EMPLOYMENT TRIBUNALS

Claimant: **Ms L Green**

Respondent: **London General Transport Services Limited t/a Go-Ahead London Limited**

Heard at: **London South (Croydon) in person and then via CVP** **On: 11/10/2022 to 17/10/2022**

Before: **Employment Judge Wright**
Ms J Saunders
Mr C Wilby

Representation:

Claimant: **Mr A Otchie – counsel (did not attend on 17/10/2022 when the claimant was represented by Dr Tene – solicitor)**

Respondent: **Mr C Ludlow - counsel**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claims under the Equality Act 2010 (EQA) and the Employment Rights Act 1996 (ERA) fail and are dismissed.

REASONS

1. Oral reasons were given on 17/10/2022 and in accordance with Rule 62(3)[1] the claimant requested written reasons on 18/10/2022 those reasons are accordingly provided.

2. The claimant presented a claim form on 11/10/2021 following a period of early conciliation which started on 26/7/2021 and ended on 6/9/2021. The claimant was legally represented throughout. The claimant was employed by the respondent as a bus driver from 29/8/2017, she was absent due to ill health from 9/6/2020 to 2/6/2021, apart from a brief return to work for 11 days on 5/10/2020.

3. A case management hearing took place on 19/7/2022 and that resulted in an agreed list of issues. At the start of the hearing, the claimant confirmed she was pursuing all the claims listed.

4. The was an issue with time limits and unless there was a continuing act or the Tribunal extended the time limit on a just and equitable basis, any act or omission prior to 27/4/2021 was out of time.

5. Under the Employment Rights Act 1996 (ERA) the claimant claims: unfair dismissal (the respondent states that it had a fair reason, capability s.98(2)); dismissal and detriment as a result of making a protected disclosure; and dismissal for health and safety reasons (s.100 ERA).

6. Under the Equality Act 2010 (EQA), the claimant claims the protected characteristics of: age (s.5) (she was born in late-1967); disability (s.6) (the respondent conceded the claimant was disabled by reason of cancer, it does however take issue with when it had knowledge of the disability); and race (s.9) (Black British). The prohibited conduct upon which she relies is: direct discrimination (s.13) (age, disability and race); discrimination arising from disability (s.15); indirect discrimination (s.19) (the protected characteristic appears to be disability); a failure of the duty to make reasonable adjustments (s.20 and s.21); harassment (s.26) (the protected characteristic appears to be disability); and victimisation (s.27). The complaint appears to be detriment and dismissal (s.39).

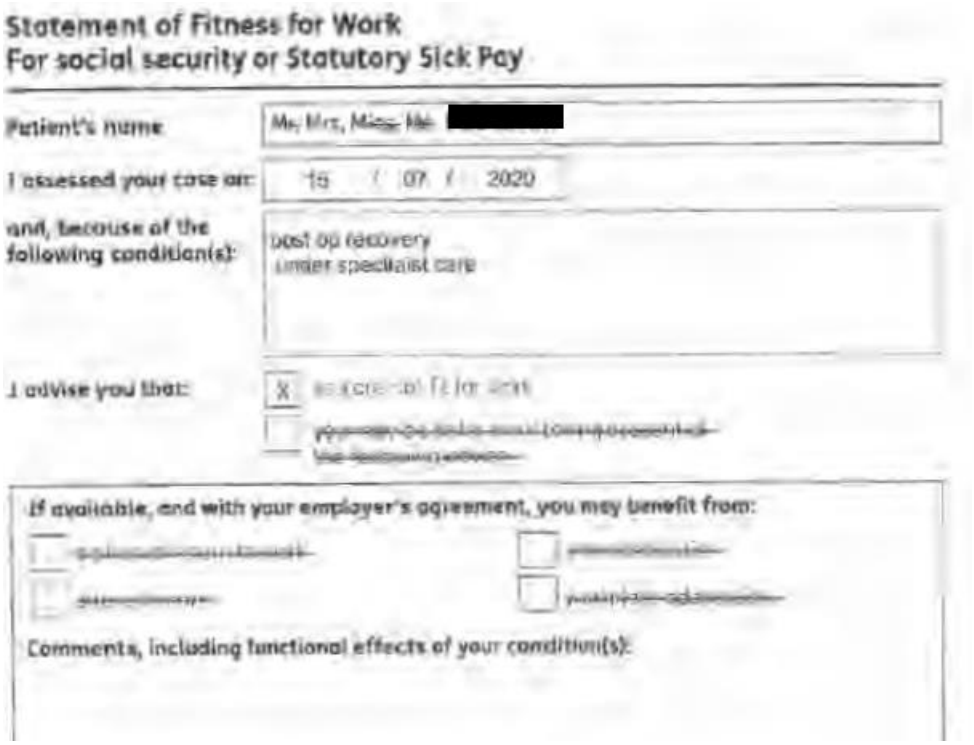
7. The Tribunal heard evidence from the claimant. Her witness statement ran to nine pages (her signature was on a 10th page). Her witness statement was shorter than her pleadings and the list of issues.

8. The respondent called five witnesses. They were: James Barlow (claimant's line manager); Aleksandra Prawuka (the claimant's line manager after Mr Barlow); Kastriot Gashi (dismissing manager); Angela

[1] The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

Ryder (appeal manager); and Debbie Lambshead (HR Manager who dealt with redeployment).

9. There was an electronic and hard copy bundle of 673 pages[2]. The quality of the documents in the bundle was extremely poor and this was raised on the first morning. The respondent said it had asked the claimant for clearer copies of her documents, but not all were forthcoming. That aside, there were many of the respondent's own documents which were illegible (for example Mr Barlow's letter to the claimant of 20/6/2020 at page 346). It is not acceptable and there is no reason why the respondent cannot produce clear copies of its own documents. This is an example (page 345):



Statement of Fitness for Work
For social security or Statutory Sick Pay

Patient's name: Ms, Mrs, Miss, Mr [redacted]

I assessed your case on: 15 / 07 / 2020

and, because of the following condition(s): post op recovery under specialist care

I advise you that: X

If available, and with your employer's agreement, you may benefit from:

Comments, including functional effects of your condition(s):

10. There was also a bundle of documents related to the claimant's comparators and two comparators suggested by the respondent. Of the claimant's five comparators, only two had the same role as she had. The others therefore were in circumstances which are materially different to the claimant's (they were managers). Comparator B was referred to as an actual comparator (she is a bus driver), however she was pregnant. She could be relied upon as an evidential comparator.

11. An issue arose during the hearing in respect of the comparator AJ. There was a misunderstanding in respect of who AJ was in the respondent's

[2] The electronic bundle was one page out from the hard copy bundle, due to a document being inserted (page 8(a)). The page number is this Judgment is the electronic page number.

organisation. Although the respondent was quite rightly concerned to comply with its disclosure obligations and urgently complied with them when it became clear who AJ was, the claimant did not take issue that he was not on the cast list or his details were not in the comparator bundle; and even when given the opportunity to do so in closing submissions, he was not mentioned.

12. It is not enough for the claimant to name seven of the respondent's employees at the preliminary hearing as actual comparators; and then to do no more. The burden of proof is upon the claimant and it is not for the respondent to disprove the people named by the claimant are in fact comparators. The claimant did not satisfy the burden in respect of her named comparators.

13. Both parties had the opportunity to give oral submission on the afternoon of day three. Instead, they both preferred to provide written submissions. Mr Otchie's ran to seven-pages and Mr Ludlow's to 24-pages. The written submissions were considered. Apart from mentioning 'age' and 'race' as protected characteristics in paragraphs 1 and 16, Mr Otchie did not make any substantive submissions in respect of those protected characteristics.

14. There was no animosity between the parties and the proceedings were conducted cordially and professionally.

15. At the outset of the hearing, reasonable adjustments were raised and in particular the claimant was asked to say if anything was required and to say if she required additional breaks.

Findings of fact

Unfair dismissal

16. The claimant was a bus driver based at the respondent's Croydon garage where about 450/500 staff are employed out of a total of 7,000. The percentage of ethnic minority staff is 56%.

17. It is important to note that the claimant was represented throughout by her Trade Union representative who was also the garage's Health and Safety representative. The same representative acted for the claimant until he submitted her appeal letter on 9/6/2021. Thereafter, the claimant was represented by a Unite Convenor.

18. It is also important to note that there was no question that the claimant's illness was entirely genuine. She was not a malingerer. There were no issues with her performance. There was an informal policy of offering re-employment to employees dismissed for ill-health capability if they

recovered within six months (or possibly longer) of termination. The terms they would return on would be on the same grade/salary. Length of service and service related benefits would not be honoured. In reality, Ms Lambshead said that holiday entitlement would be honoured (if extra holiday had accrued due to length of service), but that the main service related benefit which would not be honoured was the entitlement to full contractual sickness pay, which increased with service. Understandably, the respondent was not going to re-employ someone who had been paid substantial contractual sickness pay, when they returned to work, until they had (like their fresh-starter colleagues) they had accrued that entitlement.

19. That aside, what the informal re-employment policy demonstrates in respect of the claimant, was that her performance warranted the respondent's offer of re-employment.

20. The claimant claims she was unfairly dismissed contrary to s. 98 of the ERA. The respondent says the dismissal was fair by reason of capability.

21. Unfortunately, the claimant was diagnosed with thyroid cancer on 6/5/2020 (page 334). The respondent became aware of this on 9/6/2020[3] when she was unfit for work.

22. The agreed chronology is reproduced:

Date	***Event***	***Bundle page no.***
29.08.2017	*C commenced employment with R as a bus driver*	*202-211*
06.05.2020	*C diagnosed with thyroid lesion*	*333*
09.06.2020	*C went off sick and R on notice C had thyroid cancer*	
16.06.2020	*C underwent surgery – right half of C's thyroid removed*	
13.07.2020	*Sickness review meeting between C and James Barlow*	*334*
28.07.2020	*C underwent further surgery – completion thyroidectomy*	
16.09.2020-18.09.2020	*C received chemotherapy*	
01.10.2020	*C's company sick pay exhausted*	
05.10.2020	*C returned to work*	
10.10.2020	*C off work sick with "female ailments"*	*354-355*

[3] The claimant said she informed the respondent on 9/5/2020, but nothing turns on this.

22.10.2020	*C off work sick for "post op recovery high risk for covid19 due to nature of work and risk factors"*	*359-360 & 362*
22.10.2020	*Exception made by R and C paid full sick pay from 22 October 2020 to 1 January 2021*	*367-371*
13.11.2020	*Sickness review meeting between C and James Barlow*	*335*
24.12.2020	*Royal Marsden NHS Foundation letter confirming C no longer classed as a vulnerable person in terms of COVID-19*	*375-376*
January 2021	*C exhausted her entitlement to SSP*	
06.01.2021	*Sickness review meeting between C and James Barlow*	*335*
15.01.2021	*C attended Occupational Health review*	*379-381*
11.02.2021	*Royal Marsden NHS Foundation letter confirming suggesting discuss with R office based work until thyroid levels normalise*	*387-388*
March 2021	*James Barlow moved to Stockwell Garage and Aleksandra Prawucka took over C's case*	
03.03.2021	*Sickness review meeting between C and Aleksandra Prawucka*	*335 & 389*
25.03.2021	*Sickness review meeting between C and Aleksandra Prawucka*	*390*
23.04.2021	*Sickness review meeting between C and Aleksandra Prawucka*	*395*
28.04.2021	*Sickness review meeting between C and Aleksandra Prawucka – C warned she may be dismissed*	*397-398*
05.05.2021	*Sickness review meeting between C and Kastroit Gashi – C warned she may be dismissed*	*401-403*
19.05.2021	*Kastroit Gashi wrote to London Garages seeking alternative duties*	*408*
19.05.2021	*Kastroit Gashi wrote to C warning her that she may be dismissed*	*405 - 406*
26.05.2021	*Formal sickness review meeting between C and Kastroit Gashi – C warned she may be dismissed*	*415-417*

01.06.2021	*C attended Occupational Health review*	*419-421*
02.06.2021	*Formal sickness review meeting between C and Kastroit Gashi – C medically dismissed*	*426 & 427-428*
08.06.2021	*C appealed dismissal*	*429-430*
27.06.2021	*C made Subject Access Request*	
22.07.2021	*Appeal hearing – C attended with TU Rep – hearing adjourned*	*530-538 & 539-542*
22.07.2021	*"Grievance" submitted by C dated 10 July received 22 July*	*543-547*
19.08.2021	*Appeal hearing reconvened – C attended with TU Rep – C's dismissal upheld*	*588-592*
31.08.2021	*Letter confirming dismissal*	*593-595*
12.09.2021	*C's fit note expired*	

23. Therefore, apart from a short period in October 2020, the claimant was absent from 9/6/2020 until she was dismissed.

24. The claimant's complaint about the fairness of the dismissal is that the respondent should have waited longer to dismiss her.

25. It should be noted, that at no point, apart from in October 2020, was the claimant deemed to be fit for work by either her GP or Occupational Health (OH).

26. The claimant said she had known her GP for 30 years. They were clearly on amicable terms, as there is an entry in her GP notes, which reads (page 229):

20-Jun-2021 16:08	LEANDER ROAD SURGERY SIDDIQUI, A R (Dr)
Comment	Patient mobile telephone number [redacted] SMS text message sent to patient Dear Lora,Thank you and he or one of his team will contact you in the week coming. Best of luck and he has a very strong track record in employment law so you are dealing with a top man.Thanks, adnan siddiquiLeander Road Surgery
20-Jun-2021 16:05	LEANDER ROAD SURGERY SIDDIQUI, A R (Dr)
Comment	Online questionnaire completed by patient Dear Mrs Green,Sorry for the delay in getting back to you but my friend who is an employment lawyer will be in touch with you directly if you are happy for me to pass on your number.Please reply using the link to advise me whatever your decision is but he does think you have a strong case.Thanks, adnan siddiquiLeander Road SurgeryResponse:Hi Doc, that's ok I Know that your busyYes please I would be greatly appreciate it if you could give him my number
20-Jun-2021 15:59	LEANDER ROAD SURGERY SIDDIQUI, A R (Dr)
Comment	Patient mobile telephone number [redacted] SMS text message sent to patient Dear Mrs Green,Sorry for the delay in getting back to you but my friend who is an employment lawyer will be in touch with you directly if you are happy for me to pass on your number.Please reply using the link to advise me whatever your decision is but he does think you have a strong case.Thanks, adnan siddiquiTO RESPOND, please follow this link: (link will autogenerate here)Leander Road Surgery

27. The claimant complained that she was sent round in circles. She said that her GP would not sign her as fit for work without the input of the OH. OH could not give that input until the claimant was deemed either fit for work, or fit for work with adjustments[4]. Irrespective of the claimant's relationship with her GP, she was never able to persuade him to class her as clinically extremely vulnerable in order for the respondent to place her on the furlough scheme.

28. The simple fact was that the claimant was never, from October 2020 fit to return to work, in any capacity. The claimant argued that she was fit to return to either light duties or clerical (office based, rather than driving) duties. In terms of risk, Mr Barlow was of the view that working in the office was riskier than driving a bus. The Tribunal finds that also this was raised and explored by the respondent, the respondent was not prepared to 'slot' the claimant into a vacant role, if it had a suitable one (it was accepted by both parties the claimant was not qualified for an engineer role). The respondent said that this would be advantageous to the claimant and disadvantageous to other employees who were disabled, absent, but able to return to alternative duties.

29. The Tribunal finds the respondent's position to be correct. It had to act in fairness to all employees looking for an alternative position and to do otherwise, may result in claims under the EQA from other staff.

30. The claimant voraciously maintained Mr Gashi had never sent her a list of alternative vacancies. Mr Gashi emailed the claimant on three occasions (pages 403 14/5/2021, 407 19/5/2021 and 416 26/5/2021). Despite complaining that she had not received the list, the claimant said the list contained the same vacancies, which indicated that she did receive it. It

[4] The wording on the Med 3 certificate is 'you may be fit for work taking account of the following advice'.

may well have been that the same vacancies appeared on the lists as they remained unfilled.

31. The Tribunal finds that lists of vacancies were sent to the claimant by Mr Gashi. Mr Otchie pointed out that there was not an attachment icon (for example page 402) and so suggested the list of alternative vacances was therefore not attached to the email, particularly when he contrasted that with another email (page 438 which did show a paperclip/attachment symbol). Mr Gashi suggested that format of the emails was different and said that he had attached the list of vacancies.

32. Mr Ludlow in submissions referred the Tribunal to another email from Mr Gashi which did demonstrate there was an attachment to his email (page 416 – the attachment is titled 'alternative employment').

33. Irrespective of that, in Mr Gashi's emails where he referred to one of the three options being considered was the option of alternative employment, he always added, in parenthesis 'list attached'. If, as was the claimant's case, she desperately wanted to secure an alternative role and if, Mr Gashi repeatedly emailed her, said he had attached a list of vacancies and had not; then there is some onus upon the claimant to point this out to Mr Gashi. It is not acceptable, if something is omitted and the claimant has realised this (if she had not realised the list was not attached, then it follows that she cannot have been interested in looking at it), that she did not point it out to Mr Gashi.

34. Unfortunately, the claimant maintaining that position in the hearing, undermined her credibility as the Tribunal finds the lists were attached.

35. As per the steps taken as shown on the chronology, the Tribunal finds that the respondent's long term sickness absence process was reasonable and it was properly followed. Mr Otchie sought to criticise the respondent's witnesses for not following it and for not being 'sympathetic, reasonable and consistent'. In fact, those managing the claimant's absence were empathetic, in addition to being sympathetic, reasonable and consistent.

36. The claimant was dismissed on 2/6/2021 and this was confirmed in writing on 7/6/2021 and the re-employment offer was formally made (page 427-429). The claimant appealed the decision to dismiss on 8/6/2021 and made a subject access request on 27/6/2021 (page 430). It seemed to be the claimant's case at the hearing that as she was certified as unfit for work from the 27/5/2021 (the date is taken from the index as the Med 3 is illegible) for (it appears) six weeks, so until the 7/7/2021 (page 419), that the respondent should not have made any decision to dismiss during that period. That fails to acknowledge that apart from the Med 3 of 1/10/2020

which suggested amended duties, the claimant was never certified as fit for work (page 353).

37. Ms Ryder held an appeal meeting on 22/7/2021, which the claimant attended with her TU representative. In response to the submissions made, Ms Ryder adjourned the appeal hearing to give more time for the medical situation to resolve. In short, Ms Ryder agreed with or accepted the claimant's TU representative's suggestion that the appeal be adjourned until September 2021. The claimant had an appointment for blood tests in late August 2021 and the appeal hearing was rescheduled for 8/9/2021. Thus the claimant was given more time.

38. The claimant had raised a grievance dated 10/7/2021 which was not received by the respondent until the 22/7/2021 (page 545). The grievance was treated as part of the appeal, rather than a separate grievance as Ms Ryder intended to consider it at the reconvened appeal hearing.

39. On the 9/8/2021 the claimant requested that the adjourned appeal hearing was brought forward and be held before the 21/8/2021 due to a family bereavement as she had to travel to attend the funeral (page 571).

40. It appears from her GP notes that the claimant travelled to Jamacia on 21/8/2021 (page 226).

41. When asked whether Ms Ryder considered postponing the appeal hearing until later in September/October 2021 when the claimant returned to the UK, she said her PA had tried to do just that, but that the claimant insisted upon it taking place sooner rather than later.

42. Ms Ryder reconvened the appeal hearing on 19/8/2021. Besides the fact that the claimant would not talk Ms Ryder through her grievance (saying 'no, it is all in the letter I submitted'), her medical condition had not improved. The claimant was waiting for the result of blood tests and her medication still had not, unfortunately, balanced her hormones, such that she was not fit for work in any format. Ms Ryder expressly asked the claimant if she was 'fit to do alternative work at the moment' and the claimant replied 'no'.

43. Ms Ryder's outcome was that the situation in terms of the claimant's health had not changed from the previous meeting on 22/7/2021. The claimant was still resolving her medication (there was no criticism of her) and there had been no progress. Ms Ryder at that point, upheld Mr Gashi's decision to dismiss. She also expressed her regret that matters had reached that point.

44. At the adjourned appeal hearing on 22/7/2021, the claimant's TU representative suggested that her goal was to return in September 2021 and that that was in line with the OH report (which suggested on 1/6/2021 that a return to work between one to three months was a possibility) (page 420).

45. As has been observed, the thrust of the claimant's case was that the respondent should not have dismissed her and should have waited before doing so. That is what the respondent proposed to do, it had adjourned the appeal hearing until 8/9/2021. That was beyond the three months suggested by OH on 1/6/2021. It was the claimant who brought the reconvened appeal meeting forward.

46. It was the claimant's argument that her continued absence on zero pay resulted in there being no cost to the respondent and that was a reason why it would have made no difference whether or not she remained employed for a further period of time.

47. That is not correct. Besides the claimant continuing to accrue holiday pay (she would have accrued a year's holiday pay at the time of her dismissal), there was the cost of covering her role; whether that be the cost of overtime or agency drivers.

48. At the time the claimant was dismissed, there was no realistic prospect of her returning to work in any role, in the near future. As Ms Ryder said on 19/8/2021, matters had not moved forward since 22/7/2021. It was the claimant's choice to bring the adjourned appeal meeting forward and so she then lost the prospective benefit of having a further three weeks before the appeal was determined. If, as appeared to be the case that all the respondent needed to do, was to wait a further two weeks, she had that opportunity.

49. In terms of her health improving, the claimant did not start in her new role as a bus driver with another bus company until February 2022.

50. There is an oddity regarding the claimant's grievance of 10/7/2021, received on 22/7/2021 in that she claimed she had been dismissed, in part for a breach of the duty of care in respect of her, she referenced a Med 3 certificate (page 545):

> During this period of absence my GP provided a fit note stating **'you are not fit for work'** due to the following conditions **Post Op recovery and high risk for covid 19 due to nature of work and risk factors**. Therefore, a duty of care should have been taken into consideration based on the nature of my absence and recovery from my illness.

51. The claimant expressly referred to 'my' GP. The certificate in question is reproduced (page 401):

Statement of Fitness for Work
For social security or Statutory Sick Pay

Patient's name [redacted]

I assessed your case on: 06 / 05 / 2021

and, because of the following condition(s): Post covid 19 recovery

I advise you that:
[X] you are not fit for work.
[ ] ~~you may be fit for work taking account of the following advice:~~

If available, and with your employer's agreement, you may benefit from:
[ ] ~~a phased return to work~~ [ ] ~~amended duties~~
[ ] ~~altered hours~~ [ ] ~~workplace adaptations~~

Comments, including functional effects of your condition(s):

This will be the case for
or from 04 / 05 / 2021 to 04 / 07 / 2021

I ~~will~~/will not need to assess your fitness for work again at the end of this period.
(Please delete as applicable)

Doctor's signature

Date of statement 06 / 05 / 2021

Doctor's address
BRIDGE LANE GROUP PRACTICE
20 Bridge Lane, Battersea
London, SW11 3AD
Telephone: 02035380882

52. Bridge Lane Group Practice, Battersea is not the claimant's GP surgery and she would have known that. The claimant's surgery was Leander Road, Thornton Heath. The claimant's medical records ran to 54 page and from her cancer diagnosis to 22/8/2021 covered 35-pages (pages 243-278). The claimant therefore had numerous consultations.

53. Furthermore, the claimant would know, as Ms Ryder stated in the first appeal hearing, whether or not she had had Covid 19. The claimant mis-quoted the Med 3. It did not, as she claimed, refer to 'Post Op recovery and high risk'. It is extraordinary that the claimant incorporated this document into her grievance. She said she had gone to her GP and been given it. That simply cannot have been correct as the certificate was from a completely different surgery. This also undermined the claimant's credibility.

Protected Disclosure

54. The claimant claimed to have made two protected disclosures. They are recorded as:

In October 2020, the Claimant raised concerns about unsafe working practices to her line managers, James Barlow and [her TU representative], including that she would be unnecessarily exposed to Covid-19 and was particularly vulnerable to its effect;

The Claimant repeated the substance of this disclosure on 08 June 2021 in an appeal against her dismissal, on 10 July 2021 (re-sending her appeal with additional details) and in a grievance on 22 July 2021;

55. Firstly, the reference to repeating the substance of the disclosure at the appeal meeting post-dates any claimed detriment and the dismissal. It is not therefore relevant.

56. Secondly, the claimant has not provided any evidence-in chief in respect of the meeting in October 2020. The claimant simply says in her witness statement (although it is not clear where in the chronology this took place), she said:

> *'… I explained that it was unsafe for someone as vulnerable as I was to work in those conditions and even expressly told Mr Barlow and [her TU representative] that returning to work would expose me to a greater risk of Covid-19 contamination, but it did not move them' (paragraph 10).'*

57. The claimant in her witness statement did not claim this was a protected disclosure.

58. Mr Barlow reminded the Tribunal of the position of the pandemic at this time. He said the 'eat out to help out' scheme ended on 31/8/2020. There had been a relaxing of restrictions over the summer of 2020, but that as time moved on into the autumn, the position was taking a more serious turn.

59. Not only does the claimant claim that she raised this concern to Mr Barlow, it should be noted that her TU representative was also the garage's health and safety representative (H&S).

60. The Tribunal finds it improbable that if concerns were genuinely raised to a TU representative who was also the H&S representative, that nothing would be done. In her further information, the claimant expands upon this

and said that after this discussion, she went to him to follow it up. She said that he too rejected her request (to place her on furlough[5]) as it was unsafe for her to have direct physical contact with passengers. As the H&S representative, the Tribunal finds it implausible that he would 'reject' her approach. The H&S representative would not have any control over placing any employee on the furlough scheme; he could however have attempted to influence the management.

61. Furthermore, the Tribunal found that Mr Barlow was a responsive and conscientious manager and finds that even if he did not agree the concerns raised were a risk, that he would take steps (whether himself or to delegate the task) to reassure an employee who raised them. Mr Barlow referred to the buses being sanitised and the driver's cab being self-contained (although not air-tight). By October 2020 many measures that were lacking or ineffective earlier in the pandemic had been rectified. Mr Barlow in particular referred to risk assessments and making buses and sites covid compliant. He said the only issue the claimant raised was her own personal situation and her desire to be placed on furlough.

62. The Tribunal therefore finds that the claimant did not make such a statement or make a protected disclosure. In reality, the Tribunal finds that the conversation centred around the claimant's constant refrain that she was vulnerable and should be placed on furlough and it did not extend to her raising concerns about exposure whilst driving.

63. In any event, the claimant had, during a reduced return to work pattern, undertaken driving duties (albeit with a mentor as a general supportive measure for her or any other driver who had been absent for some time). The Tribunal does not accept that: if the claimant had raise specific health and safety concerns around the risks whilst driving to her line manager and H&S and TU representative; had then followed that up 'expressly' with her H&S representative; had had those objections then fobbed off by both; that she would take no further action and proceed to drive.

64. It is of note that the claimant's entitlement to full contractual sickness pay was coming to an end at this point. She would then revert to statutory sickness pay (SSP). The Tribunal finds that this was her concern at this stage and that in her view, being paid 80% of her salary under the furlough scheme, was clearly a more beneficial financial prospect than being paid SSP. Ultimately, the claimant was not eligible for the furlough scheme.

65. The claimant also relies upon this statement for her health and safety dismissal contrary to s.100 ERA. It is however noted that the claimant had a H&S representative at her place of work. On her case, she raised the

[5] Coronavirus Job Retention Scheme (CJRS) – referred to by the claimant as placing her on furlough.

issue with him. Even taking her case at its highest and in the absence of specific evidence, no retributive action (including dismissal) was taken against her following any such statement.

66. All the respondent's witnesses were asked whether they knew of bus driving colleagues who had contracted Covid-19 and if any had died as a result. All said, unfortunately, yes. The Tribunal finds that not only does this highlight the extreme seriousness of the situation (it can be no more extreme than death), it also indicates how grave the situation was for the respondent and its staff. It is by no means to minimise the risk to all staff including the claimant and the fact the claimant was, because of her ethnicity and health issues, in a higher risk category; the claimant was only exposed to any risk during the short time in October 2020 when she returned to work. Once the claimant was deemed unfit for work on 21/10/2020 she did not return to work and therefore, she was no longer exposed to any risk (page 363). Furthermore, the Tribunal finds it was the claimant's own decision to return to work in October 2020. That was supported by her GP who certified her as 'may be fit for work taking account of the following advice' which then referred to 'amended duties'. Her GP did not however specify what those amended duties were and referred to a 'review in the next 3 months'.

The claimed detriments

67. The claimant relies upon the same detriments for: the protected disclosure claim (s.47B ERA and dismissal s.103A); the direct discrimination claim (s.13 EQA); the discrimination arising from disability claim (s.15 EQA); the harassment claim (s.26 EQA); and the victimisation claim (s.27 EQA).

68. Those detriments were identified as[6]:

    1. pressure the claimant to return to work;

    2. repeatedly ask the claimant to confirm when she would return to work in her specific role as a bus driver;

    3. expect the claimant to work when it was unsafe for her to do so;

    4. did James Barlow continue to correspond with her, despite not being the appropriate manager to do so;

    5. fail to plan the claimant's return to work;

[6] The list appeared in various sub-paragraphs of the list of issues but they were consistently numbered 1 to 10 and that numbering is be replicated.

6. fail to put the claimant on furlough;

7. fail to apply properly its disciplinary policy and procedure relating to long-term sickness;

8. fail to warn the claimant officially that she would be dismissed for failing to return to work;

9. refuse to consider placing the claimant on furlough, despite knowing that she was a vulnerable person; and

10. dismissing the Claimant.

69. The burden of proof is on the claimant to provide facts which in the absence of any other explanation, the Tribunal could decide that the respondent had contravened the EQA. The claimant will struggle to satisfy that burden if she has not provided evidence-in-chief to support her allegation.

70. In addition, the dismissal aside, the allegations are vague and lack particularisation. For example, in the first allegation, the claimant does not say who pressured her to return to work. If on her case, it was just Mr Barlow, then the allegation would be out of time as Mr Barlow ceased to manage the claimant in March 2021 and any allegation prior to 27/4/2021 is out of time. There cannot be a continuing act if this is an allegation made of Mr Barlow. If it is the claimant's case that Ms Prawucka also pressurised her, then she may be able to argue that it was a continuing act and therefore in time. The problem is, the Tribunal simply just does not know.

71. Only one allegation (number 4) refers to a manager by name. None of them are dated or are particularised sufficiently.

72. In fact, although the respondent has attempted to do so, the allegations are just so vague as to be unanswerable. The Tribunal will however address them based upon the evidence it heard.

73. As there was very little in the way of evidence-in-chief from the claimant, she was expressly asked to say how the 'pressure to return to work' was manifested.

74. The claimant replied that she kept getting calls from her TU representative and from management to ask when she was returning to work and to specify the date. She was asked how that amounted to pressure, rather than a request for information. She said she thought it was pressure,

there were constant calls, she could not give a date and she repeatedly referred to hospital appointments.

75. It is noticeable that part of the claimant's issue/complaint appears to be with her TU representative, as well as the respondent.

76. Tribunal has already found that the management of the claimant was in accordance with the respondent's long-term sickness absence policy and that there was nothing untoward about it. It is not accepted there was any pressure placed upon the claimant. The Tribunal does not accept factually that the claimant was pressurised to return to work.

77. In respect of repeatedly asking the claimant about her return to work, the claimant does not say who on her case is liable for the detriment. In her witness statement, the claimant criticises the respondent for failing to adjust her working conditions to facilitate an earlier return to work, however, there was never a point at which the claimant was deemed fit enough to return (save for the brief period in October 2020).

78. The claimant referred to the letter from St George's Hospital of 12/10/2020 and said that despite having received this letter, the respondent continued to pressure her to return to work (page 358). The letter requested that she be given further time 'of' (presumably off) until she is given the all clear by the Royal Marsden Hospital in December 2020. This was at the time the claimant had returned to work on the 5/10/2020 (on a shortened working pattern of 2-3 days per week), was off ill on 10/10/2020 with female ailments and was then signed off work by her GP from 21/10/2020 until 31/12/2020 due to 'post op recovery high risk for covid 19 due to nature of work and risk factors' (page 363).

79. Mr Barlow's response to this was to write to the claimant on 26/10/2020 and he addressed the comment in the letter from St George's hospital that said the claimant had been told to return to work. Mr Barlow replied:

> *'I think it is important to note in writing that at no point have we demanded your return to work. Your sick pay ended as you were entitled to 13 weeks of company sick pay, and you had used this amount in the rolling year. You expressed a desire to return to work, and your doctor issued you a Med3 certificate that allowed this with amended duties, which we enabled.'*

80. Mr Barlow went on to arrange a telephone meeting at which the claimant could be accompanied by her TU representative, which was rearranged to accommodate his absence.

81. Unbeknown to the claimant and in the background, Mr Barlow was making enquires as to how he could ease the claimant's financial situation. He had concerns that the claimant did not qualify for the furlough scheme and she had exhausted her contractual sickness pay; he still wanted to support her (page 368-371). That resulted in Mr Barlow exceptionally extending the company sickness pay for the claimant to 1/12/2020 and then again to 1/1/2021.

82. The Tribunal notes that this amounted to more favourable treatment, not any form of less favourable or unfavourable treatment. As was pointed out, had the claimant been placed on the furlough scheme, she would have received 80% of pay and not 100% which she received.

83. This is not the action of managers who were pressurising the claimant about her absence or harassing her. Mr Barlow was content to leave the claimant on full pay, until after her December 2020 appointment at the Marsden.

84. Based upon the evidence heard, the Tribunal finds this allegation factually did not happen.

85. The respondent did not expect the claimant to work when it was unsafe to do so. In fact, it was quite the opposite. Mr Barlow took into account the points raised by St George's Hospital and his manager said page 371):

> *'My thinking is that in order to support her, while maintaining the position we have on furlough, I'd be prepared to offer driver Green, sick pay, on the basis of her absence being CV[7] related, due to the need for her to self isolate.'*

86. In response on 7/12/2020 Mr Barlow said (page 370):

> *'I have spoken with Ms Green last week, she is currently still at home and isolating.*
>
> *She has a number of further appointments regarding her thyroidectomy, including 16/12 for further blood tests, and 23/12 for a further consultation at the Royal Marsden. I asked her for an update from her consultant, and she left a message with him last week. Her thyroid hormone levels have been volatile during this time, and she's had pain issues, which are now resolved through a reduced dose as it was causing "hyperthyroidism".*
>
> *Based on the consultant saying that the appointments need to be held and the Royal Marsden to give her the all clear (he just*

[7] Presumably CV is 'covid' related.

generally said "December"), plus the current R rate, I think we should leave her as she is until 02/01/2020, and I would write to her proposing a return to work then, unless more information is forthcoming/ the situation changes.'

87. The claimant made a data subject access request on 27/6/2021 and that disclosure of document in this case took place (the parties were directed to exchange documents on 30/8/2022). Even if she were not aware of it at the time, the claimant must have become aware of this exchange and therefore of the support the respondent had offered.

88. In respect of the circumstances when the claimant's contractual sickness pay was ending and prior to Mr Barlow informing her he was prepared to extend it, there are difficulties in attempting to recreate the atmosphere in September/October 2020 now. It should be remembered that the furlough scheme was launched on 23/3/2020 and was originally due to end in May and then in June 2020. On 29/5/2020 the Chancellor announced that it would be extended to the 31/10/2020. In addition, employers then had to pay national insurance and pension contributions from August and contribute 10% of pay from September and 20% from October. Throughout September 2020 the Government ruled out any further extension of the scheme. On the 31/10/2020 it was announced there would be a second lockdown to start on the 5/11/2020 and that the scheme would be extended until the end of November. It was only on 5/11/2020 that the Chancellor extended the scheme to March 2021. There was a provision that any employee made redundant after the 23/9/2020 could be reinstated and put back onto the scheme. The situation was unpredictable and volatile. Statements made were contradicted. Whilst the future is never predictable, at this point in time, there was *complete uncertainty* regarding the future funding of this scheme.

89. At the time therefore the claimant was asking to be place on the furlough scheme, all the indications were that it would be ending on 31/10/2020. The Tribunal finds that was also a reason for the respondent saying no, besides the fact the claimant did not qualify, the expectation was the scheme would end on 31/10/2020.

90. The allegation that Mr Barlow continued to correspond with the claimant when it was not appropriate to do so is out of time. Mr Barlow ceased to line manage the claimant in March 2021 and Ms Prawucka took over. Any act or omission before 27/4/2021 is out of time. This cannot be a continuing act as the allegation is against Mr Barlow.

91. In any event, it is nonsense to claim that it was inappropriate for Mr Barlow to correspond with the claimant. He was her line manager and he handed over management of the ill health absence to Ms Prawucka. It was entirely appropriate for him to do so. This allegation appears to be based upon the claimant's misunderstanding that Mr Barlow moved to Stockwell in January 2021 not March 2021.

92. This allegation fails on the facts.

93. The respondent did not fail to plan the claimant's return to work. If this was an allegation in respect of the October 2020 return to work, then Mr Barlow did a risk assessment which resulted in a reduced working week and working with a mentor. That allegation is also out of time.

94. If the claimant is referring to any other time in the alternative, there was never a prospect of her returning to work and therefore, the respondent cannot have failed to do something, when there was no prospect of it happening.

95. This allegation fails factually.

96. There are two allegations (numbers six and nine) that the respondent failed to put the claimant onto the furlough scheme. The simple fact is that the claimant never qualified for the furlough scheme and therefore she was not placed on it.

97. Once the claimant's extended and discretionary company sickness pay ended and once she had exhausted SSP, she was advised she may qualify for benefits. The claimant wished to be placed on the furlough scheme as she would then be paid 80% of her pay. As has already been observed, this is more favourable treatment, not less favourable.

98. Had the claimant exhausted contractual, then extended sickness pay and SSP at any other time, there would have been no option to put her on the furlough scheme. It just so happened that the scheme was available in January 2021; however, the claimant never qualified to be placed upon it.

99. Despite the claimant not referring to them, the three furloughed comparators (A, C and E) all had NHS letters telling them to shield as they were clinically extremely vulnerable (comparator bundle pages 8, 60 and 96).

100. On this evidence, employees with NHS-certified clinical needs were placed on the furlough scheme. The NHS letter specifies 'clinically extremely vulnerable' (not just 'vulnerable') and that this requires 'extra precautionary shielding' (not just 'shielding' in general) (comparator bundle

page 96). The letter also confirms that it is evidence for the employer for eligibility for the furlough scheme (comparator bundle pages 98-99).

101. The claimant either never had such a letter or did not produce such a letter to the respondent.

102. The pregnant bus driver, comparator B, was for whatever reason, given office duties. There was a vacancy which she filled. This demonstrates that the respondent did move staff to alternative roles, where the situation warranted it and where there was a suitable vacancy.

103. The respondent told the claimant if she produced the necessary medical evidence, then putting her on the furlough scheme would be considered. The claimant never did so. Two illegible documents the Tribunal was told recorded the claimant did not need to shield; the Dr Newbold letter of 24/12/2020 (page 277); and the OH report of 15/1/2021 (page 382).

104. The allegations fail as the claimant never qualified to be placed on the furlough scheme.

105. In respect of the long term sickness policy, which is part of the disciplinary policy, the Tribunal's findings in respect of the unfair dismissal are repeated. This allegation factually fails.

106. Quite simply, the respondent did not fail to warn the claimant officially that she would be dismissed if there was no prospect of her returning to work. She was not dismissed for failing to return to work. She was dismissed because despite her treatment and her recovery from cancer, she was still not fit for work in June 2021 and there was no prospect of her being fit to return to work at that time.

107. In any event, on the 4/5/2021 Ms Prawucka informed the claimant that one outcome open to Mr Gashi was was termination of employment on medical grounds (page 399). Mr Gashi also repeated this possibility as a potential outcome on 14/5/2021, 19/5/2021 and 26/5/2021 (pages 403, 407 and 416).

108. As an allegation, it is not made out.

109. The Tribunal wishes to record its finding that the claimant's managers were all entirely supportive, empathetic and compassionate. Allegations of unlawful discrimination are extremely serious and should not be made lightly. In view of the steps the respondent took, the Tribunal can see why Mr Barlow said the claimant's comments came as a 'bolt out of the blue'. The Tribunal was impressed with all the managers'

competence, particularly in view of the pressure the respondent was under at the time due to the pandemic.

110. As the claimant has failed to establish that any of the alleged detriments happened, there can be no claim of: detriment under s.47B or dismissal under s.103A ERA (not withstanding the finding there was no protected disclosure made); direct discrimination; no discrimination arising from disability (save for the claim of dismissal which will be addressed); no harassment; and no victimisation (and notwithstanding s.212 EQA).

111. The only allegation under s.15 EQA which warrants further consideration is the something arising as a result of her disability, which is recorded as requiring additional time off. The claimant did not require additional time off, she was however absent the best part of a year. It is also correct to say that the dismissal was unfavourable treatment. The claimant was not however dismissed for her absence; that had been tolerated for a long period. She was dismissed as by June 2021, there was no prospect of her being well enough to return to work in a reasonable time-frame. The respondent had other legitimate considerations, such as covering the claimant's absence and fulfilling its contractual obligations. The respondent's legitimate aim is however accepted and it applied a proportionate means of achieving that aim. There was no less discriminatory method it could have applied. The respondent could have legitimately terminated the claimant's employment much sooner and the further time the respondent took and the further time offered (agreeing to postpone the appeal hearing), demonstrated this.

112. In respect of the claim of indirect discrimination, the claimant relies upon four PCPs. She relies upon the same PCPs for the duty to make reasonable adjustments; which she says was breached by the respondent.

113. The PCPs are:

> 1 requiring disabled / vulnerable employees to undertake the role of a bus driver and not allowing them to perform modified duties;
>
> 2 failing to assess the specific needs of disabled employees and failing to allow them to have flexible working arrangements;
>
> 3 failing to allocate disabled employees to available admin tasks or to transfer them to other garages with available clerical jobs during the period of recovery; or
>
> 4 failing to C (C should be omitted[8]) properly inform employees as

[8] If the proposed PCP is read as 'failing to properly inform employees as to their statutory rights under employment law', it makes more sense.

to their statutory rights under employment law.

114. Although the PCPs were recorded in various sub-paragraphs, they were consistently listed as one-to-four.

115. The respondent submits the first three PCPs were not applied to the claimant. The Tribunal agrees. Based upon the findings already made, put simply, the respondent did not make such requirements of the claimant.

116. The fourth PCP simply does not make any sense so as to warrant a response. It is not clear who this was applied to the claimant. In any event, as has already been noted, the claimant had the benefit if TU representation throughout. If there is any responsibility to inform the claimant of her statutory rights, it is from her TU representative in the first instance; not from her employer.

117. Having said that, the respondent correctly referred to the relevant policy it was applying, the claimant could have and did, take further advice in respect of her position.

118. Accordingly, as the PCPs did not apply, there cannot have been a disadvantage to the claimant. Those claims under the EQA therefore fail.

119. The only remaining claim to be addressed is the claim that the dismissal was automatically under under s.100 ERA. This can be quite simply dismissed as the Tribunal has found that the claimant did not in fact, make any allegation regarding health and safety so as to engage s.100 ERA.

The Law

120. Mr Otchie in submissions relied upon two authorities and said the starting point for analysing the duty of the Tribunal in deciding whether or not an ill health capability dismissal is fair, is the EAT decision in Spencer v Paragon Wallpapers Ltd [1976] IRLR 373. In that case Phillips J emphasised the importance of scrutinising all the relevant factors:

> *'Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?'*

-he added that the relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'.

121. Furthermore, in Lynock v Cereal Packaging Ltd [1988] ICR 670, the EAT (Wood J presiding) described the appropriate response of an employer faced with a series of intermittent absences as follows:

> *'The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment—sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following—the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding.'*

122. Mr Ludlow set out the law, acknowledging reliance upon *IDS Employment Law Handbooks* and *Harvey on Industrial Relations and Employment Law*. In respect of unfair dismissal, he said:

'9. Section 94(1) ERA provides that an employee has the right not be unfairly dismissed.

10. Section 98 ERA materially provides:

(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.

11. Thus section 98(2) ERA requires the Tribunal to consider whether the reason for the dismissal was 'potentially fair'. Capability is one such reason, which includes health, section 98(3) ERA.

12. The burden of proof is on the respondent to demonstrate that its reason for dismissing the claimant was a fair one.

13. Section 98(4) must also be applied. This provides that the Tribunal must consider whether the dismissal is fair or unfair in accordance with equity and the substantial merits of the case, bearing in mind the size of the employer.

14. There are 2 key aspects to a fair dismissal for long-term illness or injury involving long-term absence from work. Firstly, where an employee has been absent from work for some time, it is essential to consider whether the employer can be expected to wait any longer for the employee to return: Spencer v Paragon Wallpapers Ltd [1977] ICR 301, EAT. According to the Court of Session in S v Dundee City Council [2014] IRLR 131, Ct Sess (Inner House), the Tribunal must expressly address this question, balancing the relevant factors in all the circumstances of the individual case. Such factors include:

- *whether other staff are available to carry out the absent employee's work*
- *the nature of the employee's illness*
- *the likely length of his or her absence*
- *the cost of continuing to employ the employee*
- *the size of the employing organisation; and*

- *(balanced against those considerations), the unsatisfactory situation of having an employee on very lengthy sick leave.*

15. Secondly, a fair procedure is essential. This requires, in particular:

- *Consultation with the employee*
- *A thorough medical investigation (to establish the nature of the illness or injury and its prognosis), and*
- *Consideration of other options; in particular, alternative employment within the employer's business.*

16. The importance of consultation was stressed in the following passage from the judgment of the EAT in East Lindsey District Council v Daubney [1977] IRLR 181, [1977] ICR 566:

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

17. In Taylorplan Catering (Scotland) Ltd v McInally [1980] IRLR 53, EAT, the EAT added that consultation is also necessary to balance the employer's need for the work to be done against the employee's need for time to recover.

18. Whilst East Lindsey District Council v Daubney is the leading authority on medical investigation in the context of a fair capability dismissal, the sufficiency of the employer's belief in the grounds for dismissal is still governed by British Home Stores Ltd v Burchell [1980] ICR 303, EAT. Thus as with other reasons for dismissal, the employer is not required to prove that the employee was incapable of performing his job in order to defeat a claim for unfair dismissal. The employer need only establish an honest belief on reasonable grounds that the employee was incapable: Taylor v Alidair Ltd [1978] ICR 445, [1978] IRLR 82.

19. The Tribunal must not decide the case according to what it would have chosen to do. Rather it must apply the standard of what a

reasonable employer would have done: depending on the circumstances there may be a range of responses that a reasonable employer could have adopted.

20. The test of reasonableness also applies to the procedure as a whole (employer's investigations and whether it had reasonable grounds for its belief as to the medical position and prognosis).

21. In all cases, whilst medical and expert reports may assist the employer to make an informed decision on the issue of capability, the decision to allow someone to return to work or to dismiss for reasons relating to capability is, ultimately, one which the employer has to make as a managerial decision, not a medical one: DB Schenker Rail (UK) Ltd v Doolan UKEATS/0053/09/BI.

22. There is no onus on employers to create a special job where none exists: Merseyside and North Wales Electricity Board v Taylor [1975] ICR 185, QBD.

23. In OCS Group Ltd v A J Taylor [2006] EWCA Civ 702, [2006] ICR 1602, in the context of a conduct dismissal and reasonable adjustments claim, it was held that a Tribunal must look at the substance of what had happened throughout the disciplinary process and consider whether the overall disciplinary process was fair notwithstanding any deficiencies at an earlier stage (see paragraphs 43, 46-51). It is submitted that exactly the same principle is applicable in capability dismissal and discrimination arising from disability cases.
…

31. Section 43A ERA provides that a protected disclosure means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

32. Section 43B materially provides:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

…

40. Section 47B(1) ERA provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

41. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, the House of Lords adopted Brightman LJ's definition of 'detriment' when he stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'.

42. Causation under section 47B has 2 elements:

(1) Was the worker subjected to the detriment by the employer?

(2) Was the worker subjected to that detriment because he or she had made a protected disclosure?

43. Pursuant to section 48(2) ERA it is for the employer to show the ground on which any act, or deliberate failure to act, was done. This means that once all the other necessary elements of a claim have been proved on the balance of probabilities by a claimant - i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment – the burden will shift to the respondent to prove, on the balance of probabilities, that the worker was not subjected to the detriment 'on the ground that' he or she had made the protected disclosure.

44. In Fecitt and ors v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372, CA, the Court of Appeal held that: '…section 47B will be infringed if the protected disclosure materially influences (in the sense of being more

than a trivial influence) the employer's treatment of the whistleblower.'

…

47. Section 103A ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

48. In Kuzel v Roche Products Ltd [2008] ICR 799, the Court of Appeal essentially set out a 3 stage approach to section 103A claims:

(1) The employee must produce some evidence to suggest that his or her dismissal was for the principal reason that he or she had made a protected disclosure, rather than the potentially fair reason advanced by the employer. This is not a question of placing the burden of proof on the employee, merely requiring the employee to challenge the evidence produced by the employer and to produce some evidence of a different reason.

(2) Having heard the evidence of both sides, it will then be for the employment tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or reasonable inferences, and

(3) The tribunal must decide what was the reason or principal reason for the dismissal on the basis that it was for the employer to show what the reason was. If the employer does not show to the tribunal's satisfaction that it was the asserted reason, then it is open to the tribunal to find that the reason was as asserted by the employee. However, this is not to say that the tribunal must accept the employee's reason. That may often be the outcome in practice, but it is not necessarily so.

…

50. Section 100 ERA materially provides that:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that:
…

(c) being an employee at a place where-

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

…

52. Section 13 EqA materially provides:

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

53. Section 23 EqA materially provides:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if-

(a) on a comparison for the purposes of section 13, the protected characteristic is disability.

…

54. Section 136 EqA materially provides:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

…

(6) A reference to the court includes a reference to-

(a) an employment tribunal;…

55. In Madarassy v Nomura International plc [2007] ICR 867, CA, Mummery LJ stated that: "The bare facts of a difference in

status and a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination".

56. If a claimant establishes a prima facie case of discrimination, then the 2nd stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent. According to the Court of Appeal in Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931, CA, the respondent must at this stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground.
…

68. Knowledge not being in issue in this case, material part of section 15 EqA provides:

> *(1) A person (A) discriminates against a disabled person (B) if-*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

69. Section 15 recognises that a disabled employee may be adversely treated for something that other employees would be adversely treated for, but where that something arises 'in consequence of their disability' the disabled employee is afforded greater protection.

70. In Secretary of State for Justice and anor v Dunn EAT 0234/16, the EAT identified the following 4 elements that must be made out in order for the claimant to succeed in a section 15 claim:

> *(1) There must be unfavourable treatment. No comparison is required.*
>
> *(2) There must be something arising in consequence of the disability.*
>
> *(3) The unfavourable treatment must be because of (i.e. caused by) the something arising in consequence of the disability; and*
>
> *(4) Unfavourable treatment because of something arising in consequence of disability will not amount to unlawful discrimination if the alleged discriminator can show that the*

> *treatment is a proportionate means of achieving a legitimate aim. (emphasis added)*

71. Therefore section 15 does not give the disabled employee complete protection: the employer is not liable if it can 'objectively justify' the treatment.

72. Firstly, the employer must show that the treatment meets a legitimate aim. It should identify a real need or objective of the business. Generalisations are insufficient (Employment Statutory Code of Practice ('the Code'), para.4.26).

73. Paragraph 4.29 of the Code provides that aiming solely to reduce costs cannot be a legitimate aim. This is supported by the case law and put in context by Underhill LJ in Heskett v SOS for Justice [2020] EWCA Civ 1487:

> *'The aim in the present case could not have been characterised as no more than a wish to save costs. An employer's need to reduce its expenditure, and specifically its staff costs, in order to balance its books can constitute a legitimate aim for the purpose of a justification defence: that proposition is correct in principle. There is no principled basis for ignoring the constraints under which an employer is in fact having to operate. It is never a good thing when tribunals or courts are required to make judgements on an artificial basis. Almost any decision taken by an employer will inevitably have regard to costs to a greater or lesser extent and it is unreal to leave that factor out of account. That is particularly so where the action complained of is taken in response to real financial pressures, as in the present case…It may sometimes be difficult for a tribunal to draw the line between a case where an employer simply wishes to reduce costs and cases where it is, in effect, compelled to do so.'*

74. In HM Land Registry v Benson [2012] ICR 627, the EAT held that a decision about how to allocate resources could constitute a legitimate aim (keeping to a self-imposed budget).

75. If the respondent establishes a legitimate aim, the employer must then satisfy the Tribunal that the treatment was a proportionate way of achieving that aim. This means that it must be:

75.1 both an 'appropriate' way of achieving it; and

75.2 'reasonably necessary' (not the only possible way but the Tribunal should ask whether lesser measures could have achieved the same aim).

76. In assessing proportionality the Tribunal must weigh the 'discriminatory' effect of the treatment against the needs of the business and decide which outweighs the other. The more serious the impact the more cogent must be its justification. This is an objective test and it does not matter if the employer did not have these reasons in its mind at the time. Nor is it a 'range of reasonable responses' test.

77. Paragraph 4.32 of the Code provides that: 'The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice. Cost can only be taken into account as part of the employer's justification for the provision, criterion or practice if there are other good reasons for adopting it'.

…

83. Section 19 EqA materially provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

84. The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in 2 stages:

(1) Is the aim of the provision, criterion or practice legal and non-discriminatory, and one that represents a real, objective consideration?

(2) If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances? (Code, paragraph 4.27)

…

89. Section 20 EqA materially provides:

(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…

90. Section 21 EqA materially provides that:

(2) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(3) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

91. Tribunals should take a structured, step-by-step approach to the consideration of whether there was a duty to make reasonable adjustments. The duty does not arise in every case of disability.

91.1 Firstly, identify the provision, criterion or practice ('PCP') being applied?

91.2 Secondly, does that PCP put the claimant to a substantial disadvantage compared with a person who is not disabled?

91.3 Thirdly, has the employer taken reasonable steps to avoid that disadvantage? This is an objective question, the focus being on the practical result. There must be a prospect (some cases say a 'real prospect') of the step being effective.

92. Paragraph 7.29 of the Code sets out factors that may be relevant in deciding what is reasonable here. The size and resources of the employer; what proposed adjustments might cost; the availability of finance or other help in making the adjustments; the logistics of making the adjustment; the nature of the role; the effect of the adjustment on the workload of other staff; the other impacts of the adjustment; the extent it is practical to make.

Another factor is the likely effectiveness of the step: the chance that it is likely to be successful.

93. It is not part of the statutory obligation to create a wholly unnecessary job: Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664 EAT.

94. In Wade v Sheffield Hallam University UKEAT/0194/12 the EAT upheld a decision that it was not a reasonable adjustment for an employer to waive its competitive interview process and appoint the disabled claimant to a new role for which she did not meet the requirements.

95. The duty to make adjustments arises in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person.

96. In some circumstances there may simply be no reasonable adjustment that can be made. In Dyer v London Ambulance NHS Trust EAT 0500/13, D dealt with 999 calls in a control room that was frequently visited by members of the public. She developed an unusual sensitivity to aerosolised deodorant sprays and strong perfume that was akin to anaphylactic shock – one incident caused a near death experience and left her hospitalised for days. Following the Trust's conclusion that no reasonable adjustment could be made, D was dismissed on the ground of capability. An ET rejected her claim that the employer had failed in its duty to make reasonable adjustments and, on appeal, the EAT upheld that decision. The tribunal had come to a conclusion, as a matter of fact, that there was no reasonable adjustment that the employer could have made to avoid the disadvantage to D caused by the use of aerosols and sprays, etc, and its reasoning was capable of supporting this finding.

97. The first factor listed in para. 6.28 of the EHRC Employment Code that an employer may wish to consider when deciding what is a reasonable step to have to take is the extent to which taking a particular step would be effective in preventing the substantial disadvantage caused to the disabled person. In practice, it is most unlikely to be reasonable for an employer to have to make an adjustment that involves little benefit to the disabled person.

98. It is now well established by case law that the essential rationale of the s.20 duty is to make adjustments that are effective in keeping a disabled person in employment, not to enable them to leave employment on favourable terms. An ET commits an error of

law if it fails to engage with how the step(s) that it finds should have been taken would have been effective to enable the disabled person to find work, continue working or, as the case may be, return to work: Tameside Hospital NHS Foundation Trust v Mylott EAT 0352/09 and North Lancashire Teaching Primary Care NHS Trust v Howorth EAT 0294/13.

...

102. Section 26 EqA materially provides:

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of-

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) …

(3) …

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-

(a) the perception of B;

(b) the other circumstances of the case;

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

…

106. Section 27 EqA materially provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act-

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.'

123. The complaint is of dismissal and detriment s. 39(2)(c) and (d) and s. 40 EQA.

124. The list of issues recorded that any act or omission under the EQA (it being accepted the unfair dismissal claim was presented within time) which took place before 27/4/2021 was potentially out of time. That was subject to s.123 EQA and there being conduct extending over a period; or, it being just and equitable in all the circumstances to extend time.

125. In respect of the vagueness of the allegations, it is important that to establish that the treatment was because of a protected characteristic it must be shown that a named individual (or a number of individuals) who subjected the claimant to a detriment was consciously or subconsciously influenced by the protected characteristic. Unless the claimant identifies the alleged discriminator(s), that exercise cannot be conducted and the claim will fail Reynolds v CLFIS (UK) Ltd [2015] IRLR 562.

Conclusions

126. It is important to reiterate that there were no issues with the claimant's performance and that the respondent would have re-employed her when she was fit enough to return to work and if she reapplied.

127. It is unfortunate that the claimant lost her job in circumstance which were dreadful for her health wise and completely out of her control. The respondent however, acted eminently reasonable and compassionately.

128. The claimant made no claim that the conduct was a course of continuing conduct; or invited the Tribunal to exercise its discretion in respect of the time limit, save that she made this assertion in her claim form (page 32). It is not enough to make this assertion and not to lead any evidence in this respect or to refer to this in closing submissions. In the absence of such an invitation, the Tribunal does find that any act or omission prior to 27/4/2021 is out of time.

129. The respondent has satisfied the burden upon it to show that the dismissal was for a fair reason, that of capability. The process followed was thorough and fair. The claimant was represented at every stage. She

had the benefit of an appeal. She was offered by Ms Ryder what she asked for, which was more time; yet she shortened the process. Although the respondent does have considerable administrative resources, it is not expected to continue employment indefinitely, when there was no prospect of the claimant returning to work. Furthermore, the respondent was consistent in its dealings with the claimant and other employees (comparator F who had lung cancer and was referred to) who were on long term absence. In fact, the claimant was afforded a longer period of absence, before the decision was taken to dismiss. The dismissal was therefore fair.

130. The claimant did not make a protected disclosure and factually, the Tribunal found that none of the detriments contended for occurred. In fact, the opposite was the case. The claimant was fully supported and the Tribunal concludes that the respondent could not have done any more. To make it clear, there is absolutely no criticism of the respondent's actions.

131. The Tribunal found the claimant did not make the statement contended for at paragraph 4.1 of the List of Issues. Furthermore, the statement did not come within s. 27(2) EQA and it was not a protected act. The victimisation claim fails.

132. As the claimed detriments did not happen, there was no less favourable treatment or unfavourable treatment. The claimed PCPs did not exist. The claimant did not make a health and safety assertion; she was dismissed for there being no prospect of her returning to work. It is accepted she was absent as a result of her cancer and that she was dismissed. She was not however dismissed for her absence, she was dismissed as more than 12-months after she was first diagnosed, there was no prospect of her returning to work. The claims under the ERA and EQA therefore fail.

133. For those reasons, the claimant's claims fail in their entirety and are dismissed.

Employment Judge Wright
21 October 2022