EMPLOYMENT TRIBUNALS

Claimant: **Miss Rehanna Bernard**

Respondent: **London Borough of Brent**

Heard at: **Watford Hearing Centre**

On: **23, 24, 25, 26, 27 & 30 May 2022 (6 days)**

Before: **Employment Judge G Tobin**
Mr D Sutton
Mr D Wharton

Representation
Claimant: In person
Respondent: Miss H Bell (counsel)

JUDGMENT

[in standard-sized font]

The unanimous Judgment of the Employment Tribunal is that: -

1 At all material times, the claimant was a disabled person within the definition of s6 Equality Act 2010.

2 The claimant was not directly discriminated against in breach of s13 Equality Act 2010.

3 The claimant was not subjected to discrimination arising from her disability, in breach of s15 Equality Act 2010.

4 The respondent did not fail in its duty to make reasonable adjustments, pursuant to ss20 & 21 Equality Act 2010.

5 The claimant has been unsuccessful in her claims, proceedings are now dismissed.

REASONS

The case

1 A summary of the claim and the issues to be determined by this Tribunal were set out by Employment Judge Alliott following the case management hearing of 14 February 2020. The claimant was employed as a contact worker for around 10 months before her dismissal. The case surrounds the claimant's ability to drive to contact sessions with service users. The respondent says that the claimant was dismissed because she failed to satisfactorily complete her probation period. The claimant contends that in bringing her employment to an end the respondent discriminated against her on the grounds of her disability, namely type 1 diabetes and her consequential visual impairment.

The issues to be determined

2 At the commencement of the hearing, the Employment Judge went through the list of issues with the parties. The claimant's comparators were identified. A couple of issues that had been identified as things arising in consequence of the claimant's disability were identified as inappropriate to that section and were addressed elsewhere. The provision, practice or criteria ("PCP") was also slightly reworded so as to make this more accurate. Therefore, the list of issues relied upon at the hearing was as follows:

Disability

6.1 The respondent accepts that the claimant was at all material times, a disabled person. The disability relied upon is Type I Diabetes and consequent visual impairment (both eyes).

Direct Discrimination because of disability: s13 Equality Act 2010 ("EqA")

6.2 Has the respondent subjected the claimant to the following treatment?

6.2.1 Not following its own policy on redeployment

6.2.2 Not offering the claimant a position on redeployment

6.2.3 Terminating the claimant's employment.

6.3 Was the treatment "less favourable treatment ", i.e. did the respondent treat the claimant as alleged less favourably Than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators, namely a hypothetical comparator being a non-disabled person unable to drive (possibly to include within their probation period) and a named comparator, who we shall refer to as JK.

6.4 If so, what is because of the claimant's disability?

Discrimination arising from disability: s15 EqA

6.5 Did the following things arise in consequence of the claimant's disability?

6.5.1 Her absences from work and the impact of substances had on the service;

6.5.2 Her inability to drive to contact sessions;

6.6 Did the respondent treat claimant unfavourably as follows

6.6.1 Terminated her employment

6.6.2 Not redeploying the claimant

6.7 Did the respondent treat the claimant unfavourably in any of those ways because of the things arising?

6.8 If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

Indirect disability discrimination: s19 EqA

6.9 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP;

6.9.1 The requirement to be able to drive to contact sessions.

6.10 Did the respondent apply the PCP to the claimant at any relevant time?

6.11 Did the respondent apply the PCP to nondisabled persons?

6.12 Did the PCP put disabled persons at one or more particular disadvantage when compared with non-disabled persons?

6.13 Did the PCP put the claimant at that disadvantage at any relevant time?

6.14 If so, has the respondent found PCP to be a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments: ~~s~~s20 & 21 EqA

6.15 The PCP relied upon is the same as under indirect discrimination

6.16 Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled any relevant time, in that she was unable to drive to contact sessions?

6.17 If so did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage?

6.18 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant however, it is helpful to know what steps the claimant alleges should have been taken. This was discussed at the hearing and such steps were confirmed to be as follows:

6.18.1 The provision of taxis to take her to contact visits

6.18.2 Work that did not involve the requirement to drive to contact sessions.

6.19 If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

The law

Disability

4. Section 4 Equality Act 2010 ("EqA") identifies "disability" as a protected characteristic. So an employee should not be discriminated against on the basis of their disability.

5. S6(1) EqA defines disability:

> A person (P) has a disability if—
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

6. As identified in the list of issues the respondent accepted that the claimant met the definition of s6 EqA. Judge Alliott recorded the claimant's visual impairment as affecting both eyes, which may be correct but it was the claimant's right eye in which the impairment was more pronounced.

Direct discrimination

7. S13(1) EqA precludes direct discrimination:

> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

8. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

9. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

10. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence:

i. Has the claimant proved facts from which, in the absence of an adequate explanation, the Tribunal could conclude that the respondent had committed unlawful discrimination?

ii. If the claimant satisfies (i) above, but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

The Court of Appeal in *Igen* emphasised the importance of *could* in (i). The claimant is nevertheless required to produce evidence from which the Tribunal could conclude

that discrimination has occurred. The Tribunal must establish that there is prima facie evidence of a link between less favourable treatment and, say, the disability and not merely arising from unrelated events: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

Indirect discrimination

11. S19 EqA defines indirect discrimination:

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

12. Some points stand out according to Baroness Hale in *Secretary of State for Trade and Industry v Rutherford and Another (2006) IRLR 551HL*:

(a) The concept is normally applied to a rule or requirement which *selects* people for a particular advantage or disadvantage;

(b) the rule is applied to a group of people who *want* something. The disparate impact complained of is that they cannot have what they want because of the rule, whereas others can.

13. To bring a claim of indirect discrimination, a claimant must first show that she belongs to a particular protected group. She must also show that she is put to a disadvantage to which the protected group to which she belongs is put. A *provision, criterion or practice* ("PCP") must then be identified which is applied to the claimant and has, or would have, an adverse impact on the claimant. The PCP must be apparently neutral; if it is premised on a rule that is itself discriminatory the claim is likely to be one of another form of discrimination: see *James v Eastleigh Borough Council [1990] ICR 554*.

14. The meaning of *provision, criterion or practice* is not defined in the legislation but, whilst neutral, will cover informal and formal working practices and is also intended to allow for an examination of working practices that do not operate as absolute requirements for the job in question. So, it is essential to determine a PCP in order to assess whether something the employer does to its employees gives rise to a difference in outcome, or has an adverse disparate impact, depending on the characteristics of its employees. In indirect discrimination claims, the adverse disparate impact must be shown to affect one group – to which the claimant belongs – more than it does to another group. Defining the PCP is essential to finding whether there has been indirect discrimination: see *Environment Agency v Rowan [2008] IRLR 20, Newham Sixth Form College v Sanders [2014] EWCA Civ 734, Brangwyn v South*

Warwickshire NHS Foundation Trust [2018] EWCA Civ 2235 and *Unison v Lord Chancellor [2017] UKSC 51*.

Discrimination arising from disability

15. S15 EqA precludes discrimination arising from a disability:

> (1) A person (A) discriminates against a disabled person (B) if –
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability.

16. S15 EqA is aimed at protecting against discrimination arising from or in consequence of the disability rather than the discrimination occurring *because of* the disability itself, which is covered under direct discrimination. The term *unfavourably* rather than the usual discrimination term of *less favourably* means that no comparator is required for this form of alleged discrimination. So, for example, where a disabled employee was viewed as a weak or unreliable employee because she had taken periods of disability-related absence and this had caused her dismissal, the person may not suffer a detriment because she was disabled as such, but because of the effect of that disability.

17. In *Hall v Chief Constable of West Yorkshire Police UKEAT/0057/15* the Employment Appeal Tribunal ("EAT") emphasised that it was not necessary for the disability to be the cause of the unfavourable treatment. The burden on a claimant to establish causation in a claim for discrimination arising from disability is relatively low. It will be sufficient to show that there is some causal link, and that the unfavourable treatment has been caused by an outcome or consequence of the disability. The employer's motivation is irrelevant. The EAT in *Charlesworth v Dransfields Engineering Services Limited UKEAT/0197/16* said that s15 EqA requires unfavourable treatment to be *because of something* arising in consequence of the disabled person's disability. If the *something* is an effective cause – an influence or cause that operated on the mind of the alleged discriminator to a sufficient extent (whether consciously or unconsciously) – the causal test is satisfied. However, even if a claimant succeeds in establishing discrimination arising from disability, the employer can defend such a claim by showing either that the treatment was objectively justified, or that it did not know or could not reasonably have known that the employee was disabled.

Failure to make reasonable adjustment

18. Under ss20-22 and schedule 8 EqA an employer has a duty to make reasonable adjustments in 3 situations:

i. where a PCP puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers cases on *how* the job, process, etc is done;

ii. where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers the situation of *where* the job is done;

iii. where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers those cases where the provision of an *auxiliary aid* (e.g. special computer software for those with impaired sight) would prevent the employee being disadvantaged.

A failure to comply with any of these requirements renders that omission actionable as discrimination under s21 EqA. This claim is focused upon the first provision identified above.

19. It is important to note that the duty to make reasonable adjustments arises only where the disabled person in question is put at a "substantial disadvantage" in relation to a relevant matter in comparison with persons who are not disabled. In order to undertake the comparative exercise, the EAT held in *Environment Agency v Rowan 2008 ICR 218 EAT* that a Tribunal must identify the: (a) the PCP applied; (b) the identity of the non-disabled comparators (where appropriate); and (c) the nature and extent of the substantial disadvantage suffered by the claimant. We address the necessity for identifying properly the PCP both above and below.

20. Possibly counter-intuitively, s212(1) EqA states that "substantial" means more than minor or trivial. Although substantial disadvantage represents a relatively low threshold, the Tribunal will not assume that merely because an employee is disabled, the employer is obliged to make reasonable adjustments. The Tribunal is obliged to consider the nature and extent of the disadvantage in order to ascertain whether the duty applies and then what adjustments would be reasonable, see *Environment Agency v Rowan*. The Tribunal should avoid making generalised assumptions about the nature of the disadvantage and failing to correlate the alleged disadvantage with the claimant's particular circumstances.

21. The duty to make adjustments arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The reasonableness of the adjustment is an objective test: see *Smith v Churchills Stairlifts plc 2006 ICR 524 CA*.

22. The duty to make reasonable adjustments arises where a disabled person is placed at a substantial disadvantage "in comparison with persons who are not disabled": s20(3)-(5) EqA. There is a requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled persons: see *Fareham College Corporation v Walters 2009 IRLR 991, EAT*.

The witnesses and documentary evidence

23. We (i.e. the Tribunal) heard evidence from the claimant who had provided a written statement in advance of the hearing.

24. On behalf of the respondent, we heard evidence from the following, who also provided witness statements:

(1) Ms Stephanie Taylor, who was a Senior Contact Co-ordinator in the Looked after Children and Permanency Service in the Children and Young People Department of the respondent. Ms Taylor was the claimant's line manager.

(2) Ms Kelli Eboji, a Service Manager in the respondent's Looked after Children and Permanency Service. Ms Eboji was Ms Taylor's line manager.

(3) Mr Onder Beter, Head of Service for Looked after Children and Permanency.

(4) Mr Niyi Laosebikan, a Senior HR Adviser for the respondent.

(5) Ms Sarah Bush, the respondent's Principal HR Adviser.

7 We were provided with a large hearing bundle, which ran to 573 pages.

The facts

8 We made findings in respect of the following facts. We did not resolve all of the disputes between the claimant and respondent merely those matters which we regarded as appropriate to determining the issues of this case. In determining the following facts, we placed particular reliance upon contemporaneous or near contemporaneous correspondence, emails and documents. We approached the witness statements with some care because this evidence was prepared sometime after the events in question and for the purposes of either advancing or defending the claims in question. Where we have made findings of fact, where this is appropriate, we have also set out the basis for making such findings.

9 The claimant applied for the role of Contact Worker with the respondent on 24 September 2017. Her application said that she considered herself to be disabled and stated that her disability was "Type 1 Diabetic" [Hearing Bundle pages 58-65]. The claimant stated in her cover letter:

… I am a type I diabetic who currently has good diabetic control. I do currently have reduced vision in one eye as a result of past complications, however I am hoping for this to improve and am thankfully it hasn't had any major debilitating consequences. I am still able to drive…
I have access to a car and full clean licence. I am also fully able to use public transport.

10 On 2 August 2018 the claimant completed an occupational health pre-employment health questionnaire [HB76-79]. So far as the matters related to the relevant disability(s) contended, the claimant said she took insulin for her diabetes. She signified that she had a vision impairment and said:

I wear glasses and currently have silicon oil in my left eye which currently distorts my vision.

11 The claimant began her employment with the respondent on 1 March 2017.

12 The claimant was due eye surgery and the respondent's occupational health adviser passed her fit for work with the recommendation of no heavy lifting and that the surgery and [predicted] recovery was to be discussed with the claimant's manager [HB89-90].

13 On 16 March 2018 the claimant was allocated work, which involved driving to an appointment in Kent. The claimant requested that she be removed from this job, which Ms Taylor, the claimant's line manager agreed [HB 91,92]. Ms Taylor said they would discuss this matter further in forthcoming supervision.

14 Dr Roberto Ledda, Consultant Occupational Physician, produced a report on 20 March 2019 [HB94-95]. This noted the claimant had undergone treatment from an ophthalmologist and that the claimant had been told that she was legally able to drive. Dr Ledda said that he needed specific confirmation from the specialist, and he stated that the claimant was currently fit to work with the limitation of not driving children [HB94-95].

15 On 21 March 2018 Mr Grant Ciccone of the respondent's occupational health department wrote to Ms Taylor recommending that the claimant did not drive until this was clarified with her treating medical practitioners. He confirmed that occupational health ["OH"] did not receive the claimant's health questionnaire until the week before [HB512]. The claimant had a review meeting with Ms Taylor on that day [HB262-265]. The claimant did not use her own car for work and the respondent booked taxis for her after that date [HB247].

16 On 26 March 2018 the claimant wrote to OH and Ms Taylor stating that she received a letter from the Western Eye Hospital which did not address the matters she required and, in particular, it did not state that she was legally allowed to drive. The claimant said that she would follow this up [HB99].

17 The claimant was absent from work from 5 April 2018 for eye surgery but this did not take place and she returned to work the next day [HB36, para 6] and that day the DVLA wrote to the claimant stating that they needed to make enquiries into her fitness to drive [HB100-101].

18 On 19 April 2018 Miss Rahila Zakir, Consultant Ophthalmic Citreoretinal Surgeon, wrote to Dr Ledda as follows:

> This lady has a best corrected visual quality of 6/9 in the right eye and count fingers on the left eye. Her binocular visual acuity meets The DVLA standards for driving… I do not have information as to whether her binocular visual field meets DVLA driving standards. She will need to have a DVLA requested binocular Esterman visual field done at a participating Optometrist who can then report back to the DVLA so as decision can be made about meeting DVLA standards for acuity and visual fields".

19 On 23 April 2018 claimant had a supervision meeting with Ms Taylor. She confirmed that her eye surgery had not gone ahead on 5 April 2018 and she said she was seeking a second opinion. The claimant stated she had forwarded a letter to

occupational health from DVLA, which was to follow the advice of a doctor [HB261A-D].

20 On 23 April 2018 Dr Ledda recommended that the claimant visit an optometrist as soon as possible and then contact DVLA [HB104].

21 The claimant was absent on 26 April 2018, recovering from laser surgery [HB240B].

22 On 4 May 2018 the claimant was diagnosed with proliferative retinopathy due to her type 1 diabetes [HB109].

23 The claimant's original probation review was schedule for 25 April 2019, and this took place on 8 May 2018 because of the claimant's sickness absence. The claimant's work was regarded as satisfactory. It was recorded that the claimant had retinopathy. Ms Taylor noted that the claimant had not been able to drive, and that she was concerned as this had been going on for a while [HB267].

24 The claimant had been off work and attended a return-to-work interview with Ms Kelli Eboji (Service Manager) on 26 July 2018 [HB150A]. Whilst it was accepted by Ms Eboji that the claimant was able to return to work her contact work, there remained restrictions on the claimant's driving and Ms Eboji informed claimant that she did not have the budgets to provide taxis to transport her to and from every contact.

25 Following a discussion on 13 August 2018, Ms Taylor extended the claimant's probation until 28 November 2018 [HB 465A].

26 Dr Ledda reviewed the claimant's position again on 9 October 2018. He noted the claimant's change of vision in her "good eye" and that a further operation may be required. He determined claimant was still not able to drive [HB233-234].

27 Ms Taylor wrote to the claimant on 26 October 2019 in respect of the claimant's probation review [HB466]. She said that as the claimant has had a significant absences since the start of her employment, she had only been able to complete one probation review. Ms Taylor proceeded to state that the respondent's OH department recommended that she could not undertake driving and this was a task which is Taylor deemed an essential part of her work. Ms Taylor said that the probation policy allowed her to extend the claimant's probation for a further 13 weeks which explained why the review hearing was so late. Ms Taylor informed the claimant that she would arrange a review meeting in due course.

28 The claimant was invited to a final probationary review meeting on 8 November 2018 [HB241-242]. The review was fixed for 20 November 2018 and the invitation identified 2 possible outcomes: (1) the claimant will not be confirmed in her post and her employment would be terminated; and (2) the claimant would be confirmed in her post. The claimant was informed that the management case would be presented by Ms Eboji and she was provided with documents that Ms Eboji would be relying upon, principally a report from Ms Taylor which recommended that the

claimant "had not done enough to pass probation satisfactorily". Ms Taylor's probation report is contained in the hearing bundle at pages 243 to 267.

29 The respondent prepared a pie chart for the probation review showing the claimant's attendance up to 8 November 2018. This showed that the claimant was at work for 78.5 days of 179 working days (although when we allow for the claimant's annual leave absence this was a 51% absence rate). The claimant sickness absence and days off for appointments exceeded her attendance at work of 49% – 87 days. See hearing bundle page 266.

30 Miss Miriam Minihan, the claimant's treating Consultant Ophthalmologist, wrote on 15 November 2018:

[The claimant] has complex eye problems requiring multiple outpatient visits, tests, day case admissions and surgeries.
The aim of all this intervention is to preserve vision. Her right eye has useful vision and I am closely managing this. I elected to postpone removal of silicon oil in that eye to allow further recovery. This, unfortunately, has meant that she has to struggle with suboptimal vision and cannot drive (see silicon itself restricts vision).
I am hopeful that with timely removal of silicon oil that the vision in the right eye will be preserved and may even improve from her current level of vision. If this is the case she may well reach the visual standard for driving, although this shall be assessed in due course.

31 The claimant attended her final probationary review meeting on 20 November 2018 [HB273-274, 276-282] before Mr Onder Beter. Mr Beter did not make a decision at this hearing as, he said, he wanted further information.

32 The claimant had provided information in advance of the review hearing [HM549-551] and she provided further information to Mr Beter over the days following the review hearing [HB287-295].

33 On 28 November 2018 Mr Beter wrote to the claimant with an update [HB310]. He said he was still awaiting an update from OH following the latest report from the claimant's treating medical practitioner. The claimant had mooted possible redeployment and Mr Beter canvassed that he might consider this as an alternative outcome which was outside the probationary assessment process. If the claimant was agreeable to this possibility, then he said that he could he could consider placing her in a redeployment pool; although, if the claimant did not find suitable alternative employment with a "reasonable period" then she would likely be dismissed.

34 Dr Ledda provided his final report on 29 November 2018 [HB314-315]. He said that the claimant's treating consultant was "moderately optimistic" above a possible improvement in her eyesight. He said that there was no indication when the surgery anticipated would be taken, although his "educated guess" was 6 weeks or 2 months. His assessment was that the claimant's position remained the same "fit with the limitation of not driving" and that he was not able to proffer a date for the claimant to start her full duties.

35 On 11 December 2018 Mr Beter provided the claimant with the outcome of his review [HB321-326]. He informed the claimant that she had not passed her probation

and that under normal circumstances he would confirm her dismissal. He said, as a "reasonable adjustment" in respect of her disability, he decided to allow for a period of redeployment during the claimant's notice period in order for her to attempt to secure suitable alternative employment with the respondent. He said in order to provide the claimant with a reasonable period in which to do this he has decided on a redeployment period of 6 weeks because of the intervening Christmas period. So, the claimant was told that her employment would end on 22 January 2021 unless she secured suitable alternative employment within the respondents redeployment pool.

36 Mr Beter contended that a reasonable timeframe for the redeployment pool was usually in line with an employee's notice period but, as another "reasonable adjustment" and owing to the Christmas period, he extended this to 6 weeks.

37 Mr Beter's explained his rationale for assessing the claimant had not passed her probation period as follows:

- You have been absent from work for a considerably significant amount of time that did not allow your line manager to fully assess your ability to meet the requirements of your role during your probation period.
- When you were at work, you were unable to drive and transport children to their contact arrangements with their families. Driving is an essential part of your role and whilst reasonable adjustments have been explored, not being able to drive has put the Council's resources at constraints; at times, taxis needed to be booked to allow you to undertake your tasks costing the council money, which cannot be considered as a long-term reasonable adjustment. I noted your argument that you had not been referred to the Access to Work Scheme and a letter from the Scheme confirming that they would be sympathetic to an application by you if the LA had stopped paying for taxis. However, the Access to Work Scheme could only assist you in travelling to work, assuming that they have accepted an application from you, but they would not be providing you with taxis or other means to undertake the necessary tasks and fulfil the requirements of your role.
- There have been times when contact arrangements had to be cancelled due to your lack of availability. I have been informed that this was not only because you were absent but also lack of available locum workers to cover your shifts. This meant that some children missed the opportunity to see their loved ones.
- I heard that your absence from work had an impact on the service and your colleagues: there have been occasions when your shifts were covered by locum supervisors, which added a financial cost to the Council and is not sustainable. Additionally, some of your shifts were covered by your colleagues who were not content with this as this was impacting on their jobs.
- Although, the latest letter from your consultant was encouraging in providing a positive prospect for your eyesight, there is no certainty that you will be able to drive safely to fulfil the requirements of your role. Indeed, you have had a further operation between the date of our meeting and this letter and a further period of time absent from work to recover.
- Furthermore, considering the safeguarding responsibilities we have for these children, their families and you as an employee, the risk would be too high to allow you to fulfil your role when your vision is compromised with no guaranteed improvement or future prognosis. This is particularly so as your role is to observe the well-being and safeguarding for our most valuable children to whom we have a duty of care.
- I have heard that reasonable adjustments were put in place during your probation period which I found appropriate but unsustainable and do not mitigate the ultimate consideration I have had which is the safeguarding of vulnerable children. These were as below:
  - Taxis were booked to enable you to transport children to contact
  - Flexibility offered to you to use public transport
  - Contacts taking place locally were assigned to you to ensure you were not required to drive
  - Cancellation of contacts at times
  - Asking other members of staff to cover some sessions when you were unable to drive or absent due to medical appointments.

38 Mr Beter gave the claimant the right to appeal this decision.

39 The claimant applied for the position of Accelerated Support Team Family Support Worker. He application was acknowledge on 26 December 2018 [HB368] and she was informed that if her profile met the job requirements she would be contacted soon, but that if she did not hear further within 14 days of the closing date to assume that she had been unsuccessful on that occasion. The claimant did not hear any further in respect of this application.

40 The claimant applied for the role of Trainee Housing Officer, and this was acknowledged on 17 January 2019 [HB385] on the same basis as her previous application, i.e. if her application progressed then she would hear within 14 days.

41 The claimant's employment with the respondent ended on 22 January 2019.

42 The claimant was shortlisted for the Trainee Housing Officer vacancy and was offered an interview which she attended on 7 February 2019. The claimant was told that she had been unsuccessful on 11 March 2019 and was provided with feedback [HB 406].

Our determination

Direct discrimination because of disability

43 The claimant compared herself with another employee, JK. JK had worked with the respondent since 1 October 2015. She passed her probationary period and was a Contact Worker. JK developed a problem with her elbow which meant she had difficulties in fitting children's car seats and could not lift children in and out of a car, although, so far as we are aware she had no problem driving to or from contact sessions. The respondent determined that JK's employment was not sustainable in the long term. Dr Ledda recommended medical redeployment [HB467-468] on 14 November 2018. At that point JK had been employed over 3 years and, crucially, she had passed her probation. JK was successful in finding another job with the respondent.

44 As stated above, s23(1) EqA stipulates that there must be no material difference to each case when determining whether the claimant had been treated less favourably than a comparator. In other words, in order for the comparison to be valid, like must be compared with like and this entails an examination in the circumstances of an actual or hypothetical person who: (a) does not show the claimant's protected characteristic, which in this case is either the claimant specific or similar disability; and (b) is in not materially different circumstances to the claimant. In the claimant's case, neither she nor JK could undertake the work they were paid to do because of their respective disabilities and or impairments so the claimant's protected characteristic was substantially the same as that of JK. However, a crucial difference lies in the second part of the comparative exercise, (b). Their material circumstances were fundamentally different because the claimant had not passed her probation period and JK was an established member of staff who are had achieved 3 years continuous

service and, perhaps significantly, had also accrued the right not to be unfairly dismissed. This difference determined the way the claimant and JK were treated. The claimant was assessed through the probation review, JK was not. It would be a gross distortion to assess some aspects of the treatment and ignore the fundal premise.

45 As we discount JK as an actual comparator, we look to a hypothetical comparator with a list of key characteristics substantial similar to that of the claimant and who does not share her protected characteristics. That comparator would be a probationary employee who was no longer able to drive to contact sessions (for whatever reason).

46 In respect of issue 6.2.1, the respondent's Managing Change Policy and Procedure April 2015 provided for redeployment in section 32. This policy outlined the process which will be followed during times of structural change, see page 441 of the hearing bundle. Section 32 of the Policy specifically applies to staff given notice of dismissal for reasons of redundancy. The claimant was not caught by a redundancy situation nor was the respondent going through any structural change, either at all in the council or one that affected the claimant. It was very clear from the contemporaneous documents and from Mr Beter's evidence that he had no intention of importing part of the redundancy procedure into managing the consequence of the claimant's failure to pass her probation review. That would not be logical and indeed the claimant did not raise any contention, at the material time, that he should have done so. Mr Beter offered the claim something extra that she was not entitled to – possible redeployment. So, the respondent was not contractually obligated to apply the redeployment policy. Having decided to consider redeployment then it was natural, and appropriate, to adopt a broadly similar process to the redundancy procedure but we reject the claimant's assertion that the respondent was somehow bound to follow the Managing Change Policy and Procedure on redeployment. As the respondent was not obliged to follow the redeployment policy there can be no less favourable treatment.

47 So far as issue 6.2.2, the claimant had applied for 2 jobs for which she had been unsuccessful. These were as follows:

47.1 Accelerated Support Team Family Support Worker. The job description this role was as pages 372 to 376 of the hearing bundle. The claimant's job description for a contact worker confirmed that she was employed at grade 5 [HB55-57]. The Family Support Worker role was at grade PO1 which was, in our objective analysis, a significantly more senior and demanding role. On a comparative exercise between the relevant job descriptions, the roles were not equivalent as the PO1 role required significantly more skills and responsibilities.

47.2 Trainee Housing Officers role. The claimant was shortlisted for this position and invited for interview on 7 February 2019. The claimant was provided with near contemporaneous feedback from her interview by Ms Magda Goncalves on 11 March 2019 [HB406]. It stated that the claimant met the criteria for questions 1 and 7. The claimant partially met the criteria for questions 3, 4 and 5 and she did not meet the criteria for question 2. Notwithstanding the explanations were brief and the claimant did not agree with the outcome, there

was nothing to suggest that the claimant's non-appointment was tainted by discrimination on the grounds of her disability.

48 Again, as the claimant has not made out less favourable treatment then the *Igen* assessment cannot be engaged.

49 Mr Beter set out his reasons for dismissal (as above). His explanation is clear and compelling. So far as issue 6.2.3 is engaged, when we examine this through the prism of less favourable treatment this entails assessing how he would have treated a non-probationer:

- who could no longer drive, which was an essential component of the job and a contractual requirement;
- with a very high absence rate; and
- who could proffer no immediate prospects of remedying the above within the foreseeable future.

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50 Under such circumstances we conclude that Mr Beter's probationary review would have terminated the employment of the claimant's hypothetical comparator probably at the probation review. Indeed, such was Mr Beter's sympathy with the claimant's predicament that he offered the claimant redeployment. This was offered as a "reasonable adjustment" and we deduce from that that Mr Beter made this offer to the claimant because of her disability. This was not a usual option available to him and displays a degree of creative thinking in which he went the extra distance over and above the outcome normally available for a final probation review. The fact that the claimant was not able to secure alternative employment within that available window is not something for which we will criticise either Mr Beter or the respondent.

<u>Discrimination arising from the claimant's disability</u>

51 Terminating the claimant's employment was, of course, unfavourable treatment, under issue 6.6.1. It is incumbent on the respondent then to show that dismissing the claimant was a proportionate means of achieving a legitimate aim. The respondent contended in their grounds of resistance [HB43] that the legitimate aim was the safeguarding of the well-being of vulnerable children and the running of a functional contact service. The respondent emphasised that the claimant was not able to carry out her work as a Contact Worker. In his decision which ultimately led to the claimant's termination, Mr Beter emphasised the lack of council money available to pay for taxis, the disruption of cancelled contact arrangements and the impact of absences on the service and colleagues which was not sustainable. The respondent referred the claimant to the Access to Work Scheme, which could not remedy the substantial cost consequences for the respondent, even had the claimant engaged fully with Access to Work (as this was primarily her responsibility and not the employer's). Within the first 5 months of the claimant's employment Mrs Eboji had informed her that she did not have the budget to provide taxis to transport the claimant to and from contact meetings. Ms Taylor engage with the claimant early both about her inability to drive and the effect of the claimant's absences. The claimant's probationary review was extended, extensive enquiries were undertaken with the respondent's occupational health advisors and the claimant's treating medical practitioners and Mr Beter undertook extensive enquiries before coming to his

decision. This demonstrates a proportional response to the unfortunate disruption caused by the claimant's disability. Mr Beter set out the adjustments that the respondent had made, which he found was appropriate but unsustainable for the service in the circumstances of the claimant's case. We find terminating the claimant's employment was a proportionate means of achieving a legitimate aim.

52 When analysing issue 6.6.2, the claimant's contention that not redeploying her was unfavourable treatment, we note that the claimant had no contractual right or reasonable expectation of redeployment before this was offered. Mr Beter regarded this as a reasonable adjustment. As an unsuccessful probationer this was an option that Mr Beter put in place to allow the claimant an extra opportunity to avoid dismissal. As was determined by the EAT in *Private Medicine Intermediaries Ltd v Hodgkinson & Ors EAT 0134/15* treatment that is advantageous will not be unfavourable merely because it might have been *even more* advantageous. This means that because the claimant might have got a job through redeployment her lack of success it does not make not redeploying her as unfavourable in the circumstances of this case. .

53 Furthermore, under s15(1) EqA, as issue 6.7 recognises, any unfavourable treatment must be "because of something arising in consequence of [the claimant's] disability". So, it is not the application of a course of conduct or policy or state of affairs that is unfavourable but the specific effect this has on the claimant. The claimant was not successful in her redeployment applications because she was not determined to be a suitable candidate in 2 selection processes. We cannot see that her disability was taken into account and there is no basis for us to draw adverse inferences because there is no evidential basis for such a construction. She applied for 2 vacancies, one job was at a significantly higher level and the second job provided detailed feedback. It would be mere speculation, without any evidential foundation, for us to conclude that the claimant was not offered the Family Support Worker job because of something arising from her disability. Similarly, there is no foundation for us to conclude that the feedback given in respect of the Trainee Housing Officer role was deliberately misleading.

<u>Indirect disability discrimination</u>

54 The job description for Contact Worker role stated that 1 (of 4) of the purposes of the job was "To transport/escort children to and from contact sessions". The Principal Accountabilities and Responsibilities provided at point 3 (of 20 points) reiterated the point: "To provide transportation or escort children to and from contact sessions" [HB55]. In respect of the Person Specification [HB57] the respondent set out its essential criteria for Skills and Abilities to include:

- Ability to transport/escort children both within and outside the Borough
- The ability to drive and have access to a car, with full Clean Driving Licence.

55 The claimant did not question or dispute the requirement to be able to drive to contact sessions in her application indeed she stated: "I have access to a car and a full clean driving licence." [HB65].

56 So the respondent did have a PCP that the claimant be able to drive to contact

sessions and this was a requirement or PCP that applied to the claimant as well as other colleagues.

57 Ms Eboji confirmed that at the job interview that the claimant could drive and had use of the car and the claimant also signed up for the zip car scheme. In her evidence, Ms Taylor said that the claimant was only able to drive for 6 days because of her visual impairment and, as an adjustment, the claimant was given the bulk of nearby contact session and even allowing for this, taxes were booked for the majority of her contacts. Ms Taylor said in evidence also said that using public transport might sometimes be appropriate for one or 2 older children and for short journeys, but this was not a sufficient alternative for most cases and would not be satisfactory as a longer-term solution. Ms Taylor also said that the claimant had said using public transport was difficult because she felt it added to the pressure on her as it entailed longer overall travelling times and she was not able to have proper breaks.

58 The claimant's inability to drive to contact sessions meant that colleagues had to cover more appointments and particularly the longer journeys. The claimant said that this was not particularly problematic, but we do not accept that because there is evidence in the hearing bundle of colleagues feeling the strain (see page 268) and what colleagues say to their managers may be very different from what they said to the claimant. In any event, we believe Ms Taylor, when she said the claimant's inability to drive to contact sessions caused considerable disruption to planning and allocating contact work.

59 Notwithstanding the respondent was not able to fully quantify the costs of booking taxis, we accept that this represented a considerable cost consequence both actual and projected, because the claimant would likely need taxis for the majority of her visits. Disruption and additional cost were also incurred because taxi companies could be unreliable and not turn up on time or they might not have the appropriate car seats available.

60 One of the major reasons given by Mr Beter for the claimant ultimately losing her job was her inability to fulfil the above PCP. So, the claimant was placed at a particular advantage, as would anyone sharing her disability, by the requirement to be able to drive to contact sessions and this put the claimant at a particular disadvantage when compared to non-disabled persons because, ultimately, she failed her probation.

61 It was entirely proportionate and legitimate for the respondent to have the requirement to be able to drive to contact sessions for the Contact Workers role. It was integral to how the job was done that the Contact Workers collect and drive children to contact sessions with their families and then drive them back to other family members or their foster carers or their residential units in circumstances where the courts had intervened and provided for structured visits. This was so essential to the role as to be set out in the Job Description which was incorporated into the claimant's contract of employment [HB84B].

<u>Reasonable adjustments</u>

62 We stated above that the PCP, as defined in issue 6.9.1, put the claimant at

a substantial disadvantage in relation to non-visually impaired Contact Workers.

63 The respondent provided the steps or adjustments identified at 6.18.1 and 6.18.2, namely the provision of taxis for contact visits and to schedule work that did not involve the requirement to drive to contact sessions. However, it was the assessment of the claimant's line manager, Ms Taylor, supported by Mrs Eboji in evidence, that both of these adjustments were unsustainable.

64 The question of whether the employer has made reasonable adjustments has to be determined objectively, see *Smith v Churchills Stairlift*. In the EAT determined that costs must be weighed with other factors, although it is one of the central considerations in the assessment of reasonableness.

65 The claimant could not meet the essential criteria for a role for which she had recently been employed and this was why she had failed her probation. We have little difficulty in assessing the claimant as a capable employee, although the respondent contended that there was some conduct issues raised towards the end of her employment. The claimant was not a long-standing employee with an established record of good service. The claimant was someone who had been recently employed and very quickly demonstrated that she was not able to fulfil a key aspect of the role. Mr Beter determined that the costs and disruption for the provision of taxis was not sustainable, and we accept his assessment. If the claimant could not drive to contact sessions, then there was little work for her to do because the other aspects of the role entailed administration and report writing emanating from contact visits. We accept Ms Taylor's evidence that there was not enough non-drive contact sessions to keep the claimant fully occupied and indeed when the claimant was allocated such limited available work this increased the volume of work reallocated to the claimant's colleagues and also made the other Contact Workers jobs more difficult or undesirable with the increase of drive time to and from contact appointments. So, we determine that it was not reasonable fore the respondent to have to take the steps identified at issue 6.18.1 and 6.18.2 on an ongoing or longer basis.

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to take the steps identified at issue 6.18.1 and 6.18.2 on an ongoing or longer basis.

Conclusion

67 As we reject the claimant's disability discrimination claims, proceeding will now be dismissed.

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Employment Judge Tobin

Date: 8 September 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

9 September 2022

FOR THE TRIBUNAL OFFICE