Case No: 1600920/2021

EMPLOYMENT TRIBUNALS

Claimant: Mrs K Thomas

Respondent: Bridgend County Borough Council

Heard at: Cardiff (hybrid) **On:** 7 – 14 March 2022

Before: Employment Judge C Sharp
Ms Y Neves
Mr C Stephenson

Representation
Claimant: In person (her husband attended at points when the Claimant did not attend, but was not her representative)

Respondent: Mr C Howells, Counsel

RESERVED JUDGMENT

By unanimous decision:

1. The Claimant's claim of unfair dismissal is not well founded and is dismissed;

2. The Claimant's claim of discrimination arising from disability is not well founded and is dismissed;

3. The Claimant's claim of failure to make reasonable adjustments is not well founded and is dismissed;

4. The Tribunal did not determine whether all of the claims were within its jurisdiction as it was not a good use of limited resources, but some claims were found to be within its jurisdiction while others were not. The reasons below provide the detail.

REASONS

Background

1. The Claimant, Mrs Karin Thomas, was a loans and investment officer in the employ of the Respondent, Bridgend County Borough Council (a local government authority). She was a very competent and capable officer with

about 25 years' service in her role, a point made repeatedly by the Respondent's witnesses throughout the course of their evidence and as demonstrated by the appraisal and other documents within the hearing bundle before the Tribunal. The Claimant commenced her employment on 6 November 1995 and was dismissed on the grounds of capability (long-term absence) with an effective date of termination of 8 February 2021. The Claimant had been off work since 2 September 2019 with stress and anxiety which affected her well-being (including depression).

2. The Claimant and the Respondent entered into ACAS early conciliation between 4 May 2021 and 15 June 2021 and the ET1 was presented to the Tribunal on 7 July 2021. The Claimant brought claims of unfair dismissal, discrimination arising from a disability, failure to make reasonable adjustments and sex discrimination. The sex discrimination claim was withdrawn and then dismissed by a legal officer on 3 March 2022.

3. Time is also an issue in this case. Employment Judge Brace at the preliminary hearing that took place on 22 November 2021 indicated that discriminatory acts before 5 February 2021 may be out of time; there is no suggestion that the unfair dismissal or discriminatory dismissal claim has been brought out of time. The Tribunal noted that the Claimant in her witness statement had not provided any evidence as to why time should be extended if the claims are out of time, and noted that in the written submissions provided at the outset hearing, the Claimant did not accept that the claims were out of time and submitted that there may be a continuing act.

4. The Tribunal's own provisional analysis outlined to the parties at the outset of the hearing is that the earliest date an act may be in time to be within its jurisdiction was 25 January 2021. Preliminary consideration of the disability discrimination claims indicated that the claim about the stress risk assessment and most of the reasonable adjustment claims may be out of time, depending on the Tribunal's view as to when time runs in respect of these matters and if there is a continuing act. Mr Howells who appeared on behalf of the Respondent indicated that there would be no objection to the Judge asking additional questions of the Claimant within her examination in chief to elicit her evidence as to time and if it should be extended by the Tribunal. This step was taken.

5. The Tribunal was presented with an agreed list of issues, which it adopted for the purpose of the hearing, though it asked some questions at the outset of the hearing in order to clarify the auxiliary aid claim and the additional duties point within the first PCP pleaded, and confirmed that both parties were satisfied that the issue of disability from 2 September 2019 onwards had been conceded and sufficiently dealt with this issue. This is recorded in the issues to be determined by the Tribunal set out below.

6. Accordingly, the issues before the Tribunal for its determination are:

   6.1 Unfair dismissal – it was agreed that there was no issue of contributory fault and that *Polkey* would be left to a remedy hearing;

6.2 Whether the discrimination claims have been brought in time, and if not, should time be extended on the basis that it would be just and equitable to do so;

6.3 Discrimination arising from disability (s15 Equality Act 2010 "EqA") and the unfavourable treatment complained of is –

6.3.1 Dismissal of the Claimant;
6.3.2 Failure to tailor the stress risk assessment ("SRA") to the Claimant's specific issues.

The Claimant says that the "*something arising*" that caused the unfavourable treatment was her sickness absence from September 2019 onwards. The Respondent accepts that the treatment complained of occurred and that the dismissal was unfavourable treatment, but relies on the legitimate aim of requiring a workforce at its disposal at all times to discharge public functions, and says dismissal was a proportionate means of achieving this. In relation to the SRA claim, the Respondent's position is that all of the Claimant's stress triggers were dealt with in the final version (so there was no unfavourable treatment), and she could not prove that her absence caused any alleged failure to tailor the SRA.

6.4 Failure to make reasonable adjustments (s20/21 EqA) – the Claimant complains of 5 provisions, criterions or practices ("PCP"):

6.4.1 A practice of requiring or expecting the Claimant to undertake duties additional to those set out in her job description (the Claimant explained at the outset of the hearing that this related to duties to be carried out on her return to work);
6.4.2 A practice of only discussing "*industry standard headings*" and not the Claimant's specific stress triggers;
6.4.3 Failure to deal with the Claimant's grievance in a timely and appropriate manner;
6.4.4 Failure to adhere to Occupational Health recommendations of allowing a period of recovery before returning to work; and
6.4.5 Requiring the Claimant to return to her substantive role as Loans and Investment Officer.

The Claimant asserts that each PCP put her at a substantial disadvantage compared to someone without her disability as follows:

i) The Claimant was unable to cope with undertaking the additional duties (PCP1);
ii) The Claimant was unable to identify what adjustments were in practice being proposed (PCP2);
iii) The delay and the manner of the process exacerbated the Claimant's stress symptoms (PCP3);
iv) The Claimant was unable to recover before recommencing work (PCP4);
v) The Claimant was unable to return to her substantive role as a Loans and Investment Officer due to the stress caused (PCP5).

6.5 The Claimant also asserts that there was a failure to provide an auxiliary aid. This claim had to be clarified to the Tribunal by the Claimant at the outset of the hearing as it was not entirely clear from the list of issues what was meant. The parties agreed that the issue here was that the failure to put specific adjustments to the Claimant's role in writing in the return to work plan (as foreshadowed in the SRA) allegedly put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability as the Claimant asserted that she was unable to process information given verbally.

6.6 The Respondent concedes knowledge of the disability at the time of dismissal. There are though issues about knowledge of the substantial disadvantage to be determined by the Tribunal if the Claimant establishes her claim as required under the shifting burden of proof (see below).

6.7 The Claimant says that the following steps could have been taken to avoid the substantial disadvantage she claims to have suffered:

6.7.1 Removal of duties that were additional to those set out in the job description;
6.7.2 Provision of specific outcome measures/adjustments, namely removal of additional duties/changes made to the Claimant's role;
6.7.3 Providing the grievance outcome on an early/urgent basis;
6.7.4 Clear written changes of the specific reasonable adjustments;
6.7.5 Allowing a period of recovery following resolution of grievance before the Claimant returned to a substantive role;
6.7.6 Considering redeployment options before the decision to terminate employment.

The Tribunal will have to decide if it was reasonable for the Respondent to take those steps, and if so, when, and whether the Respondent did fail to take those steps.

The hearing

7. The Claimant represented herself, though she was supported by a variety of note-takers from a local university. Her written submissions were sent in advance of the hearing and a further set were delivered by her husband at the end of the hearing. Mr Howells, Counsel, appeared on behalf of the Respondent. The Tribunal had a reading day for the first day, and at the outset of Day 2, took the parties through the issues, the procedure at a final hearing and in particular ensured that the Claimant had an opportunity to raise any queries she might have. The Claimant was fully aware of the issues and assisted the Tribunal with its queries. Both the Claimant and Mr Howells were asked about if reasonable adjustments were required; both confirmed that they were not, though the Tribunal asked Mr Howells to provide any authorities relied upon to the Claimant by the end of Day 3 as a courtesy to an unrepresented person (normally, authorities are provided at the submission stage). The Claimant was asked if she wanted a written judgment with reasons, given the allegation that she could not process information given verbally; she declined (though ultimately a reserved decision was required due to lack of time).

8. The rest of Day 2 was taken up with the Claimant's evidence, which concluded at 4.10pm. The Claimant struggled at times to just answer the question she was asked in the Tribunal's view (a point of which she was reminded of several times), but in its experience, this is not uncommon as Claimants are keen to tell their account, whether or not the question invites such a response. The Claimant confirmed that she would be ready to question the Respondent's witnesses the next day and had prepared questions to do so.

9. The Tribunal outlines the above to provide a background to the events of Day 3. Before the hearing commenced on day 3, the Claimant emailed the Tribunal office at 7.23am saying she was not well enough to attend the Tribunal that day. Further enquiries were made by the Tribunal, and ultimately after the Claimant's husband attended the hearing by CVP, the hearing was adjourned for the day to allow medical evidence to be provided. On Day 4, evidence was provided, and the Tribunal determined that it would not adjourn the proceedings on the basis that it would be possible to have a fair hearing in all the circumstances and having balanced the other factors to be considered. Oral reasons were provided with Mr Thomas in attendance (as well as Mr Howells) and the Order was confirmed in an email to the parties, notifying them of the period to seek written reasons. This judgment does not set out those reasons, partly as it only deals with the substantive issues and partly because Orders are not set out within a judgment. The Tribunal made it clear that the Claimant and her husband were welcome to attend to watch remotely if they did not wish to take an active part in the proceedings, but it would understand if the Claimant did not attend. They did not attend on Day 5, but Mr Thomas delivered the Claimant's further written submissions on Day 6.

10. The hearing recommenced on Day 5 with the Respondent's witnesses attending and subjected to questioning by the Tribunal. The witnesses called by the Respondent were:

    Ms Deborah Exton, deputy head of finance and the dismissing officer;
    Cllr Pam Davies, chair of the grievance and appeal panels;
    Ms Helen Selway, HR Business Partner Manager;
    Mr Nigel Smith, Group Manager – Chief Accountant (the Claimant's manager between October 2015 & July 2019 and regular attendee at her welfare meetings);
    Ms Helen Little, HR Business Partner;
    Ms Dennise Thomas, HR Business Partner; and
    Ms Gill Lewis, former s151 officer for the Respondent (a chief officer role in finance) and the grievance hearing decision-maker.

11. The Tribunal's view of the Respondent's witnesses was that broadly they presented as straightforward witnesses of fact. Mr Smith accepted that he had no independent memory of what had happened and had to rely extensively on the bundle, but was clear that if the Claimant had said anything different, he was in no position to rebut. Both Mr Smith and Ms Little were willing to make concessions, and made the point that there had been no formal offer of redeployment made to the Claimant. Ms Little volunteered that it was an error to record such an offer had been made. Cllr Davies explained that she could only comment on her view as chair, while Ms Lewis had a clear memory of what had happened with the Claimant.

12. Any reference to pages in the hearing bundle will be in square brackets.

Law

Unfair dismissal

13. The Employment Rights Act 1996 gives employees the right to claim unfair dismissal:

"94 The right
(1) An employee has the right not to be unfairly dismissed by his employer.
(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).
….

98 General
(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."

14. Lord Denning MR explained in Taylor v Alidair Ltd [1978] IRLR 82, [1978] ICR 445:

"Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent."

The *Alidair* test is three-fold:
(a) Does the employer honestly believe that the employee is incapable of doing the job; and
(b) Are the grounds for that belief reasonable?
(c) Are they based on a reasonable investigation?

Effectively, the *Alidair* test replicates the questions to be asked when considering a conduct dismissal but within the context of a capacity dismissal.

15. In cases of ill-health capability, in East Lindsey District Council v Daubney [1977] ICR 566 the EAT stressed the importance of consultation and discovering the true medical position. It was said by Mr. Justice Phillips that:

"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."

16. The EAT in DB Schenker Rail (UK) Ltd v Doolan EATS 0053/09 emphasises that, while *Daubney* requires an employer to establish the *"true medical position"* before deciding to dismiss, that should not be read as requiring a higher standard of enquiry than required for a misconduct dismissal. The *Burchell* approach, requiring that a reasonable investigation into the matter be carried out, still applies. "*Reasonable*" does not mean taking every possible step that could be taken – it is an investigation that is reasonable within a range of reasonable responses open to a reasonable employer.

17. In Spencer v Paragon Wallpapers Ltd [1977] ICR 301, it was said that every case depends on its own circumstances. The basic question is whether, in all the circumstances, the employer can be expected to wait any longer, and if so, how much longer. Relevant circumstances include the nature of the illness, the likely length of the continuing absence, the need of the employer to have done the work which the employee was engaged to do. This was more recently considered in BS v Dundee City Council 2014 IRLR 131, a case cited by Mr Howells on behalf of the Respondent, which observed that while length of service can be relevant, in the case of an ill-health dismissal its relevance is not so clear cut.

18. It is worth noting that as Mr Howells submitted, even if the employee's ill-health is caused or made worse by the employer's conduct, this does not mean that the dismissal of the employee by reason of that incapacity is unfair (McAdie v Royal Bank of Scotland [2008] ICR 1087). The question remains whether it was reasonable in the circumstances at the time of dismissal to dismiss the employee, and whether the employer should have waited longer.

19. O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145 was not cited but it makes the point that when considering an unfair dismissal claim and a s15 claim there is not a necessary inconsistency between the Tribunal, on the one hand, rejecting the claim of unfair dismissal and, on the other, upholding a claim under Section 15 of the EqA in respect of that same dismissal. That is because the issue of whether a dismissal is unfair or not is determined by reference to the question of whether that dismissal was within the range of reasonable responses open to a reasonable employer. The two claims pose different questions to be answered by a Tribunal.

20. Procedural fairness is also relevant. If a policy is in place, whether it was complied with is a relevant factor, though a failure to comply does not render a dismissal automatically unfair. The circumstances of the case remains paramount in assessing fairness. The case of Taylor v OCS Group Ltd [2006] EWCA Civ 702 confirms that what matters is whether the disciplinary process as a whole was fair:

    "The task of the tribunal is to apply the statutory test and, in doing so, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage."

21. The mere fact that there was a procedural failing in the appeal process will not automatically displace the fairness of the original dismissal. As Gwynedd Council v Barratt and another [2021] EWCA Civ 1322 confirmed, a failing in the process relating to the appeal can render the dismissal unfair, but not automatically. In London Central Bus Company Ltd v Manning EAT 0103/13, a Tribunal found a dismissal unfair solely on the basis that the employer had failed to show the Claimant a list of unsuitable vacancies at the appeal hearing. The EAT upheld the appeal, holding that a procedural defect in the appeal process, while relevant, could only render a dismissal unfair if, as stated in West Midlands Cooperative Society Ltd v Tipton [1986] A.C. 536, it denied the employee the opportunity of demonstrating that the reason for their dismissal was not sufficient for the purpose of S.98(4).

22. There is, therefore, a significant degree of latitude for an employer in respect of a decision to dismiss and its fairness or otherwise. In fact, a Tribunal may disagree with a decision taken by an employer to dismiss an employee but that will not necessarily mean that the decision was unfair. The dismissal will only be said to be unfair when it can properly be said that the decision to dismiss the particular employee in the particular circumstances of the case was one which was outside the range of reasonable responses. The Tribunal cannot substitute its own view of the matter and what it would have done in the circumstances if it had been the employer.

s15 Equality Act – discrimination arising from disability

23. As for the correct approach when determining section 15 EqA claims, the Tribunal refers to Pnaiser v NHS England and others UKEAT/0137/15/LA at paragraph 31:

"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. 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 so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).
(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage

involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to 'something' that caused the unfavourable treatment."

24. In Secretary of State for Justice v Dunn (2017) 1 WLUK 573, the EAT set out four elements for a s15 claim:

    a. unfavourable treatment;
    b. the "*something arising*" is in consequence of the Claimant's disability;
    c. the unfavourable treatment must be because of the "*something arising*";
    d. the Respondent cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim. This is an objective test.

25. The Tribunal considers that there is no substantive difference between the *Psnaiser* and *Dunn* approaches.

26. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the organisational needs of the Respondent.

27. The burden of proof is on the Respondent to establish justification (MacCulloch v ICI [2008] ICR 1334). The legitimate aim must be identified by the Tribunal. Paragraph 10 in *MacCulloch* says:

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

(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (Case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or Tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (para 36). This involves the application of the proportionality principle […]. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp 142- 143.

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.
(4) It is for the employment Tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."

28. In the context of objective justification in s.15 claims, the Tribunal is reminded that it should not focus on the process leading to the decision to dismiss but should engage in an objective assessment, balancing the needs of the employer, as represented by the legitimate aims pursued, against the discriminatory effect of the decision to dismiss (Department for Work and Pensions v Boyers EAT 0282/19). The Tribunal is required to carry out an objective assessment and reach its own conclusion, having undertaken a critical evaluation, through which it must balance the discriminatory effect of the act complained of with the organisational needs and requirements of the employer. This is a different approach to an unfair dismissal claim and can lead to different outcomes from the same facts.

29. In order to assess whether the prima facie discriminatory measure (in this case, dismissal and the alleged failure to tailor the SRA) is or is not proportionate in the context of the legitimate aim being pursued, a Tribunal must weigh the real needs of the undertaking against the discriminatory effect of the proposal. There must, in this context, be an objective balance between the discriminatory effect of the dismissal and the reasonable needs of the employer (Hampson v Department of Education and Science [1989] ICR 179). How the Tribunal weighs the needs of the Respondent's undertaking against the discriminatory effect of the dismissal is critical. The treatment must be an appropriate means of achieving a legitimate aim and reasonably necessary in order to do so (Hardys and Hansons plc v Lax [2005] ICR 1565 and Homer v Chief Constable of West Yorkshire [2012] ICR 704.

30. While the Tribunal should approach matters objectively, in Birtenshaw v Oldfield [2019] IRLR 946, the EAT held that in assessing proportionality it should give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim.

31. The approach to be adopted to the question of justification in a section 15 EqA case was specifically considered by the Court of Appeal in O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145, [2017] ICR 737. Underhill LJ observed:

"37. … More generally, the proposition that it was unfair of an employer to decide, after a senior employee had already been absent for over twelve months and where there was no certainty as to when she would be able to return, that the time had come when the employment had to be terminated, seems to me to require very careful scrutiny. The argument "give me a little more time and I am sure I will recover" is easy to advance, but a time comes when an employer is entitled to some finality. That is all the more so where the employee had not been as co-operative as the employer had been

entitled to expect about providing an up-to-date prognosis … and where the evidence relied on at the appeal hearing was only produced at the day of the hearing and was not entirely satisfactory. …
45. … In principle the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a Tribunal to expect some evidence on that subject. What kind of evidence is appropriate will depend on the case. Often, no doubt, it will be so obvious that the impact is very severe that a general statement to that effect will suffice; but sometimes it will be less evident, and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing. What kind of evidence is needed in a particular case must be primarily for the assessment of the Tribunal,. …"

Knowledge – s.15

32. Section 15(2), EqA provides:

"(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably be expected to know, that B had the disability."

33. The proper approach to be taken in applying this provision (and adopted by this Tribunal) was comprehensively summarised by HHJ Eady QC (as she then was) in A Ltd v Z [2020] ICR 199:

"23. In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:

(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment: see York City Council v Grosset [2018] ICR 1492, para 39.
(2) The Respondent need not have constructive knowledge of the Complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect: see Donelien v Liberata UK Ltd (unreported) 16 December 2014, para 5, per Langstaff J (President), and also see Pnaiser v NHS England [2016] IRLR 170, para 69, per Simler J.
(3) The question of reasonableness is one of fact and evaluation: see Donelien v Liberata UK Ltd [2018] IRLR 535, para 27; none the less, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.
(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes (see Herry v Dudley Metropolitan Borough Council [2017] ICR 610, per Judge David Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and (ii) because, without

knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already] done so", per Langstaff J in Donelien 16 December 2014, para 31.
(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the code, which (relevantly) provides as follows:

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.
5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."
(6) It is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so: Ridout v TC Group [1998] IRLR 628; Secretary of State for Work and Pensions v Alam [2010] ICR 665.
(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee, as recognised by the code."

Failure to make reasonable adjustments

34. The relevant section of EqA is:

"20 Duty to make adjustments
(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(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.
…
(5) The third requirement is a requirement, 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, to take such steps as it is reasonable to have to take to provide the auxiliary aid. …

21 Failure to comply with duty
(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

35. The duty to make reasonable adjustments requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage (Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA). It relates to job-related matters (Kenny v Hampshire Constabulary 1999 ICR 27 EAT) and it has been found by the EAT that the duty is not "*triggered*" unless and until the Claimant indicates that she was intending or wished to return to work (in circumstances where the Claimant is absent from work due to the disability – NCH Scotland v McHugh EATS 0010/06). It may be that the failure to make reasonable adjustments prevents the Claimant from returning from work; if so, the duty applies to enable the Claimant to return.

36. It is not part of the duty to make reasonable adjustments for the employer to consult the employee about what adjustments should or could be made (Tarbuck v Sainsbury's Supermarkets Ltd 2006 IRLR 664, EAT), though it can be good practice or sensible to do so. The Tribunal is required to identify a timeframe within which reasonable adjustments should have been made if a failure is found (Ministry of Defence v Cummins [2015] 3 WLUK 598).

37. The leading case of Environment Agency v Rowan 2008 ICR 218 tells the Tribunal to consider the PCP, the identity of non-disabled comparators where appropriate, and the nature and extent of the substantial disadvantage suffered by the Claimant. If the Claimant shows that a specific adjustment should have been made by the Respondent, the Respondent must then show either that the substantial disadvantage would not have been eliminated or reduced by the proposed adjustment or that the proposed adjustment was not reasonable in all the circumstances in order to successfully defend the claim. When considering reasonableness, the test is objective (Smith v Churchills Stairlifts Plc 2006 ICR 524), and disproportionate measures are not required. The practical outcome of taking a proposed adjustment is important.

38. Paragraph 6.28 of the EHRC Employment Code cites a number of factors that may be relevant when deciding if a step is reasonable:

"whether taking any particular steps would be effective in preventing the substantial disadvantage;
the practicability of the step;
the financial and other costs of making the adjustment and the extent of any disruption caused;
the extent of the employer's financial or other resources;
the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
the type and size of the employer."

39. The nature of the substantial disadvantage suffered by the Claimant must be identified by the Tribunal to then analyse what steps would have been reasonable for the Respondent to take to prevent it. "*Substantial disadvantage*" means "*more than minor or trivial*" (s212(1) EqA).

40. This claim has been pleaded as a PCP case and as an auxiliary aid case. A practice requires an element of repetition (Nottingham City Transport Ltd v Harvey EAT 0032/12H) or an indication that it would be repeated (Ishola v

Transport for London 2020 EWCA Civ 11). However, a Tribunal should not be too technical in its approach to what is a PCP as shown in many decisions of the senior courts.

41. The comparator is not the population at large but may be relevant colleagues e.g. the successful candidate (Smith v Churchills Stairlifts plc 2006 ICR 524, CA). It is not always necessary to construct a non-disabled comparator if the facts speak for themselves (Fareham College Corporation v Walters 2009 IRLR 991, EAT). In Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT, the EAT explained that the purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP or the failure to provide an auxiliary aid.

Knowledge – reasonable adjustments

42. Even where an employer knows that an employee has a disability, it will not be liable for a failure to make adjustments if it 'does not know, and could not reasonably be expected to know' that a PCP, physical feature of the workplace or failure to provide an auxiliary aid would be likely to place that employee at a substantial disadvantage — see para 20(1)(b), Sch 8 EqA.*:*

"*20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know— …*
(b) that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

43. In the case of Wilcox v Birmingham CAB Services Ltd EAT 0293/10, Mr Justice Underhill confirmed that the effect of the knowledge defence in the preceding legislation was that an employer will not be liable for a failure to make reasonable adjustments unless it had actual or constructive knowledge both (i) that the employee was disabled, and (ii) that he or she was disadvantaged by the disability by a PCP or physical feature of the workplace. The point was made in the case of Thomson v Newsquest (Herald and Times) Ltd t/a The Herald and Times Group ET Case No.S/121509/09 (a case decided under the older law) showed that there was "*a significant difference between being aware that the Claimant was ill, even suffering from a mental illness that would constitute a disability under the DDA, and being aware of the specific effect that that had on her in relation to mail opening and therefore the disadvantage that she was placed at as a result of the PCP being applied".*

44. Mr Howells submitted that the principles of A Ltd v Z [2020] ICR 199 as set out above are also instructive when considering knowledge in relation to reasonable adjustments.

Time

45. For discrimination claims, section 123 EqA notes that a claim must be brought within three months of the act or omission complained of. There is no issue about the unfair dismissal claim or the discriminatory dismissal claim. However, the other discrimination claims may be out of time. The Tribunal will need to decide whether any claims are out of time, a continuing act and if any

are out of time and not a continuing act, whether it would appropriate to extend time on the "*just and equitable*" basis.

46. In that regard, the Tribunal was mindful of the case law in this area, notably Bexley Community Centre v Robertson [2003] IRLR 434, which noted that time limits are to be complied with, that there is no presumption in favour of the exercise of the discretion to extend time, and that is the exception rather than the rule. The absence of a reason is not though determinative (Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050, CA).

47. It is not mandatory to consider the factors listed within s.33 of the Limitation Act 1980 (British Coal Corporation v Keeble [1997] IRLR 336 EAT factors) but they can assist (though not as a checklist). Consideration should be given to whether the Claimant delayed once she knew of all of the relevant information and, if so, to what extent. Miller v MoJ UKEAT/0003/15/LA makes it clear that prejudice is not a determinative factor, but it is important. As HHJ Auerbach stated in paragraph 31 of Wells Cathedral School Ltd and another v (1) Souter and another EA- 2020-000801-JOJ:

"*As a matter of law, there is no particular feature that must necessarily be present in order for a just and equitable extension to be granted, nor that, if present, is automatically sufficient to warrant such a grant. However, some factors are, as it is put, customarily relevant."*

48. For a failure to make reasonable adjustments claim, it is generally viewed as an omission and time runs from when the decision was made not to make the adjustment or does an act inconsistent with doing the omitted act – Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170 CA). The Tribunal should view the matter from the perspective of the Claimant – if the Claimant does not know that the Respondent is doing nothing, and reasonably believes steps are being taken, time does not run until the Claimant reasonably should have known no action would be taken (*Morgan* – see above for citation).

Shifting burden of proof

49. For discrimination claims, there is what is called a shifting burden of proof. S136 EqA states:

"(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."

50. At the initial stage of the claim, the burden of proof is on the Claimant on the balance of probabilities (more likely than not) to establish a prima facie case, i.e. facts from which discrimination can be established in the absence of a reasonable explanation from the Respondent (Igen v Wong [2005] EWCA Civ 142, Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 and Hewage v Grampian Health Board [2012] UKSC 37). A simple

complaint of unfair treatment does not, on its own, provide sufficient facts for the burden to move to the Respondent or for the Tribunal to find that this treatment was unlawful discrimination. It is trite law that an allegation of mere difference in treatment between the Claimant and any comparator or between the protected characteristic of the Claimant and others is not sufficient to shift the burden of proof to the Respondent (Madarassy v Nomura International plc [2007] IRLR 246).

51. There are times where it is more appropriate for the Tribunal to use a less structured approach and ask the "*reason why*" for the treatment complained of, if established that it happened (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11). If the reason why the treatment occurred is not discriminatory, then whether or not the burden of proof has shifted is an academic point as the claim will fail.

Facts

52. There were little factual disputes between the parties. The Claimant was employed as an loans and investments officer. Her job description [97] stated that her job purpose was the provision of day-to-day administration of the council's treasury management activities, including leasing arrangements and advising on prudential borrowing options. Her principal responsibilities and activities included managing all aspects of the council's treasury management function, preparation of treasury management monitoring reports, reviewing and recommending amendments to the council's treasury management policy statement, and developing, calculating and monitoring Prudential Code Indicators. In addition, her job description said that "*You may be required to undertake other tasks that can be reasonably assigned to you, including development activities, which are within your capability and grade."* [98].

53. The Claimant had been employed in her role for many years and there is no dispute that she was very capable and competent. As is common in the financial arena, the Claimant faced critical deadlines, particularly around January. The Claimant said that around this time of year on top of her normal day-to-day duties, she was writing the treasury management strategy, the capital strategy and Capital Financing Requirement ("CFR"). In particular, the Claimant argued within paragraph 53 of her statement that the CFR was not part of her job description, but accepted she had been doing it for a number of years as a development task, which was referred to in her the job description.

54. The appraisal documents show that there were no concerns about the Claimant's performance. The Claimant was a grade 11 officer, having previously gone through the job evaluation process; the Tribunal understood from the limited evidence before it that the Claimant was not wholly satisfied with that process but this case is not about the job evaluation of the Claimant's role.

55. The Claimant says that on 17 July 2018 she emailed her line management [222-224], expressing concerns that she was a more junior officer attending courses and that she felt out of depth. The Claimant was particularly concerned about IRFS9 (a financial standard) but was advised as it was unlikely to have a significant impact on her work. The Claimant points to this email is evidence that she was taking on extra duties outside her job description.

56. The Tribunal asked the Claimant when she was giving evidence whether there was a simple list of what duties the Claimant said were additional; the Claimant accepted that there was not. The Claimant pointed the Tribunal to the SRA as the best summary of her position as to what was additional. The Respondent's position is that the Claimant was not carrying out additional duties, and while it was willing to remove duties to assist her return, its staff never really understood what duties the Claimant said was additional, given her successful performance for so many years.

57. The theme of the Claimant's later complaints is that she was carrying out work while her colleagues at the same grade were not working at the same level or as hard as her. She complained that colleagues in the finance team did not appear to be under the same pressures as her. This was a theme in her grievance [359 – *" I have previously said that I could have accepted that I was doing work above my grade if everyone else was the same as that would have placed the same value on all Officers but this has not been the case."*; 374 to the investigation officer for grievance *"I've no problem doing the work if people of the same equivalent grade are doing the same but they are not"]* and her complaints throughout. The Tribunal noted that through the hearing bundle and her evidence, the Claimant seemed to find it easier to set out what other people were not doing than set out precisely what were her extra duties. The other theme raised by the Claimant was that at deadline time, such as January, doing the work on reports in addition to her daily tasks was too much pressure – this was summarised as "*time and volume*".

58. On 2 September 2019, the Claimant visited her GP and was signed off work. The reason was anxiety, though later fit notes described the Claimant as having stress and anxiety [114]. The Claimant never returned to work. From 25 September 2019 onwards, the Respondent had 14 welfare meetings and 18 welfare calls with Claimant [115].

59. The Claimant saw Occupational Health on two occasions, 4 December 2019 and 27 May 2020. On the first occasion, Occupational Health confirmed that there was no "*overt underlying medical condition*" and that "*it would appear that Mrs Thomas is experiencing work-related issues, perhaps in relation to the HSE management standards area of workload… Six main areas of work that can affect stress levels: demands, control, support, relationships, role and change.".* Occupational Health made the observation that *"work-related stress is likely to continue for as long as the issues perceived by Mrs Thomas remain unaddressed. Dialogue between the employee and management is crucial in investigating and resolving any putative issues."* [277-281].

60. The Claimant had sent Occupational Health a four-page document, which was attached to its report to the Respondent received on 16 December 2019. The Claimant places great weight on this "*OH annex*", describing it as a document that the Respondent should have had regard to when asking to her complete the SRA. However, when the Claimant was first asked to complete the SRA on 29 November 2019, the Respondent did not have the OH annex as the report was not received until 16 December 2019.

61. The second Occupational Health report [463-468] repeated the same message as the first report and added *"due to the severity of her symptoms I*

anticipate that after the resolution of the stress she is likely to require a period of recovery before she will be fit to return to her substantive role. However, if management are able to provide outcomes/implement adjustments as per the risk assessment as a matter of urgency I see no reason why she would not be able to return before 20th of August". Occupational Health indicated it thought that the Claimant may be disabled under the EqA and recommended that the outcome of the grievance was provided as soon as possible. It reiterated that it had a "*limited role to play work-related stress, since problems that arise are organisational and not medical".* The Occupational Health report ended in confirming that there would be no follow-up by Occupational Health and the GP would be able to confirm when the Claimant was fit for work.

62. In the meantime, the Respondent had decided to undertake the SRA process with the Claimant in order to support her return to work. The Claimant was emailed on 29 November 2019 the standard Health & Safety Executive SRA, using the headings set out in the first Occupational Health report (though the Respondent had not by this time seen that report) by Mr Smith, who asked the Claimant to complete it but explained that it was possible not all sections were relevant [274].

63. The Claimant did complete the SRA but one of her claims is that it had not been tailored to address her specific issues (or stress triggers). As already noted, as the Claimant had not provided the Respondent with the OH annex directly and it was not received from Occupational Health until 16 December 2019, it would not have been possible for Mr Smith to do this. The Claimant completed the document which was then discussed at a meeting on 16 January 2020.

64. This meeting did not go well and there is no dispute about what happened. The Claimant was unable to accept that the purpose of the SRA was to look to the future and put steps in place to ensure that her stress levels did not on her return to work reach the level that led to further time off work. The Claimant wanted to look backwards and also discuss her unhappiness about an advertisement for her sickness cover that had been placed by an employment agency (though the evidence before the Tribunal shows that this was not on the instructions of the council). The Claimant agreed in this hearing that this was her position as she did not understand how matters could be addressed without resolving what had happened in the past and she was very upset about the job advertisement. The Claimant in her grievance said it was not acceptable that she was expected to "*move on*" [359]. Her unhappiness with this meeting led to the Claimant raising a grievance on 2 February 2020, raising a wide range of issues [353-359].

65. The Respondent amended the SRA in red text following this meeting and sent it to the Claimant for her approval [297-308]. It added an "*any other issues*" section at the end to enable the Claimant to record anything that had not already been reflected in the SRA, including her concerns about the job advertisement. The Claimant further amended the SRA to include points from her OH annex and sent that to the Respondent [309].

66. The Claimant raised a number of issues within her grievance; she was unhappy about the SRA and the job advertisement, felt her sickness issues were not addressed in a timely manner, she was aggrieved about the roles and responsibilities of herself compared of other colleagues, and asserted

that there was discriminatory treatment of officers on the same grade. The deputy monitoring officer was appointed as the investigation officer.

67. The Claimant in her oral evidence accepted that she believed it was reasonable that she was not interviewed about her grievance by the investigation officer until 9 March 2020 and the other witnesses interviewed on 16 March 2020. This was a striking concession as the Claimant also submitted that grievances should be dealt with within a month, as indicated in the grievance policy [157 paragraph 3.3 - *"The grievance will be dealt with as soon as is reasonably practicable, normally within one calendar month."].* The Claimant provided further evidence on 7 April 2020 to the investigation officer.

68. The work of the Respondent and the grievance process itself was substantially adversely affected by the Covid-19 global pandemic. From 23 March 2020, the UK entered a nationwide lockdown and the investigative officer's preparation of her report was delayed as she had to give priority to urgent matters arising from the situation [439]. This was communicated to the Claimant on 28 April 2020.

69. The grievance investigation report [445-452] was completed on 4 May 2020 and delivered to the Respondent. It was not immediately delivered to the Claimant as the standard grievance process was that the report would be provided within the grievance pack sent to the Claimant 14 days before the grievance hearing, according to the unchallenged evidence of the HR Business Partners and their manager, Ms Selway. The investigation officer pointed out that if the Claimant was unhappy about the duties of her post and its evaluated grade, this was a job evaluation issue outside the scope of the grievance process and the Claimant should appeal the grading of her role. The investigative officer noted that there had to be a degree of flexibility on the part of an individual as a job description could not cover every point affecting a role, and local government was an environment where matters changed regularly. The investigative officer felt that what had caused the Claimant's work-related stress was her feeling that her workload and responsibilities were higher than her assigned grade. She took the view that the SRA and the return to work process was the solution.

70. On 12 May 2020, the Joint Council for Wales issued a statement [454] that the three major unions and local government authorities in Wales had agreed an approach for how to deal with disciplinary and other employment procedures during the pandemic. Where practicable, such procedures would be paused for the emergency, except where an employee wished to proceed (for example to minimise anxiety) or there were matters that required prompt attention, such as health and safety concerns. The Claimant accepted under cross examination that she may have misread the words *"health and safety concern*" and incorrectly understood them to refer to concerns about the employee's health. The Tribunal took the view that health & safety concern in this context is not the same as a concern about health, but the point about minimising an employee's anxiety was relevant to this case.

71. This agreement was communicated to the Claimant by HR. However, the Claimant made it clear that she wished her grievance to proceed, even if that meant that the grievance hearing had to take place remotely. In addition, the Claimant wanted to see the grievance report as soon as possible; the Respondent varied its standard approach and provided the grievance report

early to the Claimant on 4 September 2020.There is no challenge to the Respondent's account that the Claimant's case was prioritised, and her grievance was the first virtual hearing conducted by it.

72. The grievance hearing took place on 16 November 2020, and the decision-maker was a chief officer, Gill Lewis. The Claimant's grievance was not upheld, and this was communicated to her by telephone on 18 November 2020 and confirmed in writing on 24 November 2020 [590-592]. The Claimant appealed the grievance outcome [593-596] and the grievance appeal hearing took place before elected members of 4 February 2021, chaired by Cllr Davies. The grievance appeal was not successful, and this was communicated to the Claimant by telephone on 10 February 2021 and confirmed in writing in a letter dated 22 February 2021, but not emailed until 23 February 2021 [680-681] by Ms Selway.

73. In the meantime, the Respondent dealt with the Claimant's absence from work under the absence management procedure. Discussions about the SRA were paused pending the resolution of the Claimant's grievance as the Claimant's unhappiness about the process was a key part of her grievance. The Claimant was told that while her grievance was outstanding, HR would not support her dismissal.

74. During the successive welfare meetings after the grievance was not upheld and while the grievance appeal was pending, Mr Smith and Ms Little asked the Claimant more than once to consider coming back to work to try undertaking a little work and offered a phased return. The Claimant recorded covertly the meetings of January and February 2021, including the dismissal meeting, and the transcripts were before the Tribunal. The transcripts show that the Claimant refused to undertake any work or to try a phased return. They also show that, as conceded at the hearing by Mr Smith and Ms Little at the Tribunal hearing, there was no express offer made to the Claimant that she might like to be redeployed from her role. This is an important point as in the dismissal appeal, the panel were told that the Claimant had refused redeployment. The Respondent's position is this was broadly correct as the Claimant effectively would not engage about any return to work, and therefore was viewed as not being willing to consider redeployment.

75. It is accurate to say that in the various meetings, the Claimant repeatedly said that she did not feel well enough to return to work, that she did not know when she would be able to return to work, but she would like to see the return to work plan. For example, in the meeting with the Claimant on 13 January 2021 [625 onwards], Ms Little told the Claimant that the return to work plan was flexible and the idea was to gradually increase hours and duties over a month or two to ease the Claimant back into work. The Claimant's response was that she would not be capable of doing that because she struggled to think straight. Ms Little goes on to say that the Claimant can be given more time initially to do tasks and just start with the "*real straightforward"* ones to build the Claimant's confidence, but the Claimant refuses to return at all. The Claimant added that she wanted to start earning money (her sick pay ceased in August 2020) but that her health was the priority. The Claimant states that it is "*work in general not one specific thing"* that is the issue. This meeting is important because it is explained to the Claimant that the Respondent was looking for her to return to work by 5 February 2021 on the basis that the

grievance appeal would have been heard by this date and attempts are made to get her to consider returning to work, if only on a very limited basis.

76. At the next welfare meeting on 29 January 2021 [655 onwards], the return to work plan sent the day before by Mr Smith to the Claimant was reviewed. The Claimant's comment was that having read it, "it *has enforced to me that I won't be able to come back to work on 5 February".* The Claimant was asked if she had any idea when she might be well enough to return to work; the Claimant confirmed that she did not. It was then pointed out to the Claimant that her entitlement to sick pay ended several months ago, and as the Claimant was saying that she is unable to work and did not know when she would be able to return, the next step would be a dismissal meeting. The transcript shows that the Claimant accepted this. In the invitation to the dismissal meeting, it was repeated that the Claimant's employment may be terminated [666].

77. At the dismissal meeting on 8 February 2021, the dismissing officer Ms Exton discussed with the Claimant her health and capability to work. Ms Exton specifically noted that the Claimant had only had her grievance appeal hearing a few days earlier and asked if the Claimant would like the dismissal meeting to be adjourned for a few weeks to see if that may lead to a change in her health and her willingness to return to work. The Claimant, as shown by her own transcript, said that she does not think adjourning the dismissal hearing will make any difference. She said "*to be honest I am not going to magically feel well just because of the outcome. So it's not like a magic wand is it?"* [669]. Ms Exton asked the Claimant about the return to work plan and the Claimant's consistent response was that she was not well enough to work. The decision was made to dismiss the Claimant on the basis she was not capable to carry out her role.

78. The Claimant appealed her dismissal but did not attend the dismissal appeal hearing, which took place on 27 April 2021 and was chaired by Cllr Davies. The Claimant did provide written submissions, within which she conceded that she was not capable of carrying out her role [759] *"due to the stress and anxiety which the last 18 months heightened".* The Claimant accepted that the return to work plan was a document to be discussed and could be adjusted., but the Claimant's position was that both the SRA and the return to work plan should have been more precise as to what was being changed in her role. For example, Mr Smith used to word "*could*" in the SRA, not "*would*".

79. The dismissal appeal was not successful, though the appeal panel made number of observations about where the Respondent could have improved processes and communication [770-772]. The Claimant was sent the written outcome on 29 April 2021.

Findings

SRA/Return to work plan

80. The Tribunal considered that further analysis of both the SRA and the return to work plan was required. The SRA is intended to be a work in progress while it is being completed. To succeed in assisting an employee with their stress levels, the SRA forms the basis of a structured dialogue between management and employee and is a forward-facing document. In the

Tribunal's industrial experience, use of the HSE headings is entirely normal and this is confirmed in the guidance document in the hearing bundle [122] and the first Occupational Health report [277-281]. Under cross-examination, the Claimant accepted that the final version of the SRA, which included her original comments, the Respondent's proposals, and the Claimant's comments did look at her specific issues. The Claimant was though unwilling to appreciate that the version that was sent to her originally was simply a starting point.

81. The Tribunal examined the consolidated version of the SRA completed last by the Claimant just after she raised her grievance [309-330, though there is a slightly different later version trying to make it clearer who said what and when at 816-837]. Within that document, Mr Smith and Ms Dennise Thomas acknowledged the difficulties of deadlines and the scheduling of cabinet meetings, and offered to look at redistributing lower priority work amongst the wider team to reduce the workload of the Claimant. There is a discussion about the work that the Claimant is doing and about her unhappiness that she, in her view, is doing a higher-grade work as a development opportunity. Mr Smith confirms that the capital strategy report will now be undertaken by a finance manager (one of the major issues raised by the Claimant) and that the CFR could be done by someone else. The Claimant criticises the use of the word "*could*" and says that the word "*would*" should have been used to assuage her concerns.

82. The SRA confirms that the Claimant refused to name who she said was doing less than her, which made it difficult for Mr Smith to take action. The SRA records that some delegation to the grade 6 member of staff should be considered, and more frequent homeworking would be available, which would ease the pressure on the Claimant. The SRA also records that while some issues cannot be resolved due to regulatory issues, the restructuring of the finance department was upcoming and would provide an opportunity to review job descriptions and the proposed structure. Mr Smith said that communication issues could be addressed through the reintroduction of team meetings and circulation of notes of meetings, and new appointments may also assist reduce pressure. The point was made that it was important to reduce the pressure that the Claimant was under, and not increase the pressure on colleagues to the same level. There was a discussion about courses, but the Claimant indicated she was happy to attend if required to carry out her work. An explanation about the job advertisement was recorded and there was a discussion about job evaluation.

83. In the view of the Tribunal, given that the Claimant was not about to return to work immediately, the SRA's contents were supportive. Elements of the Claimant's work were recorded as to be moved to others, and the Tribunal did not consider the use of the word "*could*" as suggesting that the Respondent was not taking the process seriously. The SRA was a working collaborative document and should be viewed in that way.

84. The return to work plan was provided to the Claimant on 28 January 2021 [654] by Mr Smith. It is a detailed phased return to work plan for the first four weeks of the Claimant's return, working shorter hours. It initially commences with her reading documents for the first week and in the second week it is suggested that the Claimant reviews workings for financial documents such as the treasury management strategy and the MRP (part of her job

description in the view of the Tribunal); it builds up to the Claimant undertaking reconciliations. At the end of the plan, it says that it is *"very much subject to discussion and amendments to assist return to work".*

85. The Claimant says that the document should have contained significantly more detail about exactly what was going to change long-term in her role. The Tribunal disagrees. This document is exactly what is required of a return to work plan. It considers that as Mr Howells suggested in his submissions, it is an example of the parties being at cross-purposes. What the Claimant wanted was an amended job description; what she asked for and received was a detailed return to work plan suggesting what the Claimant could do during a phased return. The Claimant's own transcripts show this – see for example page 628 at the welfare meeting on 13 January 2021 where the Claimant says "*KT Okay. That's fine yes Because even though I don't feel well enough to come back to work yet at the same time umm I have been told that there would be a return to work plan. Even though I am not ready yet I would still like to see that if I could. Just to give me an idea of what".* Ms Little goes on to explain about how return to work plans work, and the Claimant later says at page 631 "*18:33 KT Yes maybe if you could give me like umm right this is what we are going to do when you come back to make things better type of thing just so that I can see something in writing. That might help."*

86. In the context of the conversation, the Tribunal found that the Claimant did not ask for an amended job description. She never used these words or words to that effect. Even on receipt of the plan, she does not complain that she mis-understood and wanted an amended job description. The Tribunal did not consider the provision of the return to work plan as unreasonable or in conflict with what the Claimant asked the Respondent to provide.

Unfair dismissal

87. The Respondent relies on a potentially fair reason under the Employment Act 1996, namely capability. The Claimant accepts that this is the potentially fair reason relied on by the Respondent, but says in her circumstances the dismissal was not fair. The first question is whether the Respondent acted reasonably by having a genuine belief in the capacity Claimant. This is not a point that the Claimant disputed and the overwhelming body of evidence before the Tribunal demonstrates that the dismissing officer Ms Exton genuinely believed that the Claimant was unable to carry out her role, and this was also the view of the dismissal appeal panel as confirmed by Cllr Davies. Given the repeated assertions of the Claimant in the welfare meetings, the dismissal meeting and her submission to the dismissal appeal panel that she was not capable and the last 18 months had made matters worse, it would be perverse for the Tribunal to say that the Respondent did not have a genuine belief.

88. The Tribunal then considered whether there had been adequate consultation with the Claimant regarding her health and her ability to return to work. There were 14 welfare meetings from her absence on 2 September 2019 onwards, 18 telephone calls and numerous emails on various issues. However, it is not a matter of quantity but quality that the Tribunal must consider. Whether one looks at just the welfare meeting review forms completed by the Respondent and signed/approved by the Claimant, or also takes into account the transcripts where the Claimant covertly recorded the last two welfare

meetings in January 2021 (which she does not suggest was conducted in a different manner to the previous meetings) and the dismissal meeting, the Tribunal found that there was substantial and significant consultation with the Claimant. Every time the Claimant was asked how she was, and her answer is explored. The documents show that the Claimant was asked about her progress and the additional personal matter that could have affected her health (the Tribunal refrains from setting out the detail as it is aware the Claimant will find it distressing and it is not necessary for this judgment to do so). There was an emphasis on when the Claimant could return to work, and what work she could carry out.

89. In addition, the medical evidence from Occupational Health and the GP were discussed. The Tribunal could not identify what the Respondent could have done more by way of consultation, though this is not strictly the legal test. All that is required is the consultation is adequate, and in this case the Tribunal found that it was.

90. One of the core issues in this case was whether there was a reasonable investigation, including up-to-date medical evidence. It is worth noting that page 114 of the bundle shows the number of fit notes issued by the GP. Throughout the Claimant's absence, the GP declared that the Claimant was not fit for work due to stress and anxiety (on occasions referred to as work stress and anxiety). This is up-to-date medical evidence.

91. There were two Occupational Health reports as outlined above. The later report of May 2020 was not updated prior to the Claimant's dismissal in February 2021. Understandably, this was a point that the Claimant raised with the Tribunal. However, the Tribunal looked at the Occupational Health reports and noted that the position of Occupational Health was consistently that the Claimant's "*perceived*" issues were managerial and until they were resolved, there was nothing further or medical to be done, though once such resolution had been achieved, Occupational Health advised that the Claimant was given a period of recovery before returning to work. Occupational Health discharged the Claimant from its care and said that there would be no follow-up and her GP would be able to confirm when she was fit for work. It is therefore inaccurate to say that the Respondent did not have up-to-date medical evidence when it dismissed the Claimant as it had the evidence of the GP that the Claimant remained unfit for work. Occupational Health's professional opinion was that nothing further could be done by it, and it was a matter of addressing the Claimant's perceived concerns. The unspoken implication was that the Claimant perceived there to be a problem, but objectively this might not be correct – only discussions with the management could resolve the matter.

92. The Tribunal also noted that the Claimant did not say that her health had significantly changed for the better during the many meetings with the Respondent. In fact, at times she indicated that it had worsened because of the grievance process. When Occupational Health and its views were discussed at the welfare meeting of 13 January 2021 and the dismissal meeting, the Claimant did not ask for a referral or indicate that further medical evidence was required. On the contrary, pages 630 and 669 show that the Claimant's position as expressed to the Respondent was that *"it's work in general it's not just one specific thing*" and *"nothing has changed from when I told you that I can't come back to work at the moment".* It is impossible

therefore to see what purpose another referral to Occupational Health would have served, given its previous reports, the GP evidence and the comments of the Claimant.

93. Another key part of a reasonable investigation can be whether redeployment was considered, particularly when dealing with a large employer such as a local authority. The Claimant referred the Tribunal to the case of P v Nottinghamshire County Council [1992] IRLR 366; the Tribunal would not disagree with the principle that it may be unfair to dismiss without exploring redeployment (though the Claimant in that case lost). The Claimant's case on this point was undermined by the transcripts she provided.

94. The transcripts of the two welfare meetings of January 2021 and the dismissal meeting of 8 February 2021, and in particular pages 627, 628, 630, 657, 669 and 670 show that the Claimant simply would not engage with any conversation that could have led to a redeployment offer. It is correct that the Claimant was not offered redeployment to a specific role, the concession that Mr Smith and Ms Little made in their oral evidence to the Tribunal and confirmed by Mr Howells in his closing submissions. However, the Claimant was repeatedly asked about doing a phased return to work and doing a little bit of work to try and get into things, and her answer was a complete refusal to return and try anything. The Claimant asserts that referring to her financial position was an offer to be redeployed, but the Tribunal does not accept this. Simply saying that you want to start earning money again is not an offer to be redeployed, particularly in circumstances where the employee is refusing to return at all. The Claimant's position is best summarised at page 669 where she says "*to be honest I am not going to magically feel well just because of the outcome. So it's not like a magic wand is it?".* The Claimant was saying that regardless the outcome of the grievance appeal, she would not be well enough to work. Page 670 shows that the Respondent through Ms Little explained at the dismissal meeting that it was necessary for the Claimant to come back to work and be fit for work for redeployment options to be explored; the Claimant persisted in saying that she could not return and was not well enough. This continued even after the dismissing officer offered adjourn the dismissal meeting for a few weeks to enable to have Claimant more time to recover, particularly as grievance appeal outcome had not been received. The Claimant refused the offer [672].

95. In the judgment of the Tribunal, the Respondent never got as far as discussing in detail any redeployment opportunities because the Claimant refused to return on any basis and would not engage in such conversations because she said she was too unwell to return.

96. The Tribunal concluded that the Respondent had carried out a reasonable investigation, and despite the Claimant's submissions to the contrary, it was not unreasonable for it to refuse to wait in the longer. The Claimant was offered a delay at the dismissal meeting and refused it. In the Tribunal's opinion, the fact that she then declared herself unable to attend her dismissal appeal meeting due to health demonstrated that a delay would not in any event have got the Claimant back to work.

97. The Tribunal concluded in light of its findings that dismissal was within the range of reasonable responses open to a reasonable employer. The Claimant was too ill to return to work at all, she had been absent for about 18 months

and there was no prospect of return, given she remained unhappy following the outcome of the grievance and had said that the grievance appeal outcome would not affect her position. The Claimant could give no indication at all of any return date.

98. The Tribunal therefore turned to consider whether there were any procedural issues that render the dismissal unfair. The Claimant raised issues regarding the absence management policy, but it became clear, particularly when she was cross examined, that the Claimant had misunderstood how the policy operated. Employees who were signed off sick on a long-term basis were not subjected to the frequent absence management procedure that could see a series of formal warnings being issued; people in the position of the Claimant on long-term sickness absence are unable to return to work. The issuing of such warnings can cause significant distress. The Tribunal was not persuaded that there had been any significant and unfair breach of the absence management policies.

99. The Claimant asserted that the timing of the grievance process was unfair in that it took over nine months for her grievance to be determined; the appeal was after this timescale. However, the Claimant accepted that the interviews carried out slightly over a month after she raised her grievance was within a reasonable timescale. The evidence before the Tribunal showed that due to the global pandemic and the substantial challenges with which the local authority was facing as a result, such as setting up its test and trace system, this caused the delay from late March 2020 onwards. The investigative officer was a senior lawyer and despite her warning to the Claimant that there would be a delay as a result of the pandemic, she still issued her report by 4 May 2020.

100. The evidence of the Respondent's witnesses was that there was an agreement with the unions and Welsh local authorities that grievances and disciplinaries would be paused and the matter reviewed at the end of July 2020. The Claimant accepted initially the pause and then asked for her grievance to be heard. The evidence of the Respondent's witnesses was that the Claimant was the first grievance to be heard during the pandemic, but it did take time to set up the hearing in virtual circumstances in wholly unprecedented circumstances. The Tribunal accepted this explanation from the Respondent, which was consistent with what it had seen with other local authorities in the same position, and considered that the grievance was carried out in as timely a manner as was possible in difficult circumstances.

101. The Claimant complains that her dismissal meeting was only four days after her grievance appeal hearing, and took place while she was awaiting the outcome. However, the Claimant was not dismissed because of her grievance; she was dismissed because she was incapable of carrying out her role. More critically, the Claimant was offered a delay by Ms Exton, and she refused it as shown by her own transcript. It was nothing unfair about continuing the meeting with the agreement of the Claimant.

102. However, there was a failing in that the Claimant was not formally offered redeployment and had not refused such an offer as recorded in the HR termination form provided to the dismissing officer and as reported to the dismissal appeal panel. The evidence of Ms Exton to the Tribunal was clear about her understanding and what was in her mind about this issue when she

dismissed the Claimant as the Tribunal spent time asking her about it. Ms Exton told the Tribunal that she had been aware of the welfare meeting conversations and knew there was no vacancy in the finance department; she was unaware of whether there were vacancies elsewhere. Ms Exton told the Tribunal that she understood at the time of dismissal that there had not been an official offer of a specific role to the Claimant because the issue had been raised in the meetings with her by HR and the Claimant "*had not picked up on the point as being something she was accepting or willing to pursue".*

103. Ms Exton went on to talk about her conversation with the Claimant at the dismissal meeting and said it was evident that the Claimant was not going to return to the workplace because her health was too bad to consider it. It meant that she had never got to the step of discussing redeployment in detail. This account was confirmed by the covert transcript and accepted by the Tribunal. The Tribunal found that Ms Exton had not proceeded on the incorrect basis that a formal offer had been made to the Claimant but on the correct basis that the Claimant was too ill to return and was not able or willing to discuss any basis for her return to work.

104. The Tribunal then examined the same point in relation to the dismissal appeal panel with Cllr Davies. Cllr Davies's evidence was that the dismissal appeal panel had gone through in detail the very large bundle, including submissions of the Claimant and the records of the meetings between the Claimant and the Respondent. Her evidence was that the dismissal appeal panel did not rely on being told there had been an offer of redeployment, and asked questions about this, but had understood that there had been a meeting with HR where the Claimant had been asked how she felt and kept saying she was not well enough to come back or go anywhere else. Cllr Davies talked about the impression given by and of the Claimant – she simply was not well and could not engage with a return to work or any discussions about redeployment. Cllr Davies added that it was difficult because normally someone would go back to work on a phased return and gradually build up, but she believed that the Claimant did not want to do that on the basis of the evidence before the panel. The Tribunal accepted this evidence and noted that it was consistent with the transcripts of the later meetings with the Claimant.

105. The Tribunal could not identify anything that rendered the dismissal procedurally unfair, and in light of its findings in relation to substantive unfair dismissal, the unfair dismissal claim is not well-founded and is dismissed.

Discrimination arising from disability

106. The Tribunal considered the dismissal of the Claimant first. The Respondent accepts that the dismissal of the Claimant was unfavourable treatment and was due to "*something arising*" from her disability, namely her sickness absence. That means that the Claimant's claim will succeed unless the Respondent discharges the burden upon it to show justification for the dismissal as being a proportionate means of achieving a legitimate aim. The Claimant accepts that the legitimate aim relied upon by the Respondent, namely that it has sufficient workforce to carry out its public functions, is legitimate but says her dismissal was not a proportionate means of achieving this aim and something less discriminatory should have been done.

107. The Tribunal does not accept this argument. The reality is that unfortunately due to the Claimant's ill-health, and her inability to give any indication as to when she would be well enough to return to work, even on a phased return basis, meant that there was no other option for the Respondent but dismissal. While the Claimant was not being paid, her work was being carried out by members of the finance team. It was an important role dealing with difficult, specialist and complex matters as the Claimant herself accepted, and the Claimant had already been absent for nearly 18 months. From the evidence before the Tribunal, the Respondent needed the role to be undertaken and the treasury management function was important to manage large sums of taxpayers' money properly. If the Claimant could not see a return, the role needed to be filled.

108. The Claimant argues that the Respondent should have waited to give her a period of recovery, but this overlooks two points. Firstly, the Respondent offered a delay to the Claimant at the dismissal meeting she refused. Secondly, the period of recovery referred to in the Occupational Health report required first that the Claimant's perceived issues were resolved. The evidence shows that they were not resolved. The Claimant remained aggrieved following her unsuccessful grievance and had said that regardless of the grievance appeal outcome, she did not know when she would be able to return.

109. The Claimant says that she should have been redeployed to another role. This overlooks the fact that the Claimant refused to return at all to carry out any work, even on a phased return basis. In addition, as the Claimant has spent 25 years in the finance department in the same specialised role, and the Tribunal heard evidence that there was no other finance role available, it is improbable that the Claimant would have been willing to try a wholly new role in a wholly different team on her return from such a long absence due to stress and anxiety. Redeployment is not a limitless option – it needs to be a suitable role for the specific employee in their circumstances and with their skillset. The Claimant might argue that perhaps rather than a full redeployment, she could have carried out significantly less duties of her role; but the Claimant would not even return on a phased return basis carrying out less duties and shorter hours. This fatally undermines this suggestion.

110. The Tribunal was of the view that the dismissal of the Claimant was justified and a proportionate means of achieving a legitimate aim in all the circumstances.

111. Turning with the SRA claim, the Claimant needs to show that the failure to tailor it was because of her sickness absence (or at least significantly influenced by her sickness absence). She has failed to do so in the judgment of the Tribunal. First, when the SRA was sent to the Claimant, the Respondent had not received the Occupational Health annex which the Claimant says should have triggered the duty to tailor it. Second, the Tribunal is not persuaded that there was a duty to tailor the SRA from the outset. Its whole purpose was to be worked through by the parties to find solutions. The Claimant accepted in cross-examination that the last version ultimately did address her stress triggers; her position is that it should have somehow happened at the outset. This fundamentally overlooks the requirement for discussion. It is reasonable to use the standard HSE structure as a starting point. It was because it was the HSE template recommended by the

Respondent's health & safety officer that the version sent to the Claimant was used, not because of her sickness absence. The Claimant fails therefore to establish the causal link.

112. In addition, the Claimant has failed to explain why the failure to tailor the SRA was unfavourable treatment. She asserts that her stress triggers were not addressed by the health and safety executive template (but confirmed that they were within the final version), but the Tribunal concluded that the Claimant misunderstood how SRA's operate. For example, the Claimant says that she had an issue with her workload - the SRA template specifically deals with that issue under the heading "*demands of the job".* The Claimant complained that she felt managers were not available or too busy; that is dealt with under the heading *"support from managers and colleagues".*

113. The Tribunal is not persuaded that the failure to tailor the SRA from the outset was a failure; it is not persuaded that any such failure was because of or significantly influenced by the Claimant's sickness absence; it is not persuaded that the Claimant suffered any substantial disadvantage.

114. As a result, the discrimination arising from a disability claim is not well-founded and is dismissed.

115. The Tribunal did not consider that there was any merit in considering issues about the knowledge of the Respondent about the Claimant's disability as the SRA claim was dismissed. In relation to jurisdiction, it considered that the alleged failure to tailor the SRA was not a continuing act, and the Claimant was aware that she was unhappy with the structure of the SRA certainly on 16 January 2020 when she attended a meeting to discuss it and a few weeks later when she raised her grievance. She did not issue the proceedings in the Tribunal until 18 months later; the claim is significantly out of time. The Tribunal did not consider that the Claimant had discharged the onus on her to persuade the Tribunal that it would be just and equitable to extend time. While the Claimant went through a grievance process which saw an outcome in November 2020, she still did not come to the Tribunal. The grievance appeal outcome was in February 2021 and the Claimant delayed coming to the Tribunal by nearly 5 months. The Claimant was well enough to go through the whole grievance process and told the Tribunal that she was receiving advice from a variety of sources. If the claim had been successful, the Tribunal would not have extended time and it would have been outside of its jurisdiction.

Failure to make reasonable adjustments

116. Dealing with the first alleged PCP, "*a practice of requiring or expecting the Claimant to undertake duties additional to those set out in a job description*", the Tribunal considered that the Claimant had failed to establish that she had carried out additional duties to those set out in a job description or that she would be required to carry them out on her return. It was struck by how the evidence throughout the bundle showed that the Claimant struggled to articulate what were the additional duties she alleged she had carried out. Even as late as the hearing, when the Claimant was questioned by the Tribunal, all that the Claimant could point to was the proposed adjustments in the SRA. However, as Mr Smith and Ms Lewis stated in their evidence to the Tribunal, they did not fully understand what the additional duties of the

Claimant was asserting she carried out; they were senior managers in the finance department and in a good position to comment.

117. Ms Lewis was the chief finance officer and dealt with the Claimant's grievance; she orally described identifying what the additional duties were as the key to unlocking the mystery. She said that she relentlessly pursued this point at the grievance and remained mystified as to what the Claimant's alleged additional duties were. For example, the Claimant complained about carrying out the CFR calculation, which the SRA saw Mr Smith agreeing could be done by someone else, but Ms Lewis explained that this was a Prudential Indicator and part of the treasury management function. The Claimant's job description in the view of Ms Lewis stated that this particular task was covered by the reference to dealing with Prudential Indicators. The Tribunal agreed. Ms Lewis did support removal of the CFR calculations from the Claimant when the Claimant complained that she was overwhelmed, but Ms Lewis made the point that removal of duties could have lead to the role of Loans and Investment Officer being downgraded.

118. The Tribunal was told by the Claimant at the outset of the hearing that this claim was about additional duties to be continued after her return to work. However, the duties to which the Claimant pointed at by reference to the SRA were largely to be removed; where they could not be removed, the SRA showed that Mr Smith was going to look at removing other work to enable the Claimant to focus on the critical deadline work. The SRA was completed long before there was any prospect of the Claimant's return to work, and it was evident from Mr Smith's approach in the SRA and the return to work plan he sent on 28 January 2021 that there was scope for further discussion and agreement closer to the proposed return of the Claimant. The Claimant failed to show what additional duties were in place before her illness or what would remain and be additional to the duties within her job description. The Tribunal could not identify any additional duties to be carried out by the Claimant on her return; the most the Claimant could point to was the reference to MRP in the return to work plan, but this was linked to Treasury Management and Prudential Indicators (see paragraph 84 above).

119. In the view of Ms Lewis, and the Tribunal agreed having considered all the evidence before it, the real issue was not the alleged additional duties (that the Claimant had not established were additional, given her job description and how long she had been carrying out the duties and her role) but that the Claimant felt that she worked harder than other officers of her grade and was carrying out work which could be carried out by more senior officers. As the Claimant refused to name which officers worked less to assist Mr Smith's enquiries as to whether this was correct, was unable to clearly articulate to the Respondent what was an additional duty, and did not as advised to go through a review of her role in job evaluation, the issues could only be objectively described as "*perceived*". The Claimant repeatedly complained that the issue was as outlined in paragraph 57 above. She has failed to show that the asserted PCP existed, and the claim must fail. Regarding jurisdiction, the Tribunal considers that it is likely this claim, due to its link to the return to work plan sent on 28 January 2021, has been brought within time, but it fails due to lack of merit.

120. Turning to the second PCP, the Claimant asserts that there was *"a practice is only discussing industry-standard headings and not the Claimant's*

specific stress triggers". In the judgment of the Tribunal, the Claimant has failed to establish that this happened, let alone was a practice of the Respondent's. The Tribunal's findings above in relation to the SRA apply equally here – the Claimant's specific stress triggers were dealt with in the SRA by the time it had been completed to include the Claimant's further amendments after the meeting of 16 January 2020. The Claimant accepted this in her cross-examination. All that the industry-standard headings did was serve as a starting point for the key discussions that must take between an employer and employee. The SRA shows that there was a full discussion of the Claimant's stress triggers and proposals made to assist. The finding of the Tribunal is that the Claimant has failed to demonstrate the existence of this PCP and the claim fails. The claim is undoubtedly out of time, but the Tribunal did not consider a determination about a just and equitable extension to be a good use of limited resources.

121. The third PCP asserted by the Claimant was "*failure to deal with the Claimant's grievance in a timely and appropriate manner".* At the submission stage, the Tribunal pointed out that the Claimant had used the phrased "*timely and appropriate*" (emphasis by the Tribunal). Mr Howells said that if one looked at the connected substantial disadvantage, "*the delay in the manner of the process exacerbated the Claimant stress symptoms"*, and the proposed reasonable adjustment of *"providing the grievance outcome on an early/urgent basis",* the Claimant was specifically complaining of the time taken to conclude the grievance process and nothing else. He also noted that in her written submissions provided at the start of the hearing, a careful and considered document, at paragraphs 14 and 15 the Claimant's only criticisms were about the time taken. It was not until after this conversation that Mr Thomas sent further submissions from the Claimant where she dealt with other matters related to the grievance.

122. The Tribunal reminded itself that there are numerous authorities reminding tribunals that they should use the agreed list of issues, unless there is an obvious error. The history of this list of issues was that as early as the preliminary hearing before Judge Brace, the Claimant was complaining about time when referring to the grievance and this claim. The Claimant proposed amendments to the list of issues, which were accepted by Judge Brace, and did not raise an issue about only time being raised as an issue for the grievance and seek to add more complaints about the grievance process. The Tribunal concluded that it was difficult to see how given the wording of the list of issues, particularly when looking at the substantial disadvantage and proposed reasonable adjustment pleaded, it could include consideration of issues other than whether the grievance had been conducted in a timely manner; the reference to "*appropriate*" was linked to time only due to the way the Claimant had set out her case. Accordingly, the Tribunal considered that this claim as set out in the list of issues was only in respect of the time taken by the grievance process.

123. As the Tribunal has already found, it considered that the process in all the circumstances was timely, and the Claimant's grievance was prioritised for as early a hearing as possible within the pandemic. It was noteworthy that the regular welfare meetings continued & the Claimant had been updated; the Tribunal was not persuaded that the grievance was not dealt with in a timely manner or that the proposed reasonable adjustment was reasonable in all the circumstances. This claim was not established by the Claimant and fails. The

claim is not out of time as the grievance appeal outcome was not received until 23 February 2021 (though the Claimant did not criticise the time taken to hear her appeal), but the claim fails on its merits.

124. The Tribunal found that the Claimant had failed to establish the existence of the fourth PCP, "*failure to adhere to Occupational Health recommendations of allowing a period of recovery before returning to work".* The recommendation of Occupational Health in its second report was clear – the Claimant's perceived issues had to be resolved first, and then there would be a need for a period of recovery. The parties never got through the first stage as despite the grievance outcome and the grievance appeal outcome, the Claimant's perceived issues were not resolved. Indeed, the Claimant by the time of the dismissal meeting was clear that the outcome was irrelevant as she remained unhappy and was not well enough to return to work. Accordingly, this claim is not well founded and is dismissed. The claim is not out of time as it includes the position up to dismissal, but the claim fails on its merits.

125. This leaves the fifth PCP, "*requiring the Claimant to return to her substantive role as loans and investment officer".* The Tribunal was satisfied on the basis of the evidence before it that the Respondent did require the Claimant to return to her substantive role, and that the substantial disadvantage pleaded (that the Claimant was unable to return due to the stress caused, which is another way of saying that her health issues prevented her return as she was signed off due to stress and anxiety) have also been established. The Respondent in its submissions said that the issue was that the Claimant was saying she was unfit for work in general, so there was no alternative to her carrying out her role.

126. The proposed reasonable adjustment of considering redeployment options before dismissal was in the view of the Tribunal carried out by the Respondent, despite the lack of a formal offer. As the Tribunal has found above, the Respondent did try to get the Claimant to return to work through a phased return and to discuss what work she could carry out. The difficulty was that the Claimant would not engage. She was not willing to return at all and said that she her health prevented her returning to the workplace. This prevented any substantial discussion of possible redeployment options. It should not be overlooked that the Claimant at the time of her dismissal was subject to a fit note from her GP saying that she was unfit for work and had been so signed off for about 18 months.

127. Accordingly, while the Tribunal accepts that the reasonable step pleaded by the Claimant was reasonable, it finds that it was considered during the meetings of January and February 2021 after the grievance outcome; there was no failure by the Respondent. Redeployment was not an option due to the Claimant's position and her health.

128. The Tribunal is satisfied that the Respondent knew of both the Claimant's disability and substantial disadvantage at the time of applying the fifth PCP, which was at the time of dismissal. It is not persuaded that this claim is out of time as the Respondent was considering redeployment as late as the dismissal meeting according to the dismissal officer. The claim has failed on the basis that the Claimant has not established that the Respondent failed to take the reasonable step and it is therefore dismissed.

129. The last claim to be considered is the auxiliary aid claim. The Claimant clarified at the start of the proceedings that this was the failure to put specific adjustments to her job description in writing within the return to work plan, as foreshadowed by the contents of the SRA. Putting to one side that the Claimant did not understand the purpose of the return to work plan, which is to set out what the Claimant would be doing in the initial few weeks of her return to work on a phased return, the Tribunal was also satisfied that the Claimant had not asked for an amended job description (see the findings at paragraphs 85 & 86 above). It was as Mr Howells said a classic example of miscommunication or communications at cross-purposes. The Claimant asked to see in writing what she would be doing her return to work; this is exactly what Mr Smith produced in his draft return to work plan. The Claimant really wanted was an amended job description, but she failed to ask for this as shown by the transcripts.

130. Regardless of whether the Claimant made it clear to the Respondent what she really wanted or whether it should have somehow realised the Claimant was asking for something other than a return to work plan, the auxiliary aid claim must fail because the Claimant is unable to prove that she was subject to the substantial disadvantage pleaded, namely that she was unable to process information verbally. At no point did Occupational Health report that the Claimant was unable to process information verbally. Nor did her GP. The Claimant did not say she could not process information verbally in her OH annex or in any of the documents that she sent to the Respondent before her dismissal (or later) or in the meetings with the Respondent. In her oral evidence, the Claimant accepted that she recorded meetings covertly because she had difficulties remembering what had been said, but she had not asked the Respondent for permission or explain this to the Respondent.

131. There is nothing before this Tribunal, including the medical records and the disability impact statement showing that the Claimant was unable to process information verbally. At its highest, the Claimant said that she was having difficulties in concentrating but she appeared to be more concerned about the lack of an amended job description because what she had been told was "*just words*" [41 - paragraph 44 disability impact statement]. The Claimant wanted this judgment delivered orally, despite it being explained that written reasons would not be provided unless requested or if judgment was reserved (though the Tribunal acknowledges that mental health fluctuates; just because the Claimant could process verbal information now does not mean she could do so in the past). The evidence shows that the Claimant consistently sought amendments to minutes of meetings with the Respondent throughout her absence, which raises a query as to how the Claimant was able to seek such amendments if she was unable process verbal matters at the time she is complaining that she could not do so. The Claimant must have been able to process the meetings to propose amendments which were accepted.

132. The Claimant's witness statement for these proceedings does not assist in demonstrating that she suffered from the substantial disadvantage pleaded. Paragraphs 76 and 77 (page 25 witness bundle) are the parts which could be viewed as dealing with this issue; she said that she told the Respondent that seeing something in writing (referring to the return to work plan) would make it easier for her. The Claimant went on to explain in paragraph 77 that she

needed to see in writing what was going to change to her role so that she can look at the changes and digest it. This is not unreasonable, but it is not the same as being unable to process information verbally; wanting time to reflect on a document does not automatically mean an inability to process verbally. It is a common desire for anyone dealing with an important matter, and for those with mental health difficulties, it is potentially very useful to be given reflection space. The Claimant's position is further undermined by her additional explanation that *"I also wanted to be sure adjustments were being made to the duties I had been expected to do which were not specifically set out in the JD [job description]."* Again, this is an understandable wish, if the Claimant had asked the Respondent to provide an amended job description, but does not demonstrate an inability to process verbal information. It demonstrates a wish to have an opportunity to reflect and consider.

133. In light of this, the Tribunal is unable to find that the Claimant has proved that she suffered from a substantial disadvantage or that the Respondent knew or should have known that the auxiliary aid was required, given she did not ask for an amended job description and there was insufficient evidence to support a finding that the Claimant was unable to process verbal information, given the Occupational Health reports and the Claimant's ability to seek amendments to the minutes of oral minutes. In addition, the Tribunal considered it to be not a good use of limited resources to consider whether the claim was out of time and if time should be extended as the claim had been unsuccessful.

Employment Judge C Sharp
Date: 16 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 21 March 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche