EMPLOYMENT TRIBUNALS

Claimant: Miss Amanda Goodwin

Respondent: Sheffield Teaching Hospitals NHS Foundation Trust

HELD AT:	Leeds Employment Tribunal (by CVP)	**ON:**	27, 28 , 29 April 2022 Panel deliberations: 6 May 2022
BEFORE:	Employment Judge Buckley Tribunal Member Graham Corbett Tribunal Member Lynda Anderson-Coe		

REPRESENTATION:

Claimant: Mr. Halston (Solicitor)
Respondent: Ms Robertson (Counsel)

RESERVED JUDGMENT

1. The claim for unfair dismissal SUCCEEDS.
2. The claim for discrimination arising from disability SUCCEEDS.
3. The claim for failure to make reasonable adjustments is DISMISSED.
4. The claim for direct disability discrimination is DISMISSED.

REASONS

The claims and issues

1. The claimant claims:
   1.1 Unfair dismissal
   1.2 Discrimination arising from disability

1.3 Failure to make reasonable adjustments
1.4 Direct disability discrimination

2. The issues which we have to determine were agreed at the start of the hearing. This was subject to:
   2.1 two agreed amendments/additions emailed to the tribunal during the course of the hearing.
   2.2 a concession by the respondent during the hearing that it had knowledge of disability at the relevant time, but not knowledge of substantial disadvantage.

3. The issues as amended are:

1. Is the Claimant disabled for the purposes of s6 of the Equality Act?

This is conceded by the Respondent.

2. Did the Respondent have knowledge of the Claimant's disability for the purposes of the s15 and S20 & 21 claims?

This is conceded by the Respondent.

3. S15 Discrimination arising in consequence of disability

3.1 Did the Claimant's various absences from work arise in consequence of her disability.

3.2 Did the Respondent do the following:
   3.2.1 subject the Claimant to the Managing Attendance Policy reviews and
   3.2.2 dismiss her as a consequence of breaching the absence trigger points
   3.3.3 fail to give her alternative work/allow her to work flexibly

3.3 If so, did that constitute unfavourable treatment?

3.4 If so, was it done because of something [the Claimant's absences from work] which arose in consequence of the Claimant's disability?

3.5 If so, was the treatment a proportionate means of achieving a legitimate aim? The Respondent's legitimate aim is:

Secure a regular and satisfactory level of attendance in line with the Managing Attendance policy so as to enable the Trust to deliver safe and high quality services on a basis that is consistent and satisfactory for all involved including patients, those involved in patient care, and those delivering the services.

4. S 20 & 21 Failure to make reasonable adjustments

4.1 Are the following PCPs?

4.1.1 The Claimant was under an obligation to comply with the attendance requirements of the Managing Attendance procedure before being submitted to the capability/absence management procedure and subsequently dismissed

4.1.2 Requiring the Claimant to remain in her job role as a Phlebotomist

4.1.3 Requiring the Claimant to work her usual hours.

4.2 If so, did any of the PCPs put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and did the Respondent know or ought it reasonably to have known, of the substantial disadvantage? The Claimant relies on the following alleged substantial disadvantages:

4.2.1 She was subject to the review procedure and dismissed and

4.2.2. the Claimant could not make up lost time due to only being permitted to work her usual hours and in her usual role. If she had been allowed to do so she could have retained her job.

4.3 If so, did the Respondent fail to make reasonable adjustments? Namely:

4.3.1 Modifying the managing attendance policy to either:

4.3.2 Discount disability related absence, or

4.3.3 Not subjecting the Claimant to the procedure until she had triggered a figure higher than the 4 absence trigger point that normally applies, or

4.3.4 Amending the number of hours trigger point, or

4.3.5 Provide alternative / temporary work arrangements such as administrative work which would allow her to make up time lost through absence due to her disability, or

4.3.6 Allowing a trial period of flexible working to see whether she could recover her hours of lost work when the Claimant's son started full time school in September 2021.

5. S13 Direct discrimination

5.1 Did the Respondent do the following:

5.1.1 Fail to give the Claimant alternative work as had been provided to Kath Bruce.

5.2 If so, did that constitute less favourable treatment than that of a hypothetical comparator, or of an actual comparator?

5.3 The actual comparator is Kath Bruce.

5.4 If so, was it because of the Claimant's disability?

6. What compensation should be awarded to the claimant?

7. Unfair dismissal claim

7.1 What was the reason for dismissal and was it a fair reason within s 98 (1) & (2) ERA 1996?
7.2 Was that dismissal fair or unfair within s 98 (4) ERA 1996
7.3 What was the effective date of termination?
7.4 What damages should be awarded if the Claimant is successful?

8. What compensation should be awarded to the Claimant and should any award of compensation be subject to a Polkey deduction?

4. The respondent raised the issue of time limits in relation to the reasonable adjustment claims at the start of her closing submissions. This had not been raised in the grounds of resistance, nor was it in the agreed list of issues. As the respondent rightly pointed out, it is a matter of jurisdiction, but it is unacceptable and unfair to spring the issue on the claimant after the opportunity to call evidence on the issue has passed. I indicated that the tribunal would allow the claimant to opportunity to call evidence on the matter of any just and equitable extension if we concluded that any of the reasonable adjustment claims were out of time but would otherwise have succeeded.

Witnesses

5. We heard from the following witnesses:
   5.1 The claimant
   5.2 Sarah Wright, Pharmacy Team Lead and Community Phlebotomy Team Lead (conducted stage 1 and 2 absence review meetings)
   5.3 Mark McLelland-Swan, Operational Lead (conducted stage 3 absence review meeting)
   5.4 Rebekah Matthews, Integrated Pathway Manager for North and West Neighbourhoods (conducted stage 4 meeting and dismissing officer)
   5.5 Helen Chapman, Head of Integrated Community Care (conducted the appeal)

6. We found all witnesses to be doing their best to give truthful evidence to the best of their recollection.

Findings of fact

7. The claimant was employed by the respondent from 17 September 2012 to 9 July 2021. The respondent is a large hospital trust with 17000 employees.

8. The claimant was employed as a Community Phlebotomist. The Community Phlebotomist team at Sheffield Teaching Hospitals is a small team. There are six phlebotomists. The team covers approximately 50 planned patients a day plus some urgent same-day referrals. Each phlebotomist undertakes around 11-14 visits a day. The claimant's day-to-day role required her to review her allocated visits on the electronic patient record and print off the required blood forms. She would then drive to the home of each patient,

take a blood sample and drop the samples off at the laboratory or GP practice.

9. The appraisals included in the bundle show that there were no concerns about the claimant's performance and she was good at her job.

10. The claimant has had migraines since the age of 9 or 10. When she has headaches she has visual disturbance and can have pins and needles in her hands and feet such that she can't stand up. She can get disturbance of speech and headache for between 2 and 6 days.

11. Based on the claimant's absence records the impact of the claimant's migraines on her work increased in 2019 both in terms of frequency of absence and length of absence (and therefore presumably in intensity of symptoms).

12. The claimant was on a waiting list for Botox treatment for 4 years and began the treatment in October 2019. The treatments were initially 6 months apart, and then were reduced to 3 months.

13. A letter from the claimant's consultant dated March 2022 states that the claimant has recently started Botox treatment every 3 months which has considerably improved her headaches and reduced the frequency down to 4 to 6 headache days per month with exacerbations every 3 months prior to the treatment with the Botox.

The Managing Attendance Policy ('the Policy')

14. The Policy came into force in April 2017. Prior to that a different system was in operation using the 'Bradford factor' to trigger absence management stages. The Bradford factor is a formula that essentially gives a numerical score to patterns of absence.

15. The Policy provides a framework for managers to use to manage attendance of their staff and provides guidance to staff on what is expected with regard to attendance at work.

16. The Policy was developed jointly through a working group consisting of Trade Union representatives, managers and Human Resources staff, utilising feedback comments and suggestions from a wide range of employees across the Trust.

17. The Policy states that attendance records will be considered on an individual basis and will take into account previous attendance history and any mitigating factors, including underlying medical conditions and/or disability.

18. Section 9 of the Policy is headed 'Adjusting for disability'. It states that the Trust is committed to making reasonable adjustments in order to support all employees (regardless of disability) to maintain their attendance at work. It

states that it will be for the line manager to consider what adjustments are reasonable within their service area, and that it is likely that line managers may need to consult with senior managers before making any final decisions.

19. Section 13 is entitled redeployment. It states as follows:

> Redeployment will be considered in the formal absence management process but will not be appropriate in all circumstances.
>
> Occupational health advice must be sought on whether redeployment into an alternative established post would allow the employee to maintain an acceptable level of attendance. The line manager will assess, based on this advice and in conjunction with the factors set out in the adjusting for disability section page 11, whether it is reasonable to support the search for an established alternative post through the redeployment process.
> …
> When managing absence triggered by the number of occasions of absence redeployment would normally be considered at Stage 2, 3 and 4 of the procedure.

20. Absence above certain levels triggers the formal absence management procedure set out in the Policy. The trigger points agreed under the Policy are, in any 12 month rolling period assessed from the first day of absence:
    20.1 4 individual occasions of absence, or
    20.2 An accumulation of/consecutive 11 working days or 82.5 hours pro rata absence.

21. Under section 15 'Adjustment of Trigger Points for Disability' the Policy states:

> Under the Equality Act it may be reasonable to adjust the trigger points for employees who have a disability which impacts on their attendance at work. This should be considered alongside other adjustments and only after:
>
> - Occupational Health advice has been sought on whether or not the employee's health condition would be considered to be a disability as defined within the Equality Act
> - Occupational Health advice confirms the employee is likely to have absence from work due to this condition and is unable to maintain their attendance in line with normal triggers even with other adjustments in place
> - Consultation and advice from human resource has been sought on the adjusted triggers.
>
> Adjusted trigger points will need to be considered on an individual basis and the level determined depending on individual circumstances and the needs of the service at the point in time they are being considered.

22. The process for management of intermittent absence is set out at section 22. The procedure has four stages once triggered:

> 1. Attendance Review Meeting (Stage 1)

The outcome is the issuing of the First Formal Improvement Letter. The only exceptions will be procedural errors and where there is a disability issue not previously identified after consultation with Human Resources.

2. Attendance Review Meeting (Stage 2)
The outcome is the issuing of the Second Formal Improvement Letter. The only exception will be procedural errors and where there is a disability issue not previously identified after consultation with Human Resources.

3. Attendance Review Meeting (Stage 3)
The outcome is the issuing of the Third Formal Improvement Letter. The only exception will be procedural errors and where there is a disability issue not previously identified after consultation with Human Resources.

4. Consideration of Continued Employment Meeting (Stage 4)
This stage includes a review of the absence history to date and the meeting can potentially result in dismissal from your post.

You will be removed from formal monitoring 12 months after receiving an improvement letter (the date will be outlined in the Improvement Letter) and if your attendance is below the trigger level. During the 12 month period **any further absence that results in an employee being at or above trigger points** will cause the employee to move to the next stage of the policy.

Further absence after this 12 month period, that triggers the policy, will be referred to Stage 1 unless a pattern of absence is identified (...)

Formal meetings arranged under this policy will consider the employee's attendance record for the period of absence over a rolling 12 months, and taking in to consideration the employee's attendance record for the previous 12 months prior to the start of the formal management process. Where a pattern of absence has been identified, information reflecting the full pattern of absence will be presented/considered.

23. In summary, an employee moves to Stage 1 if the triggers, set out above, have been exceeded in any rolling 12 month period. The employee then moves to the next stage if, during the 12 month period following an Improvement Letter, there is any further absence which results in an employee being at or above trigger points. If 12 months have passed since the Improvement Letter, the employee starts again at Stage 1 if their absence exceeds the trigger points.

24. The Policy sets out what happens at each stage of the process. There is no discretion at stages 1, 2 or 3 in relation to the outcome – if the attendance review meeting takes place a formal improvement letter will be issued unless there is a procedural error or a disability issue that has not previously been identified.

25. Stage 4 is the consideration of continued employment meeting. The process for Stage 4 is set out at section 22.6 and 22.7 of the Policy as follows:

22.6 Consideration of Continued Employment Meeting (Stage 4)

If, after a stage three improvement letter has been issued, a further absence results in you being at or above the trigger points within a rolling 12 month monitoring period:

- You will be requested to attend a Consideration of Continued Employment Meeting (Stage 4).
- Your line manager in consultation with Human Resources will need to consider whether to refer you to Occupational Health for an up to date assessment prior to the stage 4 meeting taking place.
- You will be notified in writing of the date of the meeting and you will have the right to be accompanied by a Union Representative from an accredited union or work colleague. You will be given five days notice of the meeting excluding weekends.

22.7 Process – Formal Meeting Stage 4

…
The purpose of this meeting is to consider your absence record and whether or not your employment by the trust should be continued or terminated.

At the meeting;

- The history of your absence to date will be reviewed. The review will also include reasons for absence and when absences occurred.
- The Chair will explain that the purpose of the meeting is to consider whether or not to continue your employment with the Trust whilst considering your attendance record.
- Your line manager will summarise any steps that have been taken to support your satisfactory attendance at work.
- You should raise any issues which you consider to be relevant to your absences including: any underlying medical conditions which have resulted, or may in the future result, in your absence from work; any medication or treatment that you may be taking; and any general health concerns you may have. If any new information is presented not previously considered by Occupational Health a further referral may be required.
- Any medical evidence obtained through the management of your attendance to date, as well as any supporting additional information provided by you, the manager or your union representative will be reviewed and considered.
- Any other factors relevant to your case will be reviewed including any adjustments to your role e.g. in relation to hours or duties and whether redeployment has been considered.
- If your absence is considered to be disability related and meets the definitions outlined in the Equality Act, the Chair and you will discuss whether any additional support and or modifications to your new normal duties or working hours\ environment could assist in ensuring your satisfactory attendance at work.
- The Chair will discuss with you the likelihood of your attendance reaching a satisfactory level and in what time scale and consideration will be given to the impact of your non-attendance in the workplace.

Outcomes from the Meeting

- Redeployment into a different role or adjustments to your current post.
- Adjournment of the meeting to take medical\ Occupational Health advice on whether or not adjustments can be identified which would support your satisfactory attendance at work. It will be the responsibility of management to consider whether or not any proposed adjustments are reasonable in all of the circumstances.
- Dismissal with pay in lieu of notice from your post.

26. The Policy contains a section dealing with longer term sickness absence (28 consecutive calendar days or more), which follows a slightly different process.

27. Section 26 (right of appeal) states that the appeal hearing will be chaired by a manager of equivalent level or higher not previously involved, supported by Human Resources.

28. The trigger points for the claimant were adjusted in 2017 by Mark McLelland in consultation with Human Resources as a result of the claimant's disability. Both the trigger for length of absence and for frequency of absence were increased by 50%. The trigger for frequency was therefore increased to 6 occasions of absence. Because the claimant's working hours have changed, the specific trigger for cumulative length of absence has changed over time. In 2019 her pro rata trigger was 74.25 hours. At the date of termination it was 53.25 hours.

The claimant's absences.

29. The claimant's history of absences is set out at p 262 of the bundle. It is useful to extract and set out the number of individual occasions of absence and the cumulative totals of absence as a result of the claimant's migraines each calendar year throughout her employment:

2013 – 1 occasion, 2 days in total
2014 – 2 occasions, 3 days in total
2015 – None
2016 – 3 occasions, 6 days in total
2017 – None
2018 – 2 occasions, 3 days in total
2019 – 4 occasions, 12 days in total
2020 – 3 occasions, 7 days in total
2021 (up to dismissal in July 2021) – 3 occasions, 10 days in total

30. The history of the claimant's absences, and her progression through the attendance management process is as follows.

31. In 2013 she had two days absence for a headache.

32. In 2014 the claimant had 3 days absence for flu and 1 day for stomach pain, followed by 2 days absence for 'migraine/blurred vision/sickness'. This last

absence triggered Stage 1 (under the previous procedure) and an Improvement Letter was issued on 1 September 2014.

33. The claimant then had a further absence of 1 day due to migraine in November 2014. In total in 2014 she had 2 occasions of absence due to migraine for a cumulative period of 3 days.

34. In 2015 the claimant had no time off for migraines, although she triggered Stage 1 under the previous procedure as a result of 8 days absence for a hand injury. The Improvement Letter was issued on the 25 March 2015.

35. In 2016 the claimant had 2 days off for a migraine in January, 3 days off for stress in April (discounting any pregnancy related absences) and 2 days off for a migraine in August. A further day off for sciatica in November triggered Stage 1 (under the previous procedure). The Improvement Letter was issued on 23 December. The claimant was referred to Occupational Health. We have not seen the Occupational Health report or recommendations from 2016/2017.

36. She had one more absence for a migraine for 2 days on 28 December. In total in 2016 the claimant had 3 occasions of absence due to migraine for a cumulative total of 6 days.

37. In 2017 the claimant was invited to a Stage Two review meeting on 25 January 2017 triggered by the absence on 28 December 2016. That meeting was with Mr. McLelland-Swan. The outcome letter records:

> We discussed your current situation in relation to migraine type symptoms and the medical interventions that have subsequently proceeded, eg: neurologists consultation. You confirmed that there have been some medication changes as a result of your current pregnancy; We agreed that this may have exacerbated the frequency of your symptoms.

38. At the meeting the Occupational Health recommendations were reviewed, and the outcome letter records that ‘we discussed putting the following measures in place’:

- Discuss with HR regarding adjusting the Bradford Score to incorporate any migraines as a disability.
- Complete a pregnancy risk assessment
- Complete a stress risk assessment
- Initiate an action plan post assessments

39. Mr. McLelland-Swan issued a ‘Stage 2 formal record’ on 26 January 2017. This is not recorded in the claimant’s attendance record, which instead records that there was a ‘removal letter’ dated 20 February 2017. This letter is not in the bundle. Mr. McLelland-Swan recalled that the claimant’s triggers were adjusted with agreement with HR in 2017, and we infer that the Stage 2 was removed as a result.

40. In 2017 the claimant had a number of absences for migraines and/or pain in her leg that were discounted as pregnancy related. She did not have any absences that counted for absence management purposes in 2017.

41. In 2018 the claimant was absent as a result of a migraine for 1 day in August and 2 days in November, giving a total in 2018 of 2 occasions of absence due to migraine for a cumulative total of 3 days. The notes from the Welcome Back to Work meeting in August 2018 were completed by Mr. McLelland-Swan. Under 'Review attendance record and highlight any patterns/underlying causes identified' he has recorded 'no pattern'.

42. The notes from the Welcome Back to Work meeting with Mr. McLelland-Swan in January 2019 (relating to the absence in November 2018), record that there is a known ongoing issue with migraines, 'under neurology awaiting treatment options'. The notes record that no onward referral (to Occupational Health) is needed, 'has previously attended for same issue'.

43. In 2019 the claimant was absent as a result of a migraine for 6 days in February/March and 2 days in August 2019. The notes of the Welcome Back to Work meeting in March 2019 were completed by Sarah Wright. Under 'Review attendance record and highlight any patterns/underlying causes identified' she has recorded 'none identified'.

44. The absence in August 2019 triggered the formal procedure under the Policy because she had exceeded her pro rata trigger at the time (increased by 50%) of 74.25 hours. In the notes of the Welcome Back to Work meeting, under 'Review attendance record and highlight any patterns/underlying causes identified', Miss Wright recorded 'migraine (got an appointment on 11/10/19 to attend for Botox)'. Under 'Move on' (agreed actions) Miss Wright has recorded 'Been under neuro for migraines and is trying Botox'.

45. Mr. McLelland-Swan decided to defer inviting the claimant to a formal Attendance Review Meeting (Stage 1), having reviewed her attendance record in the 12 month period prior to the 12 month period under consideration, and noting that she had not reached any of the trigger points in that period. The claimant was informed of this by letter dated 6 September 2019. The letter stated that Mr. McLelland-Swan would not have the option to defer a second time if she had a further period of absence resulting in her being at or above the trigger point.

46. The claimant had another 3 day migraine related absence from 11-13 September 2019, which triggered Stage 1. The Welcome Back to Work meeting was held with Sarah Wright on 18 September 2019. Under 'Review attendance record and highlight any patterns/underlying causes identified' Miss Wright recorded 'Constant migraine'. Under 'Move on' (agreed actions) Miss Wright recorded 'Waiting for hospital appointment'.

47. The Stage 1 Attendance Review Meeting took place on 27 September 2019 with Sarah Wright. The Improvement Letter, effective from 13 September 2019, records:

> After suffering for migraines for years and trying various treatments you stated that you are waiting for Botox treatment and you remain hopeful that this would relieve your migraines and reduce your sickness... You continue to attend neuro appointments to receive treatment and have your migraines monitored. We agreed that a referral to occupational health at this time would not be beneficial as you feel your consultant manages your needs.

48. The claimant had a further 1 day absence for a migraine on 31 October 2019. This was followed immediately by a period of absence for stress from 1 November 2019 until 3 January 2020.

49. There were 4 occasions of absence for migraines in 2019 for a total period of 12 days.

50. During her absence due to stress, the claimant separately triggered Stage 1 of the long-term absence process. She attended a meeting by telephone on 2 December 2019. As her period of absence did not continue for 4 months, she did not progress any further down the long-term absence process.

51. The outcome letter from that meeting notes that the claimant and the respondent had agreed to reduce the claimant's hours to 16 hours per week from January 2020. We accept the claimant's evidence that this was not an adjustment made by the respondent as a result of her migraines. She requested it for other reasons**.**

52. The outcome letter also records that, as she had been issued a stage 1 Improvement Letter within 12 months prior to the absence she would be issued a Stage 2 Improvement letter on her return to work, because the occasions based triggers had been exceeded even taking into account the adjusted trigger due to disability.

53. When the claimant returned to work on 3 January 2020 she moved to Stage 2 of the intermittent absence process.

54. In the notes of the Welcome Back to Work meeting on 8 January 2020, under 'Review attendance record and highlight any patterns/underlying causes identified' Miss Wright recorded 'migraine, but now having Botox which has helped.'

55. The Stage 2 Attendance Review Meeting took place on 22 January 2020 with Sarah Wright. The Improvement Letter records that:

> We discussed your recent reasons for absence which initially started with a migraine which you think was triggered by stress, personal reasons and a family bereavement.... your migraines you feel has been helped by Botox injections. You don't feel that an OH referral is needed at present as your consultant is managing your migraines.

56. In 2020 the claimant was absent for 3 days for a migraine in March. This triggered Stage 3.

57. The Welcome Back to Work meeting took place on 18 March 2020 and was conducted by Sarah Wright. Under 'Review attendance record and highlight any patterns/underlying causes identified', Miss Wright recorded 'migraine seems to be the cause for most absence.' Under 'Move on' (which includes actions such as referral to Occupational Health), Miss Wright recorded 'not required'.

58. The Stage 3 Attendance Review Meeting took place on 17 April 2020 by telephone. The outcome letter records as follows:

> We discussed your attendance record that has led to this stage 3 review meeting. The main reason for your absence has been due to your recurring migraines. However, as we have discussed before, you have been proactive in seeking medical intervention to try and resolve them.
>
> We discussed how you are now receiving Consultant led Botox therapy under Neurology in order to reduce the frequency and severity of your migraines. You confirmed that there has been some improvement; however current stressors could be a contribution to a reoccurrence. This is supported by a period of six months between episodes.

59. The letter records that a referral to Occupational Health had been agreed.

60. Under 'Discussion of any support to assist you in improving your attendance' the letter records:

> You did not identify any further support or adjustments beyond what has already been arranged. We have previously adjusted your trigger in relation to your migraines as a long term condition that could be deemed a disability.

61. The Improvement Letter was issued with effect from 13 March 2020.

62. The claimant was referred to Occupational Health who provided a report dated 5 June 2020. The summary and recommendations state:

> During the consultation Miss Goodwin was able to give a clear history of her migraine headaches and the impact that these have had on her day to day life. It appears however that these are being managed well with Botox therapy which has produced positive results and tremendously eased her symptoms. I am aware that her attendance has previously been affected by this condition; however it is my opinion that this is likely to improve in the future. I'm aware that her condition is well controlled, however I would suggest that discussion is held between Miss Goodwin and her line manager regarding a plan of how she should seek support if ever her migraine attacks occur while she's seeing patients in the community as they can be debilitating at times especially with concerns surrounding blurred vision. Thereafter, management to maintain

open channels of communication in order to allow miss Goodwin to discuss any issues of concern at an early stage.

63. At this stage we find that there was some discussion of adjustments that could be made, although there is no record of them in the bundle, despite the fact that they are required to be 'clearly documented' under the Policy. We infer that these were limited to a plan for how Ms Goodwin should seek support if she had a migraine while out seeing patients. We do not accept that an arrangement was made at this stage that the claimant could make up missed days on her non-working day. It is recorded in the outcome letter on 19 February 2021 and we find it was introduced at that stage.

64. The claimant had a further migraine related absence of 1 day on 24 June 2020. This triggered Stage 4. A Welcome Back to Work meeting was held on 24 June 2020. Under 'Review attendance record and highlight any patterns/underlying causes identified', Miss Wright recorded 'Migraines have started to come back a week before. Her Botox is due and her medication had been stopped but she has subsequently restarted them.' Under 'Move on' (which includes actions such as referral to Occupational Health), Miss Wright recorded 'no(t) required at this time'.

65. At this time, as a result of the coronavirus pandemic, the file of anyone who triggered Stage 4 was referred to Helen Chapman, the Head of Integrated Community Care – CCAG & Community Services, for review and to issue outcome letters. Ms Chapman was involved in reviewing the claimant's case history but not in the level of detail that she would for a attendance review meeting.

66. Ms Chapman wrote to the claimant on 13 July 2020 stating that ordinarily there would be a Stage 4 meeting but, as a result of the coronavirus pandemic, she would not be taking a decision on the claimant's case at this time, but would review the case information when circumstances allow to see if a Stage 4 meeting was still required.

67. Ms Chapman wrote a further letter to the Claimant on 13 August 2020 to inform the claimant that, as the claimant had not had any further non-Covid related absences since triggering Stage 4 on 24 June 20202 she had decided to keep the current Stage 3 improvement letter in place.

68. The claimant was absent for a migraine for 3 days from 18 November 2020. The Welcome Back to Work meeting took place on 25 November 2020 with Sarah Wright. Under 'Review attendance record and highlight any patterns/underlying causes identified', is recorded 'STAGE 4 TRIGGERED ON THIS OCCASION'. Under 'Move on' (which includes actions such as referral to Occupational Health), Miss Wright recorded 'Previous been to OH who advised to continue with medication given under neurology and they couldn't advise any other recommendation'. Under 'Employee's comments, Miss Wright recorded ' Reduced her medication for her migraines due to having Botox she think may be the cause, not due for more Botox until 20th Dec and thinks the GAP between treatments is too long'.

69. The claimant was referred by Mark McLelland-Swan to Occupational Health in January 2021 in preparation for the Stage 4 meeting that had been triggered.

70. The referral states:

> Amanda has longstanding problems with migraines and this has now resulted in a meeting under stage four of the occasions based absence procedure. As preparation for the meeting we feel an assessment from OHS would be beneficial to ensure that Amanda has all the support available to help maintain her attendance at work. We have previously adjusted her trigger due to this condition. Amanda is unfortunately unable to drive if her migraine attack is severe and we have supported her ending her shift if she was to experience an attack at work and be collected by a relative. Amanda is under a neurologist due to the severity and frequency of her migraines and receives specific treatment to attempt to control them, which has shown some positive results when comparing the frequency of attacks pre treatment.

71. The OH report includes the following:

> You indicated that as a reasonable adjustment you have altered her trigger scores in relation to her long term medical condition. Please refer to local managing attendance policy in relation to considered adjustments and any further additional adjustment to this you can make due to the frequency of episodes experienced.
>
> ....
>
> She reports when her migraines are less symptomatic she endeavours to remain at work. Unfortunately if vision is impaired alongside her ability to manage day to day activities there are limited options available.

72. The Occupational Health nurse was asked a number of specific questions and the following answers are relevant:

> 3. How does this impact on the employee's ability to attend work and undertake their role, now and in the future?
>
> As you have indicated adjustments to her activities of her role have been introduced to enable safety at work. Unfortunately the degree of symptoms may affect her ability to be at work although she advised me that her present treatment regime is assisting the frequency of symptoms.
>
> 4. Does the employee have any medical conditions which could be regarded as a disability as defined within the Equality Act?
>
> Miss Goodwin's migraine condition is likely to fall under the disability provision of the Equality Act. This is due to the need for medical treatment and impact on managing to day to day activities when symptomatic.
>
> 5. Are there any adjustments I can consider to support the employee at work to achieve an improvement in their attendance?

> Please see above recommendations. The reasonableness of such adjustments is an employer decision.
>
> 6. Is there any medical reason why the employee, with the suggested adjustments being made, should not be able to sustain regular attendance in the future?
>
> It is hoped that there will be an improvement to her ability to be/remain at work.
>
> 7. Is the employee likely to have further periods of absence for the same or related reasons in the future?
>
> Unfortunately these cannot be ruled out but it is hoped that with her ongoing treatment this will be minimised.

73. The claimant was sent a Stage 3 'follow up' invite to a meeting to discuss the OH report and to decide whether to re-issue a Stage 3 Improvement Letter or to continue to a Stage 4 Continuation of Employment Meeting.

74. Before that meeting took place, the claimant had a further migraine related absence of 3 days on 27 January 2021. The Welcome Back to Work meeting did not take place until 28 April 2021, after the Stage 3 follow up meeting.

75. The outcome letter from the Stage 3 follow up meeting on 19 February 2021 records the following:

> We discussed the sickness absence that has resulted in your recent trigger to a potential stage four continuation of employment meeting. Your absence has been predominantly due to your migraine attacks, which are of a severity that prevent you from working.
>
> **Summary of steps you have taken to manage your own health and well being**
>
> You confirmed that you are following the recommendations you have been given in respect of lifestyle choices e.g. certain food/ drink. We discussed that you are under the care of a consultant neurologist for migraines and that you received three monthly Botox treatments to help manage the condition. You advised that you have noticed that migraines can occur when your Botox treatment is nearly due. I suggested whether a discussion with your consultant to see if the time between treatments can be reduced? You confirmed that you would ask at your next session.
>
> You advised us that you have had a recent blood test to identify your oestrogen levels as this may have some bearing on the frequency of your attacks.. You are awaiting the results and subsequent follow up.
>
> **Discussion of any ongoing health concerns and whether there is a need to request advice from the Occupational Health Service**
>
> We discussed your recent Occupational Health Service (OHS) assessment which has not suggested any new adjustments or changes that are not

> already in place. OHS confirmed that you are able to remain driving and there are no restrictions in your licence. The adjustment to your trigger remains increased to 53.25 hours due to your migraines being recognised as a disability under the Equality Act 2010.
>
> **Discussion of any support to assist you in improving your attendance**
>
> I advised you that in the event of a migraine attack it would be beneficial to contact myself (or the team lead in my absence) to negotiate whether changing working days would help maintain your attendance and manage your condition.
> …

76. The letter explained that, due to the current situation with the COVID-19 pandemic and the additional stress the claimant and others were experiencing Mr. McLelland-Swan would be re-issuing the Stage 3 improvement letter effective from 19 January 2021 to 29 January 2022.

77. Mr McLelland-Swan did not consider whether it would be reasonable to adjust the triggers further as recommended in the first paragraph of the OH report set out above. It was clear from his evidence that he had not understood the OH report to be recommending that a further increase in the triggers be considered.

78. The Policy provides that, 'Adjusted trigger points will need to be considered on an individual basis and the level determined depending on individual circumstances and the needs of the service at the point in time they are being considered'. The Policy does not specify a maximum increase of 50%. Mr. McLelland's evidence was that there was a maximum increase of 50% which he understood had been set by Human Resources.

79. As set out in the letter, the claimant was given the opportunity to contact the respondent in the event of a migraine attack to negotiate whether changing working days would help to maintain her attendance. Although there was some dispute as to whether this could have included weekends, this is not material to our decision. The claimant's evidence was that she would, if necessary, have been able to arrange childcare on other days to allow her to take advantage of this.

80. The claimant's oral evidence was that she never needed to take advantage of this arrangement because she did not have any absences as a result of migraines between the date at which the arrangement was made and her dismissal. This cannot be the only reason because there are further absences on 31 March (2 days) and 29 April (5 days). We find that it was also due to the reason recorded in the appeal outcome letter i.e. that it was 'mainly because of when the migraine symptoms occurred and the duration of these would not allow this' and because the claimant was 'not always' able to change her days due to childcare. The claimant also complained in the appeal hearing that it was difficult to get in touch with Mr. McClelland-Swan. We accept the claimant's evidence that this is something she would have been able to do going forward.

81. The Welcome Back to Work meeting from the absence in January 2021 took place on 28 April 2021. By this time the Claimant had had a further absence from 31 March for 2 days with a migraine. There are no notes of a separate Welcome Back to Work meeting for the March absence.

82. In the Welcome Back to Work meeting on 28 April 2021, under 'Review attendance record and highlight any patterns/underlying causes identified', is recorded 'Reduction of propranolol and think may be hormone related so happened every month after her medication has been reduced.'

83. Under 'Move on' (which includes actions such as referral to Occupational Health), Miss Wright recorded 'Has the option to change her working days so this doesn't impact on her sickness record'.

84. The claimant had a further migraine related absence 29 April 2021 for 5 days. This triggered Stage 4 of the Policy. In the Welcome Back to Work meeting on 14 May 2021, under 'Review attendance record and highlight any patterns/underlying causes identified', is recorded 'Migraines have been getting more frequent.'

85. Under 'Move on' (which includes actions such as referral to Occupational Health), Miss Wright recorded 'Referral to Occupational Health'. In 'Employee's comments', Miss Wright noted, 'Amanda has been having some stress at home which may contribute to her migraines'.

86. After the absence on 29 April 2021 the claimant did not have any further migraine related absences before her employment was terminated on 9 July 2021.

87. We have not been provided with a copy of the referral to Occupational Health, but we know that the telephone consultation with the claimant did not take place until 1 July 2021. The report is undated but we will refer to it as the July 2021 OH report.

88. The July 2021 OH report contains the following relevant sections:

> As previously identified trigger scores in relation to her medical condition has been put in place as per the Managing Attendance Policy.
>
> Since last spoken to there have been changes to medication which has been increased again and appears to have been of benefit in recent weeks regarding the degree of migraines/headaches being experienced.
>
> We discussed her on-going ability to try and independently manage and adjustments in relation to the reduced working hours and her ability to alter days at work should she be symptomatic.

On-going personal stressors continue and a reduced sleep pattern in relation to family commitments. We discussed potential of stress/ fatigue being a trigger.

We also discussed potential work related stressors and I would encourage a work stress tool assessment being undertaken as a baseline to rule out or identify stressors.

…

It would be hoped that the work stress tool assessment can be used as a baseline to identify or rule out work related stressors and any further actions in relation to work activities that can be considered.

Questions regarding recurrent short term sickness absence:

1. Does the employee have any underlying medical conditions and are they receiving appropriate medical treatment?

As previously indicated Ms Goodwin remains under specialist care in relation to her migraine management and is receiving 3 monthly Botox treatments. As advised there has been recent increase in medication dosage which appears to have been of benefit in relation to management of her migraines minimising the impact on her ability to be at work.

2. Does the employee have a health problem which could put them or others, at any risk? If so, how can those risks be reduced?

Again nothing identified today. It has been previously indicated her ability to not drive should she be symptomatic. She has the ability to be aware of the presentation of symptoms and place herself in a place of safety, and again you may wish to clarify through a risk assessment.

3. How does this impact on the employee's ability to attend work and undertake their role now and in the future?

As indicated unfortunately her degree of symptoms can be problematic affecting her ability to be at work and does remain unpredictable, however she does report some improvement to her ability to be at work due to the reduced severity of the migraines/headaches.

It is also hoped her ability to alter days at work may be of benefit in relation to self-management and minimise absence however it remains unpredictable regarding absences.

4. Does the employee have any medical conditions which could be regarded as a disability as defined within the Equality Act?

As indicated previously her migraine condition is likely to fall under the disability provision of the Equality Act, this is due to the need for medical treatment and impact on managing daily activities when symptomatic.

5. Are there any adjustments I can consider to support the employee at work to achieve an improvement in their attendance?

> Please see recommendations above.
>
> 6. Is there any medical reason why the employee, with the suggested adjustments being made, should not be able sustain regular attendance in the future?
>
> Again it is hoped that with improved ability to self-manage, changes to medication and adjustments to work patterns if required will assist her in maintaining attendance at work.
>
> 7. Is the employee likely to have further periods of absence for the same or related reasons in the future?
>
> Unfortunately further absences cannot be ruled out, but it is hoped that on-going treatment, access to support interventions will mean that absences are minimised.

89. On the same day as the Occupational Health assessment, 1 July 2021, the claimant was sent an invite to a Stage 4 Consideration of Continued Employment Meeting on 9 July 2021 via MS Teams. The purpose of the meeting is set out as follows:

> The purpose of this meeting is to consider your absence record and whether or not your employment by the Trust should be continued or terminated. The purpose of the meeting is to provide us with an opportunity to discuss and review the following areas:
>
> - The history of your absence to date including the reason and length of the absence(s)
> - Any medical advice obtained throughout the management of your absence
> - Any steps that have been taken to support your attendance at work including any adjustments that have been considered and/or made
> - Any information you wish to put forward that you consider relevant to the meeting
> - If your absence is considered to be disability related and meets the definition outlined in the Equality Act and whether any additional support under modification to your normal duties or working hours/ environment could assist in ensuring your satisfactory attendance
>
> After considering the full case information, the Chair will decide whether your employment with the Trust should be continued or terminated and you will be provided with reasons for the decision.

90. Rebekah Matthews had accepted the appointment to conduct the Stage 4 attendance meeting on 4 June 2021. The claimant and Rebekah Matthews were both sent a pack containing the case information on about 1 July 2021.

91. The pack did not contain the July 2021 OH report, because it had not yet been received by the respondent. The management summary and the appendix list both state that an updated Occupational Health Report will be available for the Stage 4 hearing.

92. Although Ms Matthews, in her outcome letter dated 22 July 2021, refers to 'your recent visit in January 2021' to Occupational Health, it is clear from the notes of the Stage 4 meeting that she had received the July 2021 OH report by the date of the Stage 4 meeting.

93. There are no minutes of the Stage 4 meeting, although there are notes, made by the HR representative at p 373. They state, as part of Mr. McLelland-Swan's presentation, 'OH report recent – forwarded to you, no additional adjustments.' The notes after the adjournment where Ms Matthews gives her decision refer to 'your recent visit' and state 'July OH report – nothing additional'.

94. The claimant gave clear evidence that she had not received the July 2021 OH report by the date of the Stage 4 meeting. The respondent witnesses assumed that she had been sent it by the OH nurse, but were unable to give positive evidence that it had been sent to the claimant before the meeting. On the basis of that evidence we find that the claimant did not receive the July 2021 OH report until after the Stage 4 meeting.

95. At the meeting on 9 July 2021, Mr. McLelland Swan presented the management case. The July 2021 OH report does not form part of the written summary of the management case, because it was not available when that was written. In the oral summary of the management case the only reference by Mr. McLelland-Swan to the July 2021 OH report is that there were 'no additional adjustments'.

96. There is a brief reference to the July 2021 OH report in the panel questions: 'OH can't rule out further absence in this pattern', although this could equally be a reference to the January 2021 report. Finally there is reference to the OH report in the section where Ms Matthews has already made her decision as follows:

> Heard from management, your presentation including your attendance record and the advice from OH.
> …
> Made all reasonable adjustments not improved attendance – you suggested nothing further nor did OH following your recent visit.
> …
> July OH report – nothing additional – adjustments made previously.

97. Although the Stage 4 meeting was intended to be an opportunity to discuss and review any medical advice obtained throughout the management of the claimant's absence, we find that there was very limited discussion or review of the July 2021 OH report in the meeting, and the claimant had not even seen the report at that stage.

98. In addition, we find that there was very limited, if any, consideration of the July 2021 OH report by Ms Matthews in reaching her conclusions. In particular we find that Ms Matthews failed to consider the evidence in the July 2021 OH report which suggested an optimistic prognosis.

99. The fact that there was very limited, if any, consideration of the July 2021 report by Ms Matthews is evidenced by the following:

    99.1 There is no note of any discussion of the prognosis in the notes of the meeting. The only relevant notes are of brief mentions of recommended adjustments.
    99.2 Nobody noticed that the claimant had not yet received the July 2021 OH report. If there was any substantive discussion of the report in the meeting this would be likely to have become apparent.
    99.3 The notes record that Ms Matthews states in her conclusions 'you have provided no evidence that your health will improve despite medical interventions'. There is evidence the claimant's health will improve in the July 2021 OH report.
    99.4 The outcome letter dated 22 July 2021 containing the detail of Ms Matthew's reasoning refers only to the January 2021 report ('your recent visit in January 2021') and makes no reference at all to the July 2021 OH report.
    99.5 In the written management response for the appeal hearing Ms Matthews states that Ms Goodwin last visited Occupational Health in January 2012 and makes no reference to the July 2021 OH report.
    99.6 In her witness statement at para 19.3 Ms Matthews states that the claimant last visited the Occupational Health department in January 2021 and makes no reference to the July 2021 OH report.

100. From the notes of the meeting and the summary in the outcome letter, we find that the following evidence from Ms Goodwin was before Ms Matthews. The claimant stated that she had started Botox treatment last year. She stated that the Botox was having positive effects. The period between Botox treatments had been reduced to 3 months. Towards the end of the 3 month period before the next treatment the migraines would start again. Botox was lessening the symptoms. The migraines did not last as long, but they can vary. She said that there had been an increase in the frequency of migraines.

101. We find that not only did Ms Matthews not take any or any proper account of the optimistic prognosis in the report, nor she did take any proper account of the evidence before her from Ms Goodwin's as to the positive impact of the Botox treatment. In oral evidence when her attention was drawn to the 'optimism' in the July 2021 OH report she replied: 'There was optimism which Miss Goodwin disagreed with. When we met with her she only told us that the migraines had been getting worse, and increasing and had become more debilitating.' This is not an accurate reflection of what Ms Goodwin said, as recorded in the notes of the meeting and summarised above.

102. Ms Matthews was asked in evidence about the positive indications of recent improvement in the July 2021 OH report, including the following sections in the report:

> Since last spoken to there have been changes to medication which has been increased again and appears to have been of benefit in recent weeks regarding the degree of migraines/headaches being experienced.

…

As advised there has been recent increase in medication dosage which appears to have been of benefit in relation to management of her migraines minimising the impact on her ability to be at work.

As indicated unfortunately her degree of symptoms can be problematic affecting her ability to be at work and does remain unpredictable, however she does report some improvement to her ability to be at work due to the reduced severity of the migraines/headaches.

Again it is hoped that with improved ability to self-manage, changes to medication and adjustments to work patterns if required will assist her in maintaining attendance at work.

Unfortunately further absences cannot be ruled out, but it is hoped that on-going treatment, access to support interventions will mean that absences are minimised.

103. Her attention was also drawn to the fact that, at the time of the meeting on 9 July 2021 the claimant had not had any migraine related absences since 29 April 2021.

104. When asked if the respondent would be likely to be able to manage, if, as predicted by the Occupational Health report, in the light of the recent improvement as a result of a change in medication, the absences were likely to be minimised.

105. Ms Matthew's reply was that 'I think that if that were to be the case then yes, but it was very much a 'we hope' that it will be minimised and 'we hope' that ongoing treatment will affect that… I also felt that what Miss Goodwin was saying in the Stage 4 meeting was that the migraines were getting worse.'

106. She was asked if it would have been a more proportionate approach to achieving the respondent's legitimate aim to give it some time to see if the 'hope' in the Occupational Health report had materialised, to give it another 6 months and then if the absences were still too high at that point for the respondent to cope with, they could have reconvened the Stage 4 meeting at that stage.

107. Ms Matthew's response was that she had had HR advice at the time, and that because she had already triggered that Stage 4 the previous November their advice was that it was the right decision to make.

108. She was then asked to give her opinion, not HR's opinion, as to whether it would have been better to give it some time to see if the hopes in the July 2021 OH report were borne out. Her reply was 'It could have been an option but it was not one that I considered at the time.'

109. Ms Matthews did not consider whether it would have been reasonable to adjust the triggers further. She thought that there was a maximum increase of 50%.

110. Ms Matthews was asked whether it would have been reasonable to discount disability related absences in the triggers under the Policy. Her evidence was that this would not help in managing attendance. It would not help if disability related absences were simply ignored.

111. The claimant was self-isolating in the meeting and had had a migraine for 2 days. She told Ms Matthews about this. She did not ask for the meeting to be rearranged and we find, on the basis of what she said in the appeal and in the tribunal hearing, that she wanted to go ahead with the meeting and get 'this sorted out'.

112. Ms Matthews adjourned during the meeting to consider the evidence and then gave her decision to dismiss, which is summarised in the notes as follows:

> Heard from management, your presentation including your attendance record and the advice from OH
>
> I have to say that your level of attendance despite adjustments isn't acceptable and difficult to sustain as a service
>
> Triggered stage 4 November didn't happen and since then pattern continued no improvement
>
> You have provided no evidence that your health will improve despite medical interventions
>
> Made all reasonable adjustments not improved attendance – you suggested nothing further nor did OH following your recent visit
>
> Heard from you and management about impact on service, colleagues, patients, reputation, delay in care, GP extra visits work for colleague
>
> HSE tool, you admit its personal stress out of your control
>
> July OH report- nothing additional – adjustments made previously
>
> I feel I have no option but to dismiss

113. The claimant's employment was terminated with immediate effect on 9 July 2021 with 8 weeks pay in lieu of notice.

114. After Ms Matthews had left the meeting, we find that Ms Goodwin raised with Mr. McLelland-Swan the possibility of her reducing her working days to 2 days a week. Mr. McLelland-Swan was not the dismissing officer and the decision to dismiss had already been taken. This was not something that was before Rebekah Matthews when she made her decision to dismiss.

115. The reason for dismissal is also set out in the letter of termination dated 22 July 2021. Before giving the reason for dismissal, Ms Matthews set out the information that she had noted in 22 bullet points. Fifteen of those bullet points relate to the claimant's migraines. The reason for dismissal is then stated as follows:

> …I am assured that you are unable to meet the Trust's expectations in respect of attendance and have decided to terminate your employment on the grounds of capability due to an inability to demonstrate a regular and satisfactory level of attendance in line with triggers outlines in the Managing Attendance Policy…

116. The use of the words 'unable' and 'inability' are, in our view, important. Looking at this in the context of the preceding bullet points and the notes of the reasons given in the stage 4 hearing, we find that the reason for dismissal was that, in Ms Matthew's view, the claimant was, because of her migraines, unable to meet the Trust's expectations in respect of attendance and her inability, because of her migraines, to demonstrate a regular and satisfactory level of attendance in line with the triggers in the MAP.

117. The claimant appealed her dismissal by letter dated 22 July 2021. She was invited to an appeal hearing on 15 September 2021 by letter dated 3 September 2021. Helen Chapman chaired the appeal which took place in person on 15 September.

118. Helen Chapman was asked in the tribunal hearing why she had heard the appeal when she had been previously involved in the absence management process. She explained that she had not been involved in the Stage 4 that had taken place. She accepted that she had been involved previously in reviewing the case history but said it was not to the level of detail that she would have done had there been a meeting. The deferral was based on the pandemic as much as anything else. There would have been other managers at her level available to hear the appeal.

119. We find that the nature of the appeal is as set out by Helen Chapman on p 434, 'Not a re-hearing but to determine if a fair and transparent hearing took place on the 9/7/21'. The appeal outcome letter expands on this and explains that the remit of the appeal panel is to review the findings and procedure followed and to consider whether the decision was arrived at fairly and reasonably based on fair and thorough investigation, sufficient evidence and whether the decision was fair and reasonable and commensurate with the evidence heard.

120. We find that the issues which were discussed at the appeal hearing are those set out on in the outcome letter :
    120.1 The claimant believed that the Stage 4 meeting should have been postponed for health reasons/personal reasons
    120.2 The lease car

120.3 The case not being referred to a hearing in November 2020 and the claimant feeling she had only been kept in work to support the Trust during the pandemic
120.4 That the reduction in hours was not an adjustment for her migraine
120.5 The claimant believed that she had been treated unfairly due to her migraines and that this is a disability under the Equality Act 2010
120.6 Bullying in the service.

121. Ms Chapman considered the appeal points raised by the claimant and these are dealt within in the appeal outcome letter. Under '(5) You believe you have been treated unfairly due to your condition of migraines and that this isa disability under the Equality Act 2021', her conclusions are as follows:

> In line with legislation, management acknowledged that it is the employer's responsibility to consider any potential disability which is declared by an employee in line with the Equality Act (2010) and to consider the need for reasonable adjustments in such cases. Management have consulted with the Occupational Health department for advice and support on your health and well-being and made reasonable adjustments to support you to maintain an acceptable level of attendance. It is felt that the Trust have made reasonable adjustments however these have not resulted in an improvement in your level of attendance. You acknowledged that even with the treatment that you are receiving, you are still experiencing two migraines a month and that these are significantly impacting on your day to day life and that this is something that you have suffered with for a long time now, stating that the frequency and severity of the symptoms are ruining your life.

122. The claimant had received the July 2021 OH report by the time of the appeal hearing. We note that there is no note of any discussion of the July 2021 OH report in the hearing, and that the prognosis or the effect of recent medication changes as documented in that report was not considered.

123. In the record of the management statement of case in the outcome letter dated 24 September 2021 the substantive reference to prognosis refers to the Occupational Health report in January and the only specific reference to the July 2021 OH report states that it was reviewed along with the HSE stress tool and 'it was felt that all the adjustments that had been recommended and highlighted were already in place.'

124. Helen Chapman was asked if it would have been possible to accommodate a reduction to 2 days a week. Her evidence was that anything less than about 12 hours was very difficult to manage, because of the minimum number of hours needed for things like training, attending team meetings etc. Further her evidence was that it would have been very difficult to recruit to cover the shortfall.

125. In evidence, in relation to the July 2021 OH report, Ms Chapman stated that she had assumed Rebekah Matthews had looked at it and thought that there was nothing in there that had not been considered. She said that it still talked about potential for improvement but she contrasted that against the information she was being given by the claimant.

126. We note that the question of redeployment was also discussed briefly in the appeal hearing. Ms Chapman's evidence was that the claimant said that this had not been discussed. Ms Chapman asked the claimant what role she thought she would be able to fulfil where the service could cope with recurrent unplanned absence and the claimant shrugged in response.

Alternative work

127. The respondent did not, until the appeal stage, given any consideration to the question of alternative employment or redeployment. Rebekah Matthews did not consider the possibility of redeployment or alternative employment at the time. When asked in cross-examination whether there were other roles in which the absences would have had less of an impact, she stated that she did not know if there were any other health support work roles where the absence would have less of an impact, and she could not think of any.

128. We find that it was not properly considered at the appeal hearing: there was no more than a cursory consideration of the possibility of alternative work or redeployment at the appeal hearing.

The effects on the respondent's business of the claimant's absences

129. Whenever the claimant called in sick it would take the administrative staff 2-3 hours to attempt to find cover for her appointments and to phone patients or relatives to re-arrange or cancel meetings. The claimant had about 11 appointments a day that would need to be covered or re-arranged.

130. Ms Wright's evidence was that the first day of sickness had the greater impact, because there was no warning. Long-term sickness was much easier to plan for than intermittent absences for the same reason. Generally they expected the claimant's absence to be for 2-3 days. When the claimant rang in, if she said that she expected to be off for 2 days they would rearrange 2 days of work. If she did not know how long she would be off then they rearranged the full 3 days. This would be done on the first day of absence.

131. Although the respondent could use bank staff, they could not be used at short notice to cover appointments that needed to be covered urgently that day.

132. If cover could be arranged, the respondent used staff from the active recovery assessment or IV teams who were on either band 3 or band 4, and sometimes band 6. This caused extra cost. It also took the staff away from their other work, meaning that the number of assessments that could be completed was reduced.

133. Although the other community phlebotomists could occasionally pick up a extra patient, depending on where their planned appointments were, it was not practical for them to cover more.

134. There was an impact on patients who sometimes had their appointments cancelled or rearranged. The community phlebotomy team covers frail, elderly housebound patients. Patients were informed by telephone the afternoon before the day of the visit that a community phlebotomist would be attending to take their bloods and given a time slot. There would therefore be less disruption to patients in later days if the respondent knew the absence was going to last longer than a day. There was still some impact on patients in later days, because it might lead to delay and appointments might have been planned to fit in with other treatments.

135. Some patients were required to fast from the night before their blood tests. These would have to be prioritised otherwise they would have to be cancelled, because they would be unlikely to be able to continue to fast that day until another phlebotomist or a nurse had been redeployed or reallocated.

136. Mr. McLelland-Swan was the claimant's line manager from January 2016 until September 2019. The Judge asked him about how the Trust had managed with the level of absences before they started to increase in later 2019. His reply was:

> I don't recall there being…I mean obviously we still had the same situation of unplanned absences and having to rearrange things, but because the frequency was less it wasn't as obvious and then it was absorbed.

The position of the comparator/alternative administrative work

137. During lockdown an administrative post working from home was created for Kath Brown, a phlebotomist who was shielding during the pandemic. This included some of the administrative work ordinarily done by the phlebotomists themselves and some work which Mr. McLelland classed as 'luxury' work, i.e. work that they would not normally have capacity to cover.

138. On the basis of Mr. McLelland-Swan's evidence we find that the reason administrative work was not provided to the claimant to allow her to make up time was that:

138.1 there was no 'spare' administrative work. The respondent could not have created a new job in ordinary circumstances. Extraordinary circumstances applied in the case of Kath Brown.
138.2 it would not have been possible for the claimant to do administrative work while she had a migraine
138.3 it would not have avoided the problems of cancelled appointments for the respondent if she had done administrative work while she had a migraine, and
138.4 she already had the option of making up time in her own role when she did not have a migraine.

Recruitment after the claimant's dismissal

139. The claimant's post was first advertised after her dismissal probably towards the end of 2020. The recruitment process was unsuccessful. It was re-advertised more recently and the new staff, to cover the claimant's role and other roles that had become vacant, have just started.

The law

Burden of proof

140. S 136 of the 2010 Act, so far as material, provides:-

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
>
> …
>
> (6) A reference to the court includes a reference to – (a) an employment tribunal. …"

Failure to make reasonable adjustments

141. S. 20(1) to (3) of the Equality Act 2010 (EA) provides, so far as material:

> (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 these purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage....

142. In relation to the provision, criterion or practice ('PCP'), we note the following observations of the EAT at para 18 of **Martin v City and County of Swansea** EA-2020-000460-AT:

> 18. …it is clear that PCPs are not designed to be traps for the unwary and a practical and realistic approach should be adopted at the case management stage to identify a workable PCP which should not thereafter be over-fastidiously interpreted with the results that a properly arguable reasonable

adjustments claim cannot be advanced, particularly when dealing with litigants in person.

19. Where a party is represented the employment tribunal can expect the PCP to be properly identified and so representatives should always consider how the PCP is pleaded with great care. A preliminary hearing for case management will often be a good opportunity to review whether the PCP as pleaded is workable and, if not, to consider whether an amendment might be required to rephrase the PCP. But whatever PCP is finalised it should be given a reasonably generous reading when determining the claim.

143. The tribunal is assisted by the following extracts and analysis in **Martin** on the effect of **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216:

38. In Griffiths the claimant was dismissed on the application of an attendance management policy pursuant to which an employee could be subject to warning and eventual dismissal if absence exceeded specified levels. However, there was discretion in the policy that could have permitted the employer to discount a period of disability related absence and vary trigger points in the manner the claimant asserted should have been done by way of reasonable adjustments. The discretion had not been exercised in the claimant's favour. The employment tribunal had determined that the duty to make reasonable adjustments had not arisen because a non-disabled person with a similar level of absence would have been treated in the same way. That decision was upheld in the EAT.

39. Mr Recorder Luba QC considered the approach that should be adopted to the PCP:

15. The Employment Tribunal's written reasons indicate, at paragraph [20], that it was common ground before them that the provision, criterion or practice (PCP) in this case was "the operation of the attendance management policy" and that this "was a requirement to attend work at a certain level in order to avoid receiving warnings and a possible dismissal".

16. With reference back to what had been recorded following the Pre-Hearing Review (see above at paragraph 8) the Tribunal noted, at paragraph [24], that Ms Griffiths' case was that "it is the application of the policy that is discriminatory and not the policy itself."

17. The importance of the distinction between the terms of the Attendance Policy itself and the operation of it in any particular case is important. This is not a claim of indirect discrimination. It is not said that the Policy necessarily works to the disadvantage of disabled employees. That proposition could not be realistically advanced given the explicit references in the Policy to the modifications that may be made in the case of any particular employee(s) with disabilities.

> **18. The Employment Tribunal was accordingly right in the instant case to focus on the application or operation of the Policy to this particular employee and the question of whether it put her at a substantial disadvantage so as to trigger the duty to make a reasonable adjustment.**
>
> **20. The correct focus was accordingly not on the Policy in the abstract and the way in which it may or may not impact on the employer's workforce as a whole, or upon disabled employees in particular. It was, as the Tribunal had correctly held, on the application or operation of the Policy in the instant case and whether this claimant had been owed a duty to make a reasonable adjustment which duty had not been complied with by her employer. [emphasis added]**

40. Mr Recorder Luba QC distinguished between the terms of the policy and the application of the policy that could result in the claimant being put at a substantial disadvantage.

41. The decision of the EAT was overturned in the Court of Appeal as it was held that it was incorrect in a reasonable adjustments case to compare the treatment of the claimant with a non- disabled employee with a similar level of absence, but the matter should have been analysed on the basis that a disabled employee whose disability increased the likelihood of absence from work on ill-health grounds, was disadvantaged by the operation of the policy in comparison with people who are not disabled in a more than minor way.

42. Elias LJ considered the relevant PCP and the substantial disadvantage to which it could put the claimant:

> **41 In order to engage the duty, there must be a PCP which substantially disadvantages the claimant when compared with a non-disabled person. In this case the PCP was, in the words of the employment tribunal, "a requirement to attend work at a certain level in order to avoid receiving warnings and a possible dismissal."**
>
> **42 Both the employment tribunal and the appeal tribunal considered that the attendance management policy applied equally to all in circumstances which gave rise to no disadvantage. Indeed, to the extent that the policy permitted a more lenient application of the principles to disabled employees by permitting them longer periods of absence before the imposition of sanctions is considered, the policy was potentially more favourable to disabled employees.**
>
> **43 Central to the analysis of both the employment tribunal and the appeal tribunal was the authority of Royal Bank of Scotland v Ashton [2011] ICR 632. ...**
>
> **46 Mr Leach, counsel for the employer, relies heavily on this analysis. There are in my view two assumptions behind the appeal tribunal's reasoning, both of which I respectfully consider to be incorrect. The first is that the relevant PCP was the general policy itself. If that is indeed the correct formulation of the PCP, then the conclusion that the disabled are not disadvantaged by the policy itself is inevitable**

> **given the fact that special allowances can be made for them. It may be that this was the PCP relied upon in the Ashton case. <u>But in my view formulating the PCP in that way fails to encapsulate why a sickness absence policy may in certain circumstances adversely affect disabled workers - or at least those whose disability leads to absences from work. Moreover, logically it means that there will be no discrimination even where an employer fails to modify the policy in any particular case. The mere existence of a discretion to modify the policy in the disabled worker's favour would prevent discrimination arising even though the discretion is not in fact exercised and the failure to exercise it has placed the disabled person at a substantial disadvantage.</u>**
>
> **47 In my judgment, the appropriate formulation of the relevant PCP in a case of this kind was in essence how the employment tribunal framed it in this case: the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That is the provision breach of which may end in warnings and ultimately dismissal. Once the relevant PCP is formulated in that way, in my judgment it is clear that the minority member was right to say that a disabled employee whose disability increases the likelihood of absence from work on ill-health grounds is disadvantaged in more than a minor or trivial way. Whilst it is no doubt true that both disabled and able bodied alike will, to a greater or lesser extent, suffer stress and anxiety if they are ill in circumstances which may lead to disciplinary sanctions, the risk of this occurring is obviously greater for that group of disabled workers whose disability results in more frequent, and perhaps longer, absences. They will find it more difficult to comply with the requirement relating to absenteeism and therefore will be disadvantaged by it. [emphasis added]**
>
> 43. Accordingly, it is necessary to distinguish between the terms of an absence management policy and its application. A policy can result in a disabled person being put at a substantial disadvantage because the policy is more likely to be applied to a disabled person in comparison with people who are not disabled because of the greater likelihood of sickness absences, even if there is a discretion in the policy that could be exercised that would avoid the disadvantage.

144. Under Schedule 8, paragraph 20(1), an employer has a defence to a claim for breach of the statutory duty if it does not know and could not reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP. A tribunal can find that the employer had constructive (as opposed to actual) knowledge both of the disability and of the likelihood that the disabled employee would be placed at a disadvantage.

145. The onus is on the claimant to show that the duty arises i.e. that a PCP has been applied which operates to their substantial disadvantage when compared to persons who are not disabled. The burden then shifts to the employer to show that the disadvantage would not have been eliminated or

alleviated by the adjustment identified, or that it would not have been reasonably practicable to have made this adjustment.

146. The test for whether the employer has complied with its duty to make adjustments is an objective one (**Tarbuck v Sainsbury's Supermarkets** [2006] IRLR 664). The focus is the reasonableness of the adjustment not the process by which the employer reached its decision about the proposed adjustment.

147. The tribunal must, where relevant, take account of the EHRC Code of Practice on Employment 2011 ('the Code'). The Code identifies six factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:
    147.1 Whether taking any particular steps would be effective in preventing the substantial disadvantage
    147.2 The practicability of the step
    147.3 The financial and other costs of making the adjustment and the extent of any disruption caused
    147.4 The extent of the employer's financial or other resources
    147.5 The availability to the employer of financial or other assistance to help make an adjustment (such as through Access to Work)
    147.6 The type and size of the employer.

148. When assessing reasonableness the tribunal should ask what difference the adjustment would have made (**Griffiths v SoS for Work and Pensions** [2017] ICR 160 CA applied), although it is not necessary that the adjustment would inevitably have removed the disadvantage (**Noor v Foreign & Commonwealth Office** [2011] ICR 695 EAT).

Discrimination arising out of disability

149. S 15(1) EA provides:

> "(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."

150. This section requires the tribunal to identify the unfavourable treatment complained of. The tribunal must ask itself if the 'something' arises from or was a consequence of the disability. The tribunal must then ask whether the reason for the treatment was the 'something arising'. If this is not obvious then the tribunal must enquire about mental processes – conscious or subconscious – of the alleged discriminator. The something that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable

treatment and amount to an effective reason for or cause of it. Motive is irrelevant.

151. If it was, then the tribunal must identify the legitimate aims of the treatment and determine whether the treatment was a proportionate means of achieving the legitimate aims.

152. As to proportionality, the EHRC Code on Employment notes that the measure adopted by the employer does not have to be the only way of achieving the aim being relied on but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

153. The tribunal's consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly: see **O'Brien v Bolton St Catherine's Academy** [2017] IRLR 547. It does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or otherwise caused him to take a different course.

154. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary.

155. The test for proportionality will often turn on the third and/or fourth questions in the formulation by Lord Reed in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700 at [74]:
"... it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

Unfair dismissal

156. S 98 of the Employment Rights Act 1996 (ERA) provides, as far as is relevant:

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

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

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

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

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

…

(3) In subsection (2)(a) –

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health, or any other physical or mental quality

(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."

157. The employer in this case relies on capability and some other substantial reason in the alternative. Capability (ill-health) is one of the potentially fair reasons for dismissal under section 98(2) ERA.

158. Case law on capability (ill-health) suggests that a slightly different approach is appropriate in cases of long-term absence and persistent intermittent absences. In our view the principles from both types of cases are relevant to this case.

159. In relation to intermittent absences, Lynock v Cereal Packaging Ltd [1988] IRLR 510, the EAT describes the appropriate approach of an employer as follows:

"The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment—sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following—the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various

absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding'."

160. A decision whether or not to dismiss is not purely a medical question. It is a question to be answered by the employers in the light of the true medical position and after reasonable consultation with the employee **East Lindsey District Council v Daubney** [1977] ICR 566:

"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done'.'

161. Where an employee has had a long-term absence because of illness or injury, a tribunal must consider whether the employer could have been expected to wait longer for the employee to return. This will involve balancing the "unsatisfactory situation of having an employee on very lengthy sick leave" against other factors which may include: the nature of the employee's illness; the likely length of his or her absence; the cost of continuing to employ the employee; the size of the employer (see **Spencer v Paragon Wallpapers Ltd** [1977] ICR 301, EAT; **S v Dundee City Council** [2014] IRLR 131, Ct Sess (Inner House)).

Relationship between the claims

162. In **York City Council v Grosset** [2018] ICR 1492, Sales LJ said at para 54-55:

> "54. ... there is no inconsistency between the ET's rejection of the claimant's claim of unfair dismissal and its upholding his claim under section 15 EqA in respect of his dismissal. This is because the test in relation to unfair dismissal proceeds by reference to whether dismissal was within the range of reasonable responses available to an employer, thereby allowing a significant latitude of judgment for the employer itself. By contrast, the test under section 15(1)(b) EqA is an objective one, according to which the ET must make its own assessment: see *Hardy & Hansons plc* [2005] EWCA Civ 846; [2005] ICR 1565, [31]-[32], and *Chief Constable of West Yorkshire Police v Homer* [2012] UKSC 15; [2012] ICR 704, [20] and [24]- [26] per Baroness Hale of Richmond JSC, with whom the other members of the Court agreed.
>
> 55. Against this, Mr Bowers pointed to certain dicta by Underhill LJ *in O'Brien v Bolton St. Catherine's Academy* [2017] EWCA Civ 145; [2017] IRLR 547, at [51]-[55], in which he observed that the tribunal, which had found that the dismissal in question in that case was in breach of section 15 EqA, was also entitled to conclude from this that it had been unfair as well. Mr Bowers' suggestion was that this meant, in our case, that the ET should have reasoned in the opposite direction, by saying that by virtue of its ruling in relation to unfair dismissal it should also have concluded that there was no breach of section 15 EqA. However, I think it is clear that Underhill LJ was addressing his remarks to the particular facts of that case, and was not seeking to lay down any general proposition that the test under section 15(1)(b) EqA and the test for unfair dismissal are the same. No doubt in some fact situations they may have similar effect, as Underhill LJ was prepared to accept in *O'Brien*. But generally the tests are plainly distinct, as emphasised in *Homer.*"

Application of the law to the facts

S15 Discrimination arising in consequence of disability

Did the Claimant's various absences from work arising in consequence of her disability?

163. It was not submitted that the absence that was caused by stress arose in consequence of her disability, and there is no evidence upon which we could make this finding. We find that the absences identified as due to migraines in the claimant's absence record arose from the claimant's disability.

Did the Respondent:
(i) subject the Claimant to the Managing Attendance Policy reviews,
(ii) dismiss her as a consequence of breaching the absence trigger points
(iii) fail to give her alternative work/allow her to work flexibly

164. It is not in dispute that the respondent subjected the claimant to the Managing Attendance Policy reviews and dismissed the claimant. The decisions to subject the claimant to Managing Attendance Policy reviews were made by Sarah Wright and Mark McLelland-Swan. Rebekah Matthews took the decision to dismiss and it was upheld on appeal by Helen Chapman.

165. It is not in dispute that the respondent did not give the claimant alternative work. This was never considered properly or at all by the respondent and therefore there

was no positive decision by an individual not to give the claimant alternative work. There are two potential aspects to this. The failure to give the claimant an alternative administrative role, which is also the subject of the direct discrimination claim, and a broader failure to consider alternative work as an alternative to dismissal.

166. We find that the respondent did not fail to allow the claimant to work flexibly. Our findings of fact on this are set out above. The respondent put in place an arrangement which would have allowed the claimant to work flexibly, but she never took advantage of this. This part of the claim fails.

If so, did that constitute unfavourable treatment?

167. In order to determine if there is unfavourable treatment, we must measure it against 'an objective sense of that which is adverse compared to that which is beneficial.'

168. We accept that it is intrinsically disadvantageous to be subject to MAP reviews, rather than not being subject to MAP reviews, because a MAP review is a step along the way in a process to a potential dismissal. Dismissal is self-evidently unfavourable treatment. Not being given a positive solution of alternative work or flexible working is adverse compared to being given those alternatives.

169. On this basis we find that these matters constituted unfavourable treatment.

If so, was it done because of something [the Claimant's absences from work] which arose in consequence of the Claimant's disability?

170. We have found as a fact that the reason for dismissal was that the claimant was because of her migraines, unable to meet the Trust's expectations in respect of attendance and her inability because of her migraines to demonstrate a regular and satisfactory level of attendance in line with the triggers in the MAP. We find that she was dismissed because of her past and likely future absences from work which arose in consequence of her disability. Although some of her absences were not disability related, the 'something' was more than a trivial part of the reason for the unfavourable treatment. It was a significant or effective cause of the unfavourable treatment.

171. The reason why the claimant's level of absence triggered the attendance policy reviews was, we find, at least in part because of her migraine related absences from work. The 'something' was more than a trivial part of the reason for the unfavourable treatment. It was a significant or effective cause of the unfavourable treatment. The only exception to this is that we find that the stage one long-term absence review was triggered purely by the claimant's stress related absence and not because of her migraines.

172. We have found as a fact that none of the witnesses, either properly or at all, put their mind to the question of alternative work. The reason why the respondent did not allow it was because they simply had not considered it or considered it properly. There is no evidence before us upon which we could conclude that

there was a primary facie case that or on which we could base an inference that the reason why the respondent failed to provide the claimant alternative work was, at least in part, the fact of her disability related absences. This aspect of the claim falls at this hurdle.

If so, was the treatment a proportionate means of achieving a legitimate aim?

173. The Respondent's relies on the following legitimate aim:

> Secure a regular and satisfactory level of attendance in line with the Managing Attendance policy so as to enable the Trust to deliver safe and high quality services on a basis that is consistent and satisfactory for all involved including patients, those involved in patient care, and those delivering the services.

174. We accept that this is a legitimate aim for the Respondent to have.

175. We do not consider the failures to provide alternative work or flexible working because those parts of the claim have failed.

176. We look first at subjecting the claimant to Managing Attendance Policy reviews. We consider first the discriminatory effect. The more serious the disparate impact, the more cogent must be the justification. We find that the claimant found the whole process stressful and upsetting. She had spent months of worrying about the stage meetings. Overall we find that there was a fairly moderate discriminatory effect as a result of subjecting the claimant to Managing Attendance Policy reviews.

177. We accept that in order to secure a regular and satisfactory level or attendance in an organisation of the size of the respondent it is reasonably necessary to have some kind of system which monitors absence levels, and which incorporates some progressive system to allow discussion and outcomes after certain levels are reached. We bear in mind that the test accommodates a substantial degree of respect for the judgment of the decision maker as to the reasonable needs of the employer, albeit that we are responsible for striking the ultimate balance. In our view, action short of subjecting the claimant to Managing Attendance Policy reviews would not have been sufficient to meet the aims of the Respondent. This part of the claim therefore fails.

178. We then move on to whether dismissal was a proportionate means of achieving a legitimate aim. We are required to carry out an objective balance between the discriminatory effect and the reasonable needs of the employer. As stated the test accommodates a substantial degree of respect for the judgment of the decision maker as to the reasonable needs of the employer, but we are responsible for striking the ultimate balance.

179. We consider first the discriminatory effect of dismissal. The more serious the disparate impact, the more cogent must be the justification. We find that the discriminatory impact of dismissal on this particular claimant is very severe.

180. The claimant had been employed in a job that she was good at for 9 years. She has a disability which affects her attendance levels, but has, until now, been in work since the age of 16. Throughout the 9 years working for the Trust, at least until 2019, her absences had always been at a level which the respondent could accommodate. Through the cooperation of the respondent, a large public service employer, who made the reasonable adjustment of reallocating or rearranging her appointments if she could not attend work, the claimant had successfully maintained employment and contributed to society in an essential public service role for 9 years. She remained at work through the pandemic, at personal risk, because of the essential nature of her role. When she was told at the stage 4 meeting that she was being dismissed the claimant said, 'migraines are ruining my life'.

181. Without making specific findings that are relevant to remedy, we take account of the obvious impact on a claimant who is a single mother and has worked for the same employer for 9 years of being placed on the open labour market with a disability that impacts on attendance levels.

182. We then move on to consider the effect on the respondent.

183. We have made detailed findings of fact on the effect on the respondent above. Up to 2019 the claimant had been absent throughout her employment as a result of headaches usually between 1-3 times a year, although there were a couple of years when she had no migraine related absences that counted for the purposes of absence management.

184. Up to 2019, the absences generally lasted on average 1-2 days. This did cause inconvenience to the respondent, but these absences were at a level the respondent could tolerate as reflected not only in Mr. McLelland-Swan's evidence but also in the fact that the claimant did not progress past Stage 1 of the absence management procedure until early 2020.

185. We accept that there was a significant impact on the respondent, particularly on the first day of any absence. Although an increase in the length of an absence does evidently cause an employer increased difficulty, the evidence on impact in this case focussed in particular on the difficulties caused by each *occasion* of absence.

186. Ms Wright's evidence was that the first day of sickness had the greater impact, because there was no warning. Long-term sickness was much easier to plan for than intermittent absences for the same reason. Generally they expected the claimant's absence to be for 2-3 days. When the claimant rang in, if she said that she expected to be off for 2 days they would rearrange 2 days of work. If she did not know how long she would be off then they rearranged the full 3 days. This would be done on the first day of absence.

187. There was clearly additional work to do on that first day if they had to re-arrange more days and more appointments, but the greatest impact in terms of extra administrative work was from the first day of sickness and therefore from the

frequency rather than the length of absence. Further, as patients were informed of their appointments the day before, the greatest impact on patients was from the first day of absence which came without warning.

188. We note that although there had been an increase in the frequency of the claimant's absences, and therefore an increase in the number of 'first days' the respondent had to deal with, the claimant's number of absences have never reached her increased trigger of 6 absences in a rolling 12 month period, which was presumably was set at a frequency which the respondent could be tolerated.

189. We accept that other impacts arose from the length of the absence. Arranging cover also led to extra expense, because higher band staff often had to be used. This took staff away from their other work. There was an impact on patients because some planned appointments might have to be cancelled, which might lead to delay and appointments might have been planned to fit in with other treatments.

190. We note that the respondent had offered the claimant the opportunity to change her working days at short notice, so that her absence did not impact on her sickness record. The fact that this was offered suggests that the team was able and prepared to manage the consequences of arranging cover and rearranging appointments at short notice with the consequent impact on patients, even though it clearly did cause disruption.

191. We note that the most up to date medical evidence that was available at the time was the July 2021 OH report. In particular, that report noted that the claimant's medication had been increased again since the January 2021 report. The report stated that this appeared to have been of benefit in recent weeks regarding the degree of migraines/headaches being experienced. This appeared to have been of benefit in relation to management of her migraines minimising the impact on her ability to be at work. The report hoped that on-going treatment and access to support interventions will mean that absences are minimised.

192. The evidence of the claimant before the respondent was that the Botox treatment had improved her symptoms, and this is consistent with what she had reported in previous absence management meetings. She did report some increase in frequency, but the frequency of her absences was still within her increased triggers, and therefore we assume at a level of frequency that the respondent had determined it could manage. Miss Goodwin was not asked by the respondent about the recent change in medication or its impact.

193. We note the value of the respondent's work to society and to individuals, and therefore the wider impact of any effect on its ability to provide a good service, but we also take account of the considerable size and resources of the respondent.

194. In the light of all the above, we must decide whether it was proportionate to dismiss the claimant. Balancing the severe discriminatory impact on the claimant against the clear detrimental impact of the current level of absence on the respondent's business, we have to consider whether it was reasonably necessary to dismiss the claimant.

195. We accept that, if the claimant's level of absence was expected to continue at the current level, dismissal might have been reasonably necessary. However, the evidence in the July 2021 OH report was that there had been a recent change in medication which appeared to have been of benefit.

196. This was not simply a vain 'hope' of improvement expressed by the OH nurse. It is based on an observation that there had been an increase of medication and that it already appeared to be having some impact. Further it is supported by the fact that the back to work meetings record that the migraine related absences in November 2020 and January 2021 were linked by the claimant to a reduction in medication.

197. We have taken into account the fact that the claimant had already reached Stage 4 in June 2020 and November 2020, and on both occasions these had been 'stood down' due to Covid. However, given the contents of the July 2021 OH report and its reference to improvements due to a change in medication, it cannot be said that the claimant had already been given enough opportunities to improve: the medical situation had changed.

198. We find that the impact on the respondent's business of waiting for 6 months to see if the hopes or expectations in the July 2021 OH report were borne out would have been manageable. In reaching this conclusion we take account of all the matters set out above, including in particular the fact that the respondent was prepared to allow the claimant to work alternative days to make up her absences, and therefore was willing to continue to tolerate much of the detrimental consequences upon which it relies. We also note in particular that the respondent had effectively managed the claimant's absences arising out of her migraines for many years, when they were causing a slightly lower level of absences.

199. We find that waiting for a further 6 months rather than dismissing immediately would have had a significantly reduced discriminatory impact on the claimant, and would still have achieved the respondent's legitimate aim. If the claimant's absence levels had not improved as expected after 6 months, the respondent could have taken the decision to dismiss the claimant at that stage.

200. For those reasons, we find that the decision to dismiss the claimant was not a proportionate means of achieving a legitimate aim. We reach this view taking account of the respect that should be afforded to the respondent's own assessment, but we disagree with that assessment.

201. The claim that dismissal was discrimination arising from disability under s 15 EA succeeds.

S 20 & 21 Failure to make reasonable adjustments

Are the following PCPs?

(i) The Claimant was under an obligation to comply with the attendance requirements of the Managing Attendance procedure before being submitted to the capability/absence management procedure and subsequently dismissed,

(ii) Requiring the Claimant to remain in her job role as a Phlebotomist

(iii) Requiring the Claimant to work her usual hours

202. The respondent submits that (i) as a PCP falls foul of **Griffiths**. We note that PCPs are not designed to be traps for the unwary, and that, even where a party is legally represented, a PCP should be given a reasonably generous reading when determining the claim.

203. We accept that PCP (i) would more neatly have sidestepped the difficulties identified in **Griffiths** if it had been formulated as a requirement for consistent attendance at work.

204. However, the PCP replied on by the claimant is not the general policy itself. If that was the PCP it would be inevitable, applying **Ashton**, that it would not put people who are disabled at a particular disadvantage because special allowances can be made for them.

205. The PCP here refers to an obligation to comply with the attendance requirements of the Policy before being submitted to the capability/absence management procedure and dismissed. The claimant is not merely asserting that the PCP was the terms of the Policy, but contending that it resulted from the application of the Policy resulting in her dismissal because she was unable to comply with the attendance requirements.

206. It is clear that (ii) was applied to the claimant.

207. None of the PCPs are a 'one off' - we accept that the PCPs would be applied in a similar way in the future to employees in similar situations.

208. If (iii) means the PCP of only working her usual hours rather than making them up at other times we do not accept that this was a PCP applied to the claimant. We have found as a fact that the respondent offered the claimant the facility to make up her hours at other times. If it is meant as the equivalent of a requirement to maintain normal levels of attendance we accept that the PCP applies but it overlaps completely with (i).

If so, did any of the PCPs put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and did the Respondent know or ought it reasonably to have known, of the substantial disadvantage? The Claimant relies on the following alleged substantial disadvantages:

(i) The disadvantage being that she was subject to the review procedure and dismissed and

(ii) The Claimant could not make up lost time due to only being permitted to work her usual hours and in her usual role. If she had been allowed to do so she could have retained her job.

209. In relation to PCPs (i) (and (iii) if overlapping) we accept that the claimant was put at a substantial disadvantage compared with non-disabled comparators. Although the disadvantage is identified as being subject to the review procedure and dismissed, it is more accurate to classify the disadvantage as the greater risk of being subject to the review procedure and being dismissed because she was at a greater risk of absence than people who are not disabled. This should have been obvious to the respondent.

210. In relation to PCP(ii) we do not accept that there is evidence upon which we could base a conclusion that requiring the claimant to remain in her job role as a phlebotomist or work her usual role put her at a substantial disadvantage because she could not make up lost time in her usual role. The fact that she could not make up time in her usual role was not related to her disability. The reason why the claimant said she did not take advantage of the offer of making up time in her usual role was because she had not yet had a migraine since the offer was made, or because it was difficult to get in touch with Mr. McLelland-Swan. The respondent said it was childcare difficulties. None of these explanations support a finding that she was placed at the claimed substantial disadvantage in comparison with persons who were not disabled.

If so, did the Respondent fail to make reasonable adjustments, namely:

Modifying the managing attendance policy to either:

(i) Discount disability related absence, or
(ii) Not subjecting the Claimant to the procedure until she had triggered a figure higher than the 4 absence trigger point that normally applies, or
(iii) Amending the number of hours trigger point, or

(v) Provide alternative / temporary work arrangements such as administrative work which would allow her to make up time lost through absence due to her disability, or

(vi) Allowing a trial period of flexible working to see whether she could recover her hours of lost work when the Claimant's son started full time school in September 2021.

<u>(i) Discounting disability related absences</u>

211. We agree with Ms Matthews that this would not have been reasonable because it would not help in managing attendance. It would not help the respondent to manage or monitor an ongoing situation if disability related absences were simply ignored, and did not trigger any review by the line manager. The respondent would lose control of the situation and there would be no protection for the respondent's

service. Further, the opportunities to identify support or reasonable adjustments would be reduced if disability related absences were simply not counted at all.

(ii) Not subjecting the Claimant to the procedure until she had triggered a figure higher than the 4 absence trigger point that normally applies

212. This had already been done. The 4 absences trigger point had been increased to to 6. This part of the claim fails.

(iii) Amending the number of hours trigger point

213. The reasonable adjustment being contended for was a further increase on top of the 50% increase already applied. None of the respondent's witnesses saw this as an option, relying on an unwritten rule, apparently imposed by Human Resource, that there was a maximum increase of 50%. This is contrary to the Policy which provides that the increase will be determined on the basis of the individual circumstances. As a result, none of the respondent witnesses considered a further increase at the time, despite the fact that, in our view, the Occupational Health report in January 2021 clearly recommended that a further extension be considered.

214. However, a failure to consider a reasonable adjustment at the time, is not sufficient to found liability. We must consider whether this was a reasonable adjustment to make.

215. In our view, it was not reasonable to adjust the trigger further. We bear in mind that the application of the triggers does not, or should not, result in automatic dismissal. The respondent is required at Stage 4 to consider whether or not dismissal is the appropriate outcome and the Policy states that attendance records will be considered on an individual basis, taking into account previous attendance history and any mitigating factors, including underlying medical conditions and/or disability. These factors will or should be taken into account when deciding whether or not to dismiss.

216. Further, if the triggers were increased, the ability of the respondent to monitor patterns of disability related absence would be reduced. The inbuilt mechanisms of reviews, referrals to Occupational Health and consideration of reasonable adjustments would not be triggered until much later. This not only reduces the respondent's control of the impact on its business, but also reduces the value of the process as a mechanism for providing support, advice and guidance. In our view it was not reasonable to further increase the triggers.

217. Importantly the respondent should note that this does not mean that it would never be a reasonable adjustment to increase the triggers by more than 50%. The Policy provides that this will be considered on the individual circumstances and that is the approach that the respondent needs to take.

(iv) Provide alternative / temporary work arrangements such as administrative work which would allow her to make up time lost through absence due to her disability, or

218. We find that this was not a reasonable adjustment to make. There is no prospect of the step avoiding the disadvantage. She was allowed to make up lost time in her normal job on her non-working days in any event. Further, providing administrative work for the claimant when she was unable to do her normal work would not significantly reduce the impact on the respondent's business.

(v) Allowing a trial period of flexible working to see whether she could recover her hours of lost work when the Claimant's son started full time school in September 2021.

219. The time to make this adjustment had not yet arisen.

220. For the reasons set out above, the claim for failure to make reasonable adjustments is dismissed.

Direct discrimination

Did the respondent fail to give the claimant alternative work as had been provided to Kath Bruce?

221. The respondent did not provide the claimant with alternative administrative work.

If so, did that constitute less favourable treatment than that of a hypothetical comparator, or of an actual comparator (Kath Bruce). If so, was it because of the Claimant's disability?

222. Kath Bruce is not an appropriate actual comparator. The coronavirus pandemic and impact of shielding are material differences between the circumstances relating to each case.

223. We have made findings on the reasons why the claimant was not provided with alternative administrative work to make up lost time above. There is no evidence that could lead us to conclude that there is a prima facie case of less favourable treatment, at least in part, because of the claimant's disability. There is no evidence before us on which we could base an inference that a hypothetical comparator would be have been treated differently, or that the reason for her treatment was, at least in part, her disability.

Unfair dismissal

What was the reason for dismissal and was it a fair reason within s 98 (1) & (2) ERA 1996?

224. A reason for dismissal is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee. We have found as a fact that the reason for dismissal was that the claimant was, because of her migraines, unable to meet the Trust's expectations in respect of attendance and her inability, because of her migraines, to demonstrate a regular and satisfactory level of attendance in line with the triggers in the MAP.

225. The respondent submitted, on the basis of **Wilson v Post Office** [2000] IRLR 834, that the reason for dismissal was not capability but some other substantial reason. In **Wilson** the claimant's employment was terminated on the grounds of his unsatisfactory attendance record. The EAT in para 20 states:

> The reason given by the employer was the attendance record. True it is, as Mr. Nieman urges that the attendance record had been caused by Mr. Wilson's ill health, but the latter was not the reason he was dismissed. He was dismissed because he failed to comply with the requirements of the agreement.

226. That is the not the position here. In this case the claimant was dismissed because she was unable, because of her underlying long-term condition, to comply with the requirements of the MAP.

227. We do not accept, as submitted by the respondent at para 11 of the skeleton argument that the reason for dismissal was that 'her attendance requirements had not met the requirements of the MAP, agreed through a working party including trade unions and representing the standard of attendance expected.'

228. In our view the reason, as found, relates to the capability, by reference to health, of the claimant for performing work of the kind which she was employed to do. Because of her migraines she was, sporadically, unable to carry out the work that she was employed to do and therefore was incapable, in the respondent's view of complying with its attendance requirements.

229. If we are wrong, then the reason would fall within some other substantial reason. Given that the claimant's underlying health condition is so intimately connected to her inability to meet the attendance requirements, and underpins the respondent's reasoning on why there was sufficient reason for dismissal, in our view the classification of the reason as capability or some other substantial reason does not in this case, unlike in **Wilson,** affect the tribunal's approach to fairness.

230. This was implicitly accepted by the respondent's barrister reference and reliance in her skeleton argument and submissions to the principles applying in capability cases, such as **Lynock v Cereal Packaging** [1988] IRLR 510.

Was that dismissal fair or unfair within s 98 (4) ERA 1996

231. Ms Robertson submitted that the approach in **Lynock** at paras 9 and 14 was appropriate, even though that case concerned unconnected intermittent illnesses, because the impact on the employer in terms of uncertainty was similar.

232. We do not accept that the fact that there may be a similar impact means that the approach in para 9 of **Lynock** is appropriate. Para 9 deals specifically with the utility, or otherwise, of obtaining medical evidence where is impossible to give a reasonable prognosis or projection of the possibility of what will happen in the future, because 'one is dealing with intermittent periods of illness each of which is unconnected' because there is no underlying condition. That is not the situation the employer was dealing with in this case.

233. Aside from this, we accept that the other factors highlighted by Ms Robertson from para 14 in **Lynock** are relevant, including whether or not there has been any improvement, that the approach of the employer should be based on sympathy understanding and compassion and that the employer has to look at the whole history and the whole picture including:
    - the nature of the illness,
    - the likelihood of recurring or some other illness arising,
    - the length of the various absences and the spaces of good health between,
    - the need of the employer for the work done,
    - the impact of the absences on others who work with the employee,
    - the adoption and the exercise carrying out the policy,
    - the important emphasis on a personal assessment in the ultimate decision
    - the extent to which the difficulty of the situation and the position of the employer has been made clear

234. Given the presence of an ongoing underlying condition we have also found assistance in the cases dealing with long term absence. There is significant overlap with the **Lynock** factors, but where the impact on the employer is caused by an underlying condition we consider that the prognosis is clearly relevant. This is the case whether the impact on the employer's business comes from long term or intermittent absence. In both cases, it is relevant to consider when, if at all, the impact on the respondent's business is likely to ease or disappear. A reasonable investigation would include finding out about the up to date medical position. The tribunal will consider whether in all the circumstances the respondent could reasonably have been expected to wait any longer, and if so, how much longer before dismissing the claimant on the grounds of capability.

235. In considering fairness, we bear in mind that we must not substitute our view for that of the respondent. In particular we note that we are applying a different test to that we have applied under s15 EA.

236. We also take account of the fact that this a large employer with considerable administrative resources. We have considered the process as a whole, including the appeal.

237. Having regard to our findings above, in essence our conclusion is that it was outside the band of reasonable responses for the employer not to wait for a reasonable period (6 months) to see if the positive opinion expressed in the July 2021 PH report was borne out.

238. In reaching this conclusion, we take particular account of the following:

    238.1 Neither Ms Matthews nor Ms Chapman addressed their minds at the time to the question of whether, in the light of the recent change in medication and the July 2021 OH report, it would be appropriate to

defer the decision on dismissal, and if so for how long, to see if the level of absence improved as a result of the recent change in medication.

238.2 The claimant had not been sent the July 2021 OH report by the time of the dismissal hearing. There was no substantive discussion of it in the disciplinary and appeal hearing, and no discussion with the claimant of the prognosis or the impact of the recent change in medication.

238.3 There was very limited, if any, consideration of the July 2021 OH report by Ms Matthews or Ms Chapman in reaching their conclusions and in particular the parts relating to the impact of a recent change in medication and on prognosis.

238.4 The decision to dismiss is not a medical question, but a question to be answered in the light of available medical advice. The respondent is entitled to take account of the evidence of Miss Goodwin on prognosis. However we note that no proper account was taken of the evidence of Miss Goodwin on the positive impact of the Botox treatment, and the 'negative' evidence given by Miss Goodwin was either misinterpreted or overstated see 234.2 above.

238.5 Ms Matthew's evidence was that if the 'hope' expressed in the July 2021 OH report was borne out, the respondent would have been able to cope with the level of absence.

239. We note that the claimant did not raise the matters set out in the July 2021 OH report. In our view it is too great a burden to expect the employee to be responsible for ensuring that the most up to date medical position is properly discussed with her and properly considered by respondent when reaching their decision as to whether dismissal was the appropriate sanction. The fact that the employer should take proper account of the most up to date medical position and prognosis is not the sort of point that needs to be explicitly raised by the employee at the time.

240. We bear in mind that the respondent had before it the fact that the claimant had already reached Stage 4 in June 2020 and November 2020, and on both occasions these had been 'stood down' due to Covid. However, given the contents of the July 2021 OH report and its reference to improvements due to a change in medication, no reasonable employer would take the view that the claimant had already had been given enough opportunities to improve.

241. No reasonable employer would have dismissed this as simply a vain 'hope' of improvement expressed by the OH nurse. It is based on an observation that there had been an increase of medication and that it already appeared to be having some impact. Further it is supported by the fact that the back to work meetings record that the migraine related absences in November 2020 and January 2021 were linked by the claimant to a reduction in medication.

242. The respondent is entitled to have regard to the severity of the impact of the claimant's continued absences on the respondent. We accept that, if the absences had not improved, the respondent would, for a limited period, continue to be put to effort and inconvenience in rearranging appointments and the consequences set out in our findings above. Ultimately, if the absences had not improved it would

have been open to the employer to conclude that the level of absence was still not sustainable.

243. We have taken account of a reasonable employer's view of the ongoing impact on the respondent's business, but we find that the following factors would have meant that no reasonable employer could have concluded that the appropriate outcome was immediate dismissal:

243.1 The respondent had put in place an arrangement to allow the claimant to work alternative days to make up her absences, and therefore was willing to continue to tolerate most of the detrimental consequences upon which it relies.
243.2 The respondent had effectively managed the claimant's absences arising out of her migraines for many years, when they were causing a slightly lower level of absences.
243.3 The expectation in the July 2021 OH report was that the level of absence would decrease. If that turned out not to be the case, the employer could have fairly dismissed the claimant. The impact on the respondent was going to be for a limited period.
243.4 The claimant was an experienced and good worker with 9 years service. She was performing her role 90% of the time. The respondent would have known that replacing her would not be quick or straightforward (as demonstrated by the time it has taken the respondent to fill the role).

244. Further, we find that the respondent also failed to give any or any proper consideration to the possibility of redeployment. It was not considered at all before the appeal, and the consideration by Ms Chapman was extremely limited and cursory. The respondent is a large organisation. Many of the difficulties relied on by the respondent arise out of the particular nature of the claimant's role. We do not know if there were any vacancies in roles within the Trust in which the difficulties with unplanned absences would not have been so critical, because the respondent did not give that any or any reasonable consideration at the time.

245. In the circumstances, in a large organisation like the respondent, in particular where an employee has been employed for 9 years, is otherwise capable, is not at fault for her intermittent absences and where there is an underlying disability we find that the failure to consider, or consider properly, any possibility of redeployment took the process outside the band of processes that a reasonable employer could adopt.

246. For those reasons we find the dismissal unfair.

247. In terms of the prior involvement of the appeal manager in the absence management process, we find that this is not in accordance with the Policy and could easily have been avoided. There were other managers who could have heard the appeal. This is not a disciplinary case and therefore the ACAS Code does not apply but the basic principles of the code should still be followed. The ACAS Code, like the Policy, clearly provides that, where possible, an appeal

should be dealt with by a manager who has not previously been involved in the case. However, looking at the process as a whole this would not in our view have, on its own, rendered the dismissal unfair.

248. We have considered the question of whether Ms Matthews should have postponed the hearing once she became aware that the claimant had been suffering from a migraine for 2 days. In our view it would be best practice to adjourn a hearing that might result in dismissal if the respondent is aware that the claimant is unwell to the extent that they would not normally be in work. However we note the claimant did not request a postponement and indeed it was her evidence in the tribunal hearing that she was keen that the meeting proceeded. She also had the opportunity to attend the appeal hearing in person when she was well. Looking at the process as a whole this would not in our view have, on its own, rendered the dismissal unfair.

Next Steps

249. The matter will not be listed for a remedy hearing. Subject to any comments by the parties, the matter will be listed for 1 day. We have not made findings on whether or not any compensation should be reduced by a percentage or limited to a certain period, either under **Polkey** or as a matter of causation, because the evidence which needed to be adduced on those matters depended to an extent on our findings on liability.

250. Both parties have permission to adduce additional witness evidence or documentary evidence on that issue and on any other issues relevant to remedy. A separate case management order will be issued to that effect.

_____

Employment Judge Buckley
Date: 27 May 2022

JUDGMENT SENT TO THE PARTIES ON
Date: 1 June 2022