disadvantage compared to non-disabled colleagues. This is because her disability meant that she was incapable of performing such a physically demanding and mobile role. The respondent was therefore under a duty to make reasonable adjustments.

120. What the tribunal found most striking about this case is that whilst the respondent made certain adjustments, they did not make, or even

consider, the one adjustment to their redeployment policy that would have avoided the disadvantage, and importantly, the need to dismiss the claimant. This adjustment was to transfer the claimant to an existing Grade 4 vacant role, rather than require her to go through an application and interview process.

121. When questioned about this during the hearing, the respondent witnesses referred to the written redeployment policy and the need to comply with it in the interests of fairness and consistency. The problem, however, was that this policy applied to all employees facing the termination of their employment (other than for misconduct) and did not specifically address how it should be applied so as to comply with the duties under s.20 and s.21 EQA.

122. Whilst all of the witnesses for the respondent appeared to have a broad understanding of their duties towards disabled employees, there did not appear to be an appreciation that, inherent in s.20/21 EQA, unlike other forms of disability discrimination, there was a requirement to treat disabled employees *more favourably* than their colleagues, so as to take away the disadvantage caused by the disability. Whilst well intentioned, the respondent stuck doggedly to the policy, most likely thinking that it was the fairest and most appropriate thing to do. The claimant was treated like any other employee. It is surprising the there was no discussion about adjusting the policy – namely matching the claimant in to another role, thereby avoiding the need for an interview, notwithstanding what is said in the deployment policy. This alternative was not explored or considered at any stage, up to and including the appeal against dismissal.

123. The tribunal considered the statutory code that accompanied the EQA and it stated at page 87 that:

> ***An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. Such a post might also involve retraining or other reasonable adjustments such as equipment for the new post or transfer to a position on a higher grade.***

124. The Tribunal considered carefully what the respondent witnesses said about its process of requiring the claimant to be interviewed. It understood, and was more sympathetic to, the position with regards those posts that were of a higher grade. The tribunal was not prepared to go so far as to say that it would have been reasonable simply to have transferred the claimant to a higher grade post without her successfully interviewing for it. But the tribunal concluded that it would have been a reasonable adjustment to have matched the claimant into a Grade 4 vacancy. The tribunal was told that Grade 4 was in effect the lowest grade. It was clear to the tribunal that a number of Grade 4 roles were available and vacant.

125. The claimant had demonstrated herself to be capable – and successful – in Grade 4 roles. She had demonstrated herself to be more than capable in an administrative position. Had a role been available within the Pollution Team, it would have been offered to her. Where the claimant did not have the experience and skills, it would have been reasonable for the respondent to have trained the claimant on those aspects of the new role which she would have been unfamiliar with. The tribunal struggled to understand how the respondent could deem the claimant suitable for a fixed term contract to perform the Housing Enforcement Assistant role referred to at paragraph 63 above, but not the same role on a permanent basis.

126. As stated above, the tribunal was satisfied that in many respects the respondent provided support and assistance to the claimant, such as helping her prepare for interviews, or extending her time in the redeployment pool, but that support did not go far enough and did not avoid the disadvantage to her because she was dismissed despite there being appropriate Grade 4 vacancies within the organisation which she could have been appointed to.

127. The adjustment, namely to match the claimant into a vacant Grade 4 role, and provide relevant training where required, rather than force the claimant to apply and interview for roles in accordance with the redeployment policy, would have avoided the substantial disadvantage referred to at paragraph 119 above.

128. Turning to each of the adjustments set out in paragraph 2.22.1 above:

(a) Redeploying the claimant

129. This was not a reasonable adjustment. There was no requirement for Travel Trainers to be deployed in schools.

(b) Assimilating the claimant into the Travel Assistance Case Manager role

130. It was not reasonable to assimilate the claimant into this role, given it was a number of grades higher.

(c) Continue with amended Travel Trainer role

131. It was not reasonable to continue to allow the claimant to perform this adapted role if, as the respondent said, there was no long term need for it.

(d) Not requiring the claimant to be assessed by interview

132. In so far as this refers to Grade 4 positions, the tribunal concluded that this was a failure to make a reasonable adjustment, for the reasons stated above.

(e) Failing to assimilate the claimant to a suitable role in the restructure proposal

133. This was not a failure to make a reasonable adjustment. It is not clear that there were suitable posts within the restructured department which were vacant and which the claimant could have filled. This was not a matter which the tribunal heard sufficient evidence about to reach any different conclusion.

(f) Transferring the claimant to fill any suitable desk-based vacancy at the council

134. In so far as this refers to Grade 4 positions, the tribunal concluded that this was a failure to make a reasonable adjustment, for the reasons already stated.

(g) Creating a new role for the claimant.

135. There was no need to create a new role. Neither was it reasonable for the respondent to have done so.

(h) Offering the Housing Enforcement Role on a permanent basis

136. For the above reasons, the tribunal concluded that this was a failure to make a reasonable adjustment.

(i) Shortlisting the claimant for the Customer Service Advisor role

137. This was not a reasonable adjustment. It was a higher grade role.

(j) Not being selective in the roles offered to the claimant.

138. It was not clear to the tribunal what this allegation was about.

(k) Redeploying the claimant to the role of Shared Lives Co-ordinator

139. This was a post that was two grades higher than the claimant. It was not a reasonable adjustment for the respondent to have appointed the claimant to this post without application and interview.

(l) Recruiting for the Business Support Officer role in the Pollution Team and redeploying the claimant to that role

140. The anticipated vacant role did not infact crystallise. It was not reasonable for the respondent to have appointed the claimant to a role which did not exist.

(m) Redeploying the claimant to the role of Administrator – Integrated Adult Mental Health

141. This was a higher grade role. It was not a reasonable adjustment for the respondent to have appointed the claimant to this post without application and interview.

142. (n) Allowing the claimant to apply for the Business Support Officer role in April 2019

143. This was a Grade 4 vacant post. Once again, hurdles seem to have been put in the claimant's way and there was no consideration of simply matching her into this role, whether or not she had applied for it previously.

(o) Giving the claimant a trial period for any of the roles

144. This does not appear to have been considered by the respondent because they did not decide to match the claimant directly into the roles. However, it would have been a reasonable adjustment to make in respect of Grade 4 positions.

(p) Giving the claimant training

145. For the above reasons, this would have been a reasonable adjustment.

(q) Failing to provide a standing desk

146. The claimant was provided with a standing desk. There was no failure to make a reasonable adjustment.

147. As the tribunal had found that the respondent failed to make reasonable adjustments, it then went on to consider whether the claim had been brought within the permitted time limits. The respondent submitted that these claims were out of time.

148. The tribunal concluded that the respondent acted inconsistently with the duty identified above, each time they required the claimant to interview for a Grade 4 post rather than simply match her to a vacancy. Each was a failure to make a reasonable adjustment which the claimant could have pursued as a discrete claim against the respondent. The last such omission was on 12 April 2019 when the claimant was not permitted to apply for the Business Support Officer role (paragraph 70 above). That claim was out of time by 4 months. Therefore on the face of it, the tribunal

agreed with the respondent that the reasonable adjustment claims were out of time.

149. The tribunal then went on to consider whether it was just and equitable to extend time and concluded that it was. Whilst there was no reason provided by the claimant to explain the lateness of the claim, aside from her clearly wanting to explore with the respondent the possibility of obtaining an alternative position, the deciding factor for the tribunal was the balance of prejudice. The tribunal weighed up the prejudice to both parties when considering this point. The tribunal could not idenify – neither was one identified in evidence or during submissions – any prejudice to the respondent. This was not a case where the respondent could say it was prejudiced because witnesses were being asked to recall factual matters that were crucial to its case. This was about the application of the redeployment policy and each of the witnesses were able to respond to those questions. The tribunal therefore concluded that there was greater prejudice in denying the claimant the ability to pursue this claim, even taking into account that there were other claims that had been brought in time. The tribunal concluded that there was a continuing act leading up to the failure on 12 April 2019 and that it was just and equitable to extend the time limit to allow her to bring this claim.

150. For the above reasons, the claim of failing to make reasonable adjustments is well founded and succeeds.

Discrimination arising from disability

151. Although there is a list of acts of unfavourable treatment set out in the list of issues, the tribunal concluded that they essentially boiled down to the decision to dismiss the claimant.

152. There is no doubt that the reason for the claimant's dismissal was because of an inability to perform her role and that this “inability” arose in consequence of her disability. This was rightly conceded by the respondent.

153. The respondent’s defence to the s.15 claim essentially relied on justification. The legitimate aims are those at paragraphs 2.16.1 above.

154. The tribunal asked itself whether dismissal was a proportionate means of achieving each of the aims put forward by the respondent. The tribunal accepted that they were legitimate aims. The difficulty for the respondent was one of proportionality. The respondent simply did not need to dismiss the claimant in order to achieve its aims. The tribunal concluded that those findings and conclusions referred to at paragraphs 120-127 above were also relevant to this issue and need not be repeated. It was a disproportionate response to dismiss the claimant in these circumstances,

when there were other, reasonable and more proportionate, routes the respondent could have taken to avoid the dismissal.

155. For the above reasons, this claim is well founded and succeeds.

Unfair dismissal

156. The tribunal concluded that the respondent had proven that the reason for dismissal was the claimant's capability to perform her role. The respondent decided that the claimant was not capable of performing her duties as a Travel Trainer and no alternative position had been found for her.

157. As to the fairness of the dismissal, the tribunal concluded that the dismissal was unfair. The tribunal was careful not to focus on its own view as to the fairness of what the employer did, or should have done, but to assess what they did against what a reasonable employer would have done. However the tribunal concluded that a reasonable employer would not have failed to consider its duties, specifically whether a central part of the redeployment policy should be adapted for the claimant, thereby allowing her to be matched for a Grade 4 post rather than requiring her to go through an interview. The fact that there were vacant Grade 4 posts, which the claimant could do, even with some training, took the decision to dismiss, outside the band of reasonable responses, in the tribunal's judgment. The tribunal also relies on its reasoning at paragraphs 120-127 to support the above conclusions.

158. For the above reasons this claim is well founded and succeeds.

Indirect discrimination

159. The respondent's position is that this claim turned on the defence of justification, it being implicit from their submission that they believed that the requirements of sections 19(2)(a)-(c) had been met. The tribunal agreed with that analysis. The respondent essentially relied on the same justification defence as the s.15 EQA claim. However, care needs to be taken at this point because the questions which the tribunal has to ask itself are slightly different. For the s.15 claim, the tribunal had to ask itself whether *dismissal* was a proportionate means of achieving a legitimate aim. With the s.19 claim, the tribunal has to ask itself whether the *application of the PCP* (the restructuring proposal dated 24 April 2018, which stated that all Travel Trainers would directly assimilate into a new Travel Trainer role) was a proportionate means of achieving a legitimate aim.

160. The tribunal concluded that the restructure proposal was a proportionate means of achieving the legitimate aim at 2.27(c) above when taking into account the reasons for the proposal at paragraphs 27-34 above.

161. Even if the above analysis was wrong, the tribunal considered whether it would have extended time on this claim and decided that it would not have done so. The allegation was very old, going back to April 2018. The tribunal concluded that the balance of prejudice, here, tipped in favour of the respondent. The tribunal was not persuaded that it was just and equitable to extend the time limits to enable the claimant to bring this claim.

162. For the above reasons this claim fails and is dismissed.

Harassment

163. The tribunal considered each act of harassment and reached the following conclusions.

JW ignoring the unacceptable mismanagement of her accident at work?

164. The tribunal found that JW had attempted to assist the claimant. It was, after all, an accident that had occurred when JW was not line managing the claimant and the claimant was not even an employee of the respondent at that time. The tribunal concluded that JW did not ignore the mismanagement of the claimant's accident at work, as alleged or at all. This was not harassment related to disability.

MC dismissing the claimant's immediate concerns and telling the claimant she would have to wait until the team restructure consultation period to discuss any queries relating to her role?

165. The tribunal concluded that the claimant's immediate concerns were not dismissed in the way alleged by the claimant. MC wrote to the claimant redirecting her to others. The tribunal concluded that this did not have the purpose of creating the proscribed environment referred to at paragraph 96 above, and neither was it reasonable for the claimant to have felt that it did. It was not harassment and it was not related to disability.

DS accusing the claimant of producing an Occupational Health report that was not commissioned by the respondent?

166. DS asked the claimant who had produced the OH report as it had not been produced by the council's OH experts. At best the claimant was embarrassed by the question, as she said in evidence. It was, however, a reasonable question to ask, given the the OH report was not produced on formal letterhead, but on a memo. The tribunal concluded that this did not have the purpose of creating the proscribed environment referred to at paragraph 96 above, and neither was it reasonable for the claimant to have felt that it did. It was not harassment and it was not related to disability.

DS telling the team that no feedback was received during the consultation phase?

167. DS said that he was attempting to be sensitive as he did not want to reveal to others the personal circumstances of the claimant. The tribunal concluded that this did not have the purpose of creating the proscribed environment referred to at paragraph 96 above, and neither was it reasonable for the claimant to have felt that it did. It was not harassment and it was not related to disability.

JW failing to address the claimant's concerns and ignoring the outcome of her most recent OH report during their one to one meeting?

168. The tribunal accepted JW's evidence on this point which was contained in her witness statement as follows:

> ***I did not discuss the Occupational Health report or redeployment with Ms Nimoni during this meeting as my intention had been for the meeting to be used to discuss lesson plans. At this time I had not been able to consider the Occupational Health report fully nor had a chance to seek advice from HR regarding its content, so felt that I was not yet in a position to discuss it.***

169. The tribunal concluded that this did not have the purpose of creating the proscribed environment referred to at paragraph 96 above, and neither was it reasonable for the claimant to have felt that it did. It was not harassment and it was not related to disability.

HR and JW suggesting the claimant needed to gain experience in administrative skills?

170. The claimant might have considered it patronising, but it was not harassment. There was nothing about what HR or JW did that could be construed as disability related harassment. If it did have the effect referred to at paragraph 96 above, it was not reasonable for it to have done so.

The director of HR failing to provide a formal reply to the claimant's grievance?

171. The director of HR quite reasonably considered that it was being dealt with. She did not believe it to be a formal grievance. If there was a failure, it did not constitute disability related harassment. If it did have the effect referred to at paragraph 96 above, it was not reasonable for it to have done so.

VU failing to document what was said during a formal meeting attended by the claimant, HR and the claimant's union representatives on 19 February 2019?

172. A decision not to take notes at this meeting was not disability related harassment. If it did have the effect referred to at paragraph 96 above, it was not reasonable for it to have done so.

MC not inviting the claimant to a team meeting on 3 July 2019 and telling the claimant "it wasn't an important meeting"?

173. This was not disability related harassment. The claimant was working in another team at this point. The tribunal concluded that this did not have the purpose of creating the proscribed environment referred to at paragraph 96 above, and neither was it reasonable for the claimant to have felt that it did. It was not harassment and it was not related to disability.

SI failing to respond to the claimant's email complaint dated 4 July 2019?

174. The tribunal accepted Mr Iles evidence on this point, as follows:

> ***I forwarded Mrs Nimoni's email of 4th July 2019 to Gillian Bevan and we discussed the content (page 1091). We didn't consider this as a formal complaint or grievance as such, but as an email sent just after the Final Attendance Review meeting, asking for the notes and making some final points for information. However, on 5th July 2019, I emailed Daniel Shepherd to ask for confirmation that the exclusion was not the case and whether it had been misrepresented (page 1093B).***
>
> ***Daniel Shepherd replied by email on 5th July 2019, to say that the exclusion had been misrepresented (page 1093B). Daniel Shepherd provided me with a form of wording by way of response (page 1093A). I considered Mrs Nimoni's email and Daniel Shepherd's response. I intended to send a separate response to Mrs Nimoni, to her email of 4th July 2019, but omitted to do so when sending the Final Attendance Review meeting outcome letter.***

175. For the above reasons this claim of harassment fails and is dismssed. The tribunal concluded that this did not have the purpose of creating the proscribed environment referred to at paragraph 96 above, and neither was it reasonable for the claimant to have felt that it did. It was not harassment and it was not related to disability.

176. For the above reasons, all claims of harassment therefore fail and are dismissed.

Reduction in compensation

177. The tribunal could see no basis or justification to make a Polkey reduction. The tribunal concluded, however, that there should be a relatively small reduction on the grounds of contributory fault. The tribunal accepted that certain applications were not completed as fully as they could have been and had they been completed with more effort by the claimant, she would

have been invited for interview and there would have been a chance that she would have been successful. The tribunal concluded, however, that any reduction should be on the low side, fixed at 20%. This reduction will be applied to the basic award for the unfair dismissal and any compensatory award arising from the unfair dismissal and discrimination claims.

178. There will need to be a remedy hearing in due course. The parties must therefore provide their dates to avoid for the next 12 months. If the parties believe more than one day is needed, they should give their reasons and state how long will be required.

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Employment Judge Hyams-Parish
4 January 2022