EMPLOYMENT TRIBUNALS

Claimant:	**Miss Krystyna Niedzielska**		
Respondent:	**Faccenda Foods Limited**		
Heard at:	**Columbus House, Newport**	**On:**	**11, 12, 13 & 14 April 2023**
Before:	**Employment Judge R Havard**		
Members:	**Mr R Mead** **Mr C Stephenson**		

Representation:

Claimant:	In person
Respondent:	Ms L Shaw, Solicitor
Interpreter (Polish language):	Ms Klimczok-Zat (on 11.04.23), Ms Maniak-Griffiths (on 12.04.23) and Ms Kacznarczyk (on 13 and 14.04.23)

RESERVED JUDGMENT

1. The unanimous judgment of the Tribunal is that the Claimant's claim of unfair dismissal is not well-founded and is dismissed;

2. The unanimous judgment of the Tribunal is that the Claimant's claim of discrimination arising from disability pursuant to section 15 of the Equality Act 2010 is not well-founded and is dismissed;

3. The unanimous judgment of the Tribunal is that the claimant's claim regarding the Respondent's failure to make reasonable adjustments pursuant to sections 20 and 21 of the Equality Act 2010 is not well-founded and is dismissed.

REASONS

Introduction

1. By a claim form dated 29 May 2019, the Claimant indicated that she wished to pursue a claim of unfair dismissal and discrimination on the grounds of disability. She wrote on the claim form (page 8 of the hearing bundle. All page references in this judgment relate to the hearing bundle unless stated otherwise):

> "*I worked for this employer for six years since 2 April 2013, employer dismissal my on 9 April 2019 on medical reasons. I went on sick note on 31 July 2018 I have pain and swelling on the foot can't walking. Occupational Health Department nurse have report send to HR about me condition and perspected to return to work. DISCRIMINATION when I get it*

sick note for such long period nine months because of my condition Employer decide to dismiss my on medical ground as they say im blocking workplace they can't kept my any longer. I want to mention about another employee for similar process and similar issue for being on sick note since April 2018 she still employed and kept the job as back on return to work frays for two days in three weeks' time and again she back on sick note and still be employed where im been dismiss" (sic).

2. A case management hearing took place on 16 November 2022. The outcome of that hearing is recorded in an order of 5 December 2022 (pages 40 to 49). It was confirmed by the Respondent that it accepted that the Claimant was disabled at the material time by a condition affecting her feet (paragraph 29, page 43). The Claimant also complained of other physical conditions such as carpal tunnel syndrome and a back condition, but did not rely on any physical conditions over and above the condition affecting her feet as part of her disability. However, it was confirmed that those other conditions may feature in terms of the Claimant's absence from work and any prognosis relating to her ability to return to work.

3. In the same order of 5 December 2022, it was confirmed that there was no disagreement that the claim form as originally presented brought complaints of:

   (a) unfair dismissal;

   (b) unfavourable treatment because of something arising in consequence of disability. The unfavourable treatment was the dismissal, said to be because of the Claimant's sickness absence. The Respondent pleaded a justification defence.

4. At the hearing on 16 November 2022, an amendment application was then made relating to the complaint of a failure to make reasonable adjustments which had not been pleaded, or adequately pleaded, in the claim form. By a decision dated 5 December 2022 (pages 25 to 39), the following amendments were allowed and therefore formed part of the complaint by the Claimant relating to the Respondent's failure to make reasonable adjustments:

   (a) a failure to provide appropriate footwear at the time of dismissal;

   (b) the Respondent adopted a practice of requiring employees to return to work before providing or arranging for provision of bespoke appropriate footwear, and a reasonable adjustment the Respondent was alleged to have failed to make was to provide the footwear whilst the Claimant was on sick leave to facilitate her return to work.

Issues

5. At the case management hearing on 22 November 2022, a list of issues was agreed between the Claimant and the Respondent. At the beginning of this hearing it was confirmed by both the Claimant and Ms Shaw on behalf of the Respondent that there was no requirement for those issues to be amended in any way.

6. The agreed issues the Tribunal will decide are set out below.

1. Unfair dismissal

1.1 What was the reason or principal reason for dismissal? The Respondent says the reason was capability (ill health);

1.2 If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

1.2.1 The Respondent genuinely believed the Claimant was no longer capable of performing their duties;

1.2.2 The Respondent adequately consulted the Claimant;

1.2.3 The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

1.2.4 Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant;

1.2.5 Dismissal was within the range of reasonable responses.

2. Remedy for unfair dismissal

2.1 Does the Claimant wish to be reinstated to their previous employment?

2.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

2.5 What should the terms of the re-engagement order be?

2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.6.1 What financial losses has the dismissal caused the Claimant?

2.6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.6.3 If not, for what period of loss should the Claimant be compensated?

2.6.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.6.5 If so, should the Claimant's compensation be reduced? By how much?

2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.6.7 Did the Respondent or the Claimant unreasonably fail to comply with it?

2.6.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

2.6.9 If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

2.6.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

2.6.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

2.7 What basic award is payable to the Claimant, if any?

2.8 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

3. Discrimination arising from disability (Equality Act 2010 section 15)

3.1 Did the Respondent treat the Claimant unfavourably by: 3.1.1

Dismissing the Claimant

3.2 Did the following things arise in consequence of the Claimant's disability:

3.2.1 Her sickness absence

3.3 Was the unfavourable treatment because of any of those things? / Did the Respondent dismiss the Claimant because of that sickness absence?

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

3.4.1 **[To be set out by Respondent in their amended grounds of resistance]**

3.5 The Tribunal will decide in particular:

3.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 could something less discriminatory have been done instead;

3.5.3 how should the needs of the Claimant and the Respondent be balanced?

3.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

4.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs at the time of the Claimant's dismissal:

4.2.1 A practice of requiring the Claimant to return to work before appropriate, bespoke, footwear (insulated, higher footwear with proscribed insoles) was arranged and/or provided;
4.2.2 A practice of requiring employees to wear standard issue footwear;
4.2.3 A practice of requiring the Claimant to return to work in the same role and working conditions as immediately before her sickness absence;

4.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that she was unable to perform the essential duties of the role when wearing standard issue footwear/ without being provided with bespoke insulated, higher footwear with proscribed soles. The Claimant says without the specialist footwear her symptoms would remain and be exacerbated in work so that she was unable to return to work in her existing role and working conditions (which were cold and wet), and was at risk of having to stay on sick leave and at risk of dismissal.

4.4 Did the lack of an auxiliary aid, namely appropriate footwear (insulated, higher footwear with proscribed soles), put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that she was unable to perform the essential duties of the role when wearing standard issue footwear/ without being provided with bespoke insulated, higher footwear with proscribed soles. The Claimant says without the specialist footwear her symptoms would remain and be exacerbated in work so that she was unable to return to work in her existing role and working conditions (which were cold and wet), and was at risk of having to stay on sick leave and at risk of dismissal.

4.5 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

4.6 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

4.6.1 Order and/or arrange and/or provide the Claimant with the specialist footwear before she was required to return to work;

4.7 Was it reasonable for the Respondent to have to take those steps and when?

4.8 Did the Respondent fail to take those steps?

5. Remedy for discrimination

5.1 Should the Tribunal make a recommendation that the Respondent take

steps to reduce any adverse effect on the Claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the Claimant?

5.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4 If not, for what period of loss should the Claimant be compensated?

5.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

5.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

5.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.9 Did the Respondent or the Claimant unreasonably fail to comply with it?

5.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?

5.11 By what proportion, up to 25%?

5.12 Should interest be awarded? How much?

Evidence

7. The Claimant gave evidence on her own behalf, and also called Ms Gizella Kedzierska to give evidence on her behalf.

8. The Respondent called:

   (i) Mr Ben Harris who, at the material time, was employed by the Respondent as Production Manager;

   (ii) Kath Florence who, at the material time, was employed as Senior HR and Development Officer at the Respondent.

9. All those who gave oral evidence had provided written witness statements.

10. An agreed bundle had been prepared by the Respondent and submitted, together with an index. The bundle ran to 196 pages.

11. In the course of giving her evidence, the Claimant provided responses which represented assertions which had not been included in her written statement. This occurred on two occasions and Ms Shaw applied to introduce additional documentation to deal with this new evidence. The documents were already in the possession of the Claimant. Ms Shaw's applications were not resisted by the Claimant. The Tribunal allowed those documents into evidence (pages 197-217).

12. As already indicated, unless otherwise stated, any page references in this Judgment refer to pages in the bundle and the additional documents.

13. Prior to the commencement of the hearing, Ms Shaw had provided to the Claimant and to the Tribunal a document entitled "Respondent's Skeleton Argument" and a further document entitled "Chronology and cast list".

Submissions

14. At the conclusion of the evidence, Ms Shaw provided oral submissions in addition to her written Skeleton Argument. The Claimant also provided oral submissions to the Tribunal.

Findings of Fact

15. The Respondent is a business which supplies fresh poultry products. Whilst its registered office is in Brackley, Northamptonshire, it operates a site at Abergavenny. The Respondent employs a total of 6,500. At the site at which the Claimant worked, it employs 345.

16. On 2 April 2013, the claimant commenced her employment with the Respondent. She was employed as a Production Operative and her role involved supplying the production line with packaging material.

17. The first reference to concerns with regard to the Claimant's feet was in 2014 when the Claimant complained about the footwear with which she had been issued by the Respondent. In her statement, she referred to them as *"wellies"* and in her oral evidence as *"rubber footwear"*. In any event, the Claimant went to see her GP and asked for a certificate to give to the Respondent which indicated that she needed her footwear to be changed, *"from rubber footwear to work footwear"*. The Claimant confirmed that the *"workplace nurse"* at the Respondent reassured her that adequate footwear would be ordered. The Claimant then received leather ankle shoes*, "like other normal employees"* although the Claimant complained that this footwear was also not helpful as her feet would be very cold during the working day. She also complained about them getting wet.

18. However, the Claimant continued to work and the next reference to the Claimant's physical condition is in 2016 when she went to see her GP because of pain in her spine having been to hospital for X-rays on 8 August 2016.

FIT NOTE – 15 AUGUST 2016

19. The Claimant went to her GP on 15 August 2016 and her GP issued a Statement of Fitness for Work ("Fit Note") on the same day. The GP advised the Claimant that she may be fit for work but on amended duties due to back pain, in particular, sciatica and scoliosis (page 91). This was in contrast to all subsequent Fit Notes produced by the Claimant which confirmed that the Claimant was not fit to work.

20. When the Claimant produced the Fit Note, she accepted in her written statement that the Respondent reacted by putting the Claimant on lighter duties.

21. Whilst the Claimant suggested that the Respondent knew she was disabled from 2016 and made adjustments by putting her on lighter duties, this related to her back condition and not her feet. As stated, the Claimant was only claiming to be disabled due to a condition affecting her feet as opposed to any other condition, such as affecting her back or carpal tunnel syndrome relating to her wrists.

22. The Tribunal noted that, on 2 August 2017, the Claimant attended a hospital in Poland and an ultrasound was undertaken in relation to both knees (pages 98-99).

23. The Claimant then confirms in her statement under "Paragraph 23" that, in February 2018, she went to her doctor due to tightness in her wrist although she does not say which wrist, but that surgery would be required.

24. The Claimant also accepted and the Tribunal found, that in February 2018, she found out that there was a vacancy in the Respondent for a Product Supplier. The Claimant asked her manager whether she could do this type of job and the manager agreed. That role was described by the Claimant as a "*walking type of job,"* carrying items between the production area and the warehouse. The manager agreed to her request and that the Claimant could undertake this role. It was this job that she was undertaking as at July 2018 when she was signed off as unfit to work due to foot pain.

25. Prior to July 2018, no medical reports or medical records were presented to the Tribunal relating to the Claimant's condition affecting her feet. Indeed, in her written statement, under "Paragraph 35", the Claimant states that, *"In July 2018 I have started to get pain in my left foot."*

FIT NOTE – 31 JULY 2018

26. On 31 July 2018, the Claimant obtained a Fit Note from her GP which stated that, as a result of foot pain, the Claimant was not fit for work for a period of two weeks until 13 August 2018. The Claimant presented this Fit Note to the Respondent (page 191). The Claimant's absence from work commenced.

FIT NOTE – 13 AUGUST 2018

27. On 13 August 2018 the Claimant was assessed again by her GP and, again, the GP issued a Fit Note confirming that, due to foot pain, the Claimant was not fit for work until 26 August 2018 (page 192).

28. As a result of her non-attendance at work, the Respondent arranged for the Claimant to attend an appointment with an Occupational Health ("OH") Adviser, namely Ms Margo Baynham.

OH REPORT – 15 AUGUST 2018

29. The OH report of 15 August 2018 (pages 105 to 108) was a detailed report but the Claimant challenged its accuracy. Indeed, it was a feature of her evidence during the first day of the hearing that the Claimant challenged the accuracy of this and all subsequent OH reports to which reference will be made. The Claimant also challenged the accuracy of the GP Fit Notes which she herself would provide to the Respondent and on which the Tribunal found she relied to justify her absence from work. Finally, the Claimant disputed the accuracy of the account set out in the DWP's decision to award the Claimant a standard and enhanced rate of Personal Independence Payment ("PIP") (pages 131 to 137) to which further reference is also made below.

30. This caused the Tribunal considerable concern when assessing the credibility and reliability of the Claimant's evidence. On the second day of the hearing, when the Claimant resumed her evidence, she claimed that she had made mistakes in giving her evidence on the previous day regarding what she had said, for example, in relation to the PIP assessment, as she had found giving evidence stressful. However, the Claimant went on to suggest that, despite providing the Respondent with Fit Notes from her GP stating that she was not fit to work, she maintained in her evidence the exact opposite, and that she was fit to return and all she needed was appropriate footwear. The Tribunal was also unable to place any weight on the evidence of Ms Kedzierska as much of her evidence related to what the Claimant had said to her in respect of

the OH assessments and the Medical Capability Hearing, none of which had been attended by Ms Kedzierska herself.

31. With regard to the OH report of 15 August 2018, it was alleged by the Claimant, both in cross-examination and when asked to confirm the position by the Tribunal that it was, in fact, the Senior HR Adviser at the Respondent, Ms Kath Florence, who drafted the report and not Ms Baynham.

32. In all its deliberations, the Tribunal took into account the fact that this hearing was being conducted with the assistance of interpreters in the Polish language in order to assist the Claimant, but the Claimant was clear in her evidence that she alleged Ms Florence to have fabricated the OH report of 15 August 2018. Despite making such a serious allegation, the Claimant was not in a position to suggest any evidence at all to support it. Furthermore, there is an email from Ms Baynham to Ms Florence of 15 August 2018 (page 104) stating as follows:

> "*Kath*
>
> *I will complete reports on*
>
> *Krystyna Niedzielska – foot pain (order boots? Unsure of her size) perhaps Monika would be kind enough to call her… when ordering boots please consider a prescribed insole, as she has been referred to podiatry and the orthopaedic team for an assessment. It is likely she will remain on the sick – pain scale today being high and (nerve pain)*
>
> *Margo Baynham / Nurse*"

33. The Tribunal found that there was no evidence to support the allegation made by the Claimant and found that the OH report of 15 August 2018 was prepared by the OH Nurse, Ms Baynham.

34. It was also suggested by the Claimant that it was not until 14 March 2023 that she saw the OH report of Ms Baynham of 15 August 2018 for the first time. However, the documentary evidence suggested that this was not the case. It was included in an email from the Respondent's representative to the Claimant of 18 October 2019 (page 200) and those documents were included in a bundle prepared for a preliminary hearing on 24 October 2019. Reference is made in the judgment of Judge Sharp in paragraph 18 of her judgment (top of page 207) to the Claimant arguing about the provision of appropriate footwear as referred to in an email from Ms Baynham of 15 August 2018. Indeed, the Claimant's assertion that she only received sight of the report on 14 March 2023 conflicted with what she had said earlier in her oral evidence when she suggested that it was at a hearing on 16 November 2022 that she was presented with the report.

35. The Tribunal found the Claimant's account was inconsistent and lacked credibility regarding the time at which she became aware of Ms Baynham's report of 15 August 2018. The Tribunal found that, at the latest, it was in October 2019 that she was provided with it.

36. As for the content of the report, the Claimant stated, *"It is as if the report is not about me at all"* and went on to complain that the appointment only lasted ten minutes and she could not accept that such a detailed report could be based on such a short appointment. Taking account of the detail contained in the report, the Tribunal did not accept the Claimant's evidence that the appointment only lasted ten minutes.

37. The Tribunal was satisfied that the content of the OH report accurately reflected not only what Ms Baynham was told by the Claimant on 15 August 2018 but also on what Ms Baynham observed in the course of the consultation and her examination of the case notes. Indeed, on the third page of the report (page 107) it states, *"I have reviewed her case notes…".* The Tribunal was satisfied that the section entitled "*Past history*" (page 106) was based on an

examination of the case notes and listening to the Claimant. The report details not only the fact that the Claimant was experiencing pain in both feet but also that it was painful for her to walk.

38. The Tribunal noted the following in the section *"Past history":*

> "*No family history of hammer toe and does not wear high heels. I advised her this condition is treatable and when she is fit to return back to work she will be fitted and provided with support shoes and any other recommendations made from the orthopaedic specialist.*"

39. Under "*Current Situation"*, Ms Baynham stated:

"Mrs Niedzlelska wants to return to work but at present is experiencing pain In both her feet making it difficult for her to walk or stand for any length of time. She has been advised to wear soft orthopaedic shoes with padded support inside her shoes to support the arches of her feet which she was wearing on the day of the consultation."

40. Consequently, as at 15 August 2018, even with adapted footwear, the Claimant was experiencing pain in both feet and was considered unfit to work.

41. Under *"Recommendations / Opinion"* (page 107), Ms Baynham confirmed that the Claimant was unfit for work and waiting for an appointment with an orthopaedic specialist. She stated *"the Claimant remains unfit for work at this time due to ongoing uncontrolled symptoms"* and that she was, *"unable to offer any actual timeframe as to when she would be fit to return back to work".*

42. The OH report of 15 August 2018, therefore, is consistent with the Fit Notes provided by the Claimant's GP which the Claimant had submitted to the Respondent. The Tribunal was entirely satisfied that it was Ms Baynham who had written the report. There was no motivation for the report to have been fabricated as it was very much in the Respondent's interests for the Claimant to return to work but the assessment led to the conclusion that the Claimant was unfit to return for the foreseeable future.

FIT NOTE – 26 AUGUST 2018

43. On 26 August 2018, the Claimant's GP produced a Fit Note confirming that, due to foot pain, the Claimant was not fit for work (page 193), and this was for a period of one month.

44. On 28 August 2018, her GP wrote indicating that there was a, "*likely diagnosis Morton's neuroma and waits USS and orthopaedic outpatient appointment…*". This was sent to the Claimant and headed *"To whom it may concern"* (page 109).

45. On 17 September 2018, the claimant attended *"the ultrasound office"* in Poland which produced a report (page 110) stating that what they had found, *"could correlate with a neuroma. MRI evaluation required."*

FIT NOTE – 26 SEPTEMBER 2018

46. On 26 September 2018, the Claimant received a further Fit Note from her GP confirming that, due to foot pain the Claimant was not fit for work for one month. In the comments section of the Fit Note, there is reference to Morton's neuroma.

OH REPORT – 11 OCTOBER 2018

47. On 11 October 2018, the Claimant attended a second OH assessment (pages 111-113). On this and all subsequent occasions, the OH Adviser was Mr Matt Thomason. Once again, the Claimant took issue with the accuracy of what was said by Mr Thomason. However, an

interpreter was present and the report records the Claimant telling Mr Thomason that she had been diagnosed with Morton's neuroma and that this can cause severe pain.

48. Under the section headed *"**Fitness to work"**,* Mr Thomason stated as follows:

> "*Following my assessment with Mrs Niedzielska today I advise she remains unfit for work at this time and it is clear her symptoms need to resolve prior to her returning to a role that predominantly involves standing most of the shift in a cold environment.*
>
> *When she is able to return to work I advise she be provided with appropriate footwear that will give her appropriate support, comfort and warmth.*"

49. Indeed, in her oral evidence, the Claimant confirmed, *"I was told that if I got better the company would have to get me comfortable shoes."*

50. Nevertheless, the Claimant went on to say that, *"every report says I am not fit when what nurse is saying is untrue."*

51. The Claimant maintained that the GP had misdiagnosed the presence of Morton's neuroma and that if a correct diagnosis had been made, she would have been able to come back to work earlier with painkillers being prescribed as opposed to anti-inflammatory medication.

52. However, on 31 October 2013, the Claimant attended hospital for an ultrasound administered by a Dr Dafydd who concluded as follows:

> *"ULTRASOUND LEFT FOREFOOT*
>
> *There is a one cm Morton's neuroma in the 2nd interspace, in keeping with the patient's symptoms."*

53. On 15 November 2018, the Claimant attended hospital for surgery to alleviate her carpal tunnel syndrome in her right wrist and, in a letter from the hospital of 29 November 2018 (page 117), it confirms that this had been successful and that the consultant had consented to the Claimant undergoing the same procedure on her left wrist.

FIT NOTE – 26 NOVEMBER 2018

54. On 26 November 2018, the Claimant attended her GP for an assessment and received a fit note confirming that she was unfit for work for a further month due to foot pain which was described as Morton's neuroma but was referred to Orthopaedics (page 195).

55. Having been referred to Dr Gafin Morgan at Prince Charles Hospital, Mr Morgan wrote to the Claimant's GP on 19 December 2018 (page 120) confirming that, in fact, there was no evidence of any neuroma and indicated proposed future treatment, stating that the condition would not prevent her from working again in the future.

FIT NOTE – 27 DECEMBER 2018

56. Nevertheless, the Claimant provided the Respondent with a Fit Note from her GP based on an assessment on 27 December 2018 which stated that, because of Morton's neuroma, the Claimant was not fit for work for 28 days.

OH REPORT – 10 JANUARY 2019

57. On 10 January 2019, the Claimant was assessed again by the OH Adviser, Mr Thomason. An interpreter was present. Once again, the Claimant disputed the accuracy of the report (pages 122-123).

58. The report records the Claimant telling Mr Thomason that she continued to have pain and discomfort in her left and right feet, that she had a steroid injection in her left foot prior to Christmas which had not helped, and that she was due to attend an orthopaedic podiatry clinic on 15 January 2019. There is a report of that visit (page 124) and therefore the Tribunal was satisfied that this information was provided to Mr Thomason by the Claimant on 10 January 2019 and that the content of his report accurately reflects what was said to him by the Claimant on that occasion. It also referred to the Claimant showing Mr Thomason the scar of her right wrist relating to her carpal tunnel surgery in 2018, which is again accurate.

59. In his conclusion, Mr Thomason states that, in his opinion, the Claimant remained unfit for work, referring to two health issues, namely her feet and her wrist and that he would like to assess her again in four to five weeks' time.

60. As stated, on 15 January 2019, the Claimant was seen by Mr Morgan at the Orthopaedic Department of Prince Charles Hospital where there is reference to the Claimant suffering pain from what Mr Morgan believed was linked to her ongoing spinal problems. There is reference to pain in her left foot and reference to pain in her right foot as well. He confirmed that the diagnosis of a neuroma from a sonographer in Poland was incorrect.

FIT NOTES – 24 & 25 JANUARY 2019

61. Nevertheless, there are Fit Notes based on assessments with the GP on 24 and 25 January 2019 (pages 126 and 125) which confirm that the GP considered that, due to foot pain, the Claimant was not fit for work until 24 January 2019 and 7 February 2019 respectively. Despite the fact that both Fit Notes state clearly that, in the GP's opinion, the Claimant was not fit for work, in her oral evidence, the Claimant maintained that the GP does not say that she is not fit for work. The Tribunal rejected the Claimant's evidence, particularly as, at the time, she had provided the Fit Notes to the Respondent and had therefore relied on them.

62. Due to the Claimant's ongoing absence from work, the Respondent wrote to the Claimant on 28 January 2019, the Claimant having submitted those GP Fit Notes, asking her to attend another OH assessment.

OH REPORT – 7 FEBRUARY 2019

63. This assessment took place on 7 February 2019 with the OH Adviser, Mr Thomason, and he produced a report (pages 128-129).

64. Whilst the Claimant again disputed its accuracy, the Tribunal was satisfied that it reflected what was said by the Claimant to Mr Thomason. In reaching this finding, the Tribunal noted that an interpreter was present and that there was detail contained in the report which was accurate. This included such information as the misdiagnosis of Morton's neuroma, the date of an appointment with the orthopaedic surgeon and that the Claimant would be travelling to Poland for a further MRI scan on her feet. Consequently, the Claimant complained of pain in both her feet which had not improved and that she said to Mr Thomason, *"She gets days when the pain is very severe."*

65. Mr Thomason concludes that the Claimant continued to remain unfit for work. The Claimant made much of the fact that, even though she gave written consent to Mr Thomason to write to her GP for further information, Mr Thomason had failed to do so. However, Mr Thomason says in his report that he would not write to her GP until the end of February 2019 as this would post-date her orthopaedic appointment on 25 February 2019.

FIT NOTE – 21 FEBRUARY 2019

66. On 21 February 2019, the Claimant attended a further assessment with her GP who provided her with a Fit Note, which she in turn provided to the Respondent. The Fit Note confirmed that she was not fit to work for 21 days as a result of both foot pain and back pain.

67. It was suggested by the Claimant that, at the OH assessment, she discussed with Mr Thomason if she could go back to work. She claims to have said that she could go back and that, *"I was in very good condition back then"* but the Tribunal did not accept her evidence and again found that the content of the OH report was an accurate reflection of what was discussed. It was also not consistent with the Claimant submitting 14 days later, and therefore relying on, a Fit Note from her GP stating she was not fit to return to work.

PERSONAL INDEPENDENCE PAYMENT ("PIP") AWARD – 26 FEBRUARY 2019

68. On 26 February 2019 the Department for Work and Pensions wrote to the Claimant with the outcome of her claim for a PIP.

69. The outcome was that the Claimant was awarded a PIP at the standard rate of £57.30 per week from 2 November 2018 to 10 February 2023 and an enhanced rate of £59.75 a week to help with her mobility needs from 2 November 2018 to 10 February 2023.

70. In justifying this decision, the person awarding the amounts, Mr Kane, provided a description of what had been said to him by the Claimant (pages 133-134). Indeed, Mr Kane states that he had looked at all the information available to him, including the "*How your disability affects you"* form (page 132) although the Tribunal was not shown that form. It was understood that the assessment had taken place at the beginning of December 2018 although that is not clear from the letter. In particular, under the heading, "Moving around", it states, "You can stand and then move more than 1 metre but no more than 20 metres either aided or unaided" (page 133). Under this heading, the Claimant scored 12 out of 12. In the explanatory notes, Mr Kane explains that, if the total scores for the daily living activities and mobility activities are between 8 and 11, the Claimant would be awarded the standard rate. This is what was awarded to the Claimant for her daily living activities. However, if the score is 12 or more, the Claimant would be awarded an enhanced rate and this is what she was awarded in respect of her mobility activities.

71. In the second paragraph of the Claimant's account (page 134) refers to substantial physical restriction in movement, for example, "*You were seen to walk aided with a normal gait at a very slow pace and to sit and stand with difficulty."*

72. When standing on tiptoes and balancing on one foot, *"You were seen to be in pain on doing this and needing to use furniture for support."*

73. As stated above, in the course of her evidence given on 11 April 2023, the Claimant stated that she did apply for a PIP but related this to problems with her spine and not her feet and that, *"I was walking fine".* She denied having the problems outlined in the PIP report and said that she did not know what exercise they were referring to and that it was not true. She also denied that she was on strong painkillers saying, *"I don't know why they wrote that".* However, there was no evidence to suggest that the Claimant challenged the findings of Mr Kane at the time she received the letter at the end of February 2019.

74. She also maintained that her GP had misdiagnosed her condition.

75. As has already been indicated above, in resuming her evidence on 12 April 2023, the Claimant suggested to the Tribunal that, in challenging the accuracy of the content of the Fit Notes from the GP, the PIP report, the treating consultant and the OH advisers, she had made a mistake and wished to correct herself and that the assessment for PIP had been on 4 December 2018 and before surgery to her right hand and also she had been diagnosed with Morton's neuroma by her GP which was incorrect.

76. However, whilst the Tribunal took account of the Claimant's explanation with regard to the misdiagnosis, it did not alter the fact that, whether or not it was as a result of Morton's neuroma, the GP had concluded that the Claimant was not fit for work as a result of foot pain and this would have been based on the description provided by the Claimant to the GP. The same applied to the description applied to Mr Kane at the DWP for the purposes of the PIP claim.

77. On 25 February 2019, the Claimant attended for an MRI in Poland and the results are contained in a letter from the physician dated 28 February 2019 (pages 140-141). It was confirmed that there were degenerative changes which were described as moderate but *"no evident changes typical for Morton's neuroma were visualised."*

FIT NOTE – 14 MARCH 2019

78. Nevertheless, on 14 March 2019, the Claimant attended an assessment by her GP who, once again, advised the Claimant that she was not fit for work for 21 days. Of particular note is the description of the condition which led the GP to that conclusion namely *"? Arthritis. Foot pain high severity".*

OH REPORT – 20 MARCH 2019

79. On 20 March 2019, the Claimant attended another assessment by OH Adviser Mr Thomason.

80. Once again, the Claimant alleged that the content of the report prepared by Mr Thomason on the assessment carried out on 20 March 2019 was not accurate. She maintained that she did not say anything to Mr Thomason about anything being wrong with her right foot nor that she was getting pain and discomfort in her left foot. However, this was only seven days after a Fit Note from her GP describing her foot pain as *"high severity".* The Claimant suggested that this must have been based on a conversation between her GP and the orthopaedic specialist back in December 2018 but the Tribunal did not find such an explanation to be plausible.

81. Furthermore, the Claimant maintained that, with the symptoms she was experiencing at the time, she could have gone back to work. However, the Tribunal found that, at no stage, did she say to either her GP or the OH adviser that she was fit to return. Indeed, there was no indication from the GP in the Fit Note that he was suggesting that the Claimant could return to work on a phased basis, or amended duties, or with workplace adaptations. It simply states that the Claimant was not fit for work.

82. This was consistent with the conclusion reached by Mr Thomason a week later where he describes the current position as the Claimant continuing to have pain and discomfort in both feet, also pain in the upper spine and neck area, the cervical region, and that she was awaiting surgery on her left wrist in which she experienced constant pain as well as complaining of pain in her right wrist. Mr Thomason illustrates an awareness of the Claimant's history in that he stated that he was not sure whether the ongoing pain in the Claimant's right wrist was a left-over symptom from her recent surgery.

83. In the OH report, Mr Thomason stated:

> *"Following my assessment with Mrs Niedzielska today I advise she continues to remain unfit for all work. Given her multiple musculoskeletal issues with her spine, hands and feet I do not anticipate a return to work within the next six months."*

84. The Claimant disagreed with what Mr Thomason was saying and maintained, for example, that she made no comment regarding her spine at all but the Tribunal rejected the Claimant's evidence. It was suggested in questions put by the Claimant to Ms Florence that Mr Thomason had deliberately withheld information from his reports regarding the Claimant receiving physiotherapy but, again, there was no evidence to support such an allegation.

85. For the reasons outlined above, the Tribunal was satisfied that the report is an accurate reflection of what was discussed between the Claimant and Mr Thomason on 20 March 2019.

86. On 2 April 2019, the Respondent wrote to the Claimant inviting her to a Medical Capability Hearing. The letter confirmed that the purpose of the hearing was to discuss the Claimant's long-term absence from work, the Claimant having been on long-term sick since 31 July 2018 with pain in her feet and there is also reference to pain being experienced in her spine and neck area.

87. The letter is written by Mr Ben Harris who subsequently conducted the hearing.

88. Whilst it was denied by the Claimant that the letter made any reference to the possibility that the Claimant's employment may be terminated, in line with the Absence Policy on medical capability grounds, there is a clear warning to that effect in the letter (page 147).

89. The Company's Absence Policy (pages 68-85) described long-term absence as any consecutive period of absence over four weeks in duration.

90. In the Absence Policy, there is a recognition of the Respondent's obligation and duty to make reasonable adjustments in order to prevent an employee such as the Claimant being placed at substantial disadvantage.

91. At section 12, it states:

> "*The Company will work with employees over a period of time, in conjunction with Occupational Health to support them in their recovery and aims to facilitate a full return to work where possible. Unfortunately, whilst it is impossible to specify a timescale, the Company recognises that they will reach a point when it will become apparent that it is in the interest of both the employee and the Company to take the decision to terminate employment on the grounds of ill-health. This will be considered as a last resort where it is felt, in the opinion of a medical professional that an employee will be unable to return to work in a reasonable timescale."*

92. At section 13 of the Absence Policy (page 83), the procedure to be followed in respect of a Medical Capability Hearing is set out.

FIT NOTE – 8 APRIL 2019

93. On 4 April 2019, the Claimant was assessed by the GP for her fitness to work. Once again, by a Fit Note dated 8 April 2019 (page 150) submitted by the Claimant to the Respondent, the GP confirmed that the Claimant was not fit to work due to "*foot pain"* and *"a/w carpal tunnel surgery also".*

MEDICAL CAPABILITY HEARING – 9 APRIL 2019

94. The hearing was conducted by the Production Manager, Ben Harris, who gave evidence to the Tribunal. The Tribunal found Mr Harris to be a credible and reliable witness. Mr Harris confirmed, and the Tribunal found, that, at this site and other sites, he had worked with a number of other employees with disabilities. Indeed, this was not challenged.

95. He stated that, prior to the hearing on 9 April 2019, he had considered the OH report of Mr Thomason of 20 March 2019 and noted the conclusion that had been reached, namely that a return to work within the next six months was not anticipated nor was a further review indicated due to the number of multiple health issues that may require surgical intervention. Mr Harris had also considered the previous OH reports and the GP Fit Notes, all stating that the Claimant was unfit to work and, in respect of the most recent OH report, it indicated that the Claimant's symptoms were deteriorating.

96. The Claimant attended the hearing with a colleague who acted as her translator. Ms Florence also attended.

97. Mr Harris stated that, taking account of all that he had read, having listened to what had been said in the course of the hearing, and taking account of the amount of time the Claimant had already been on the sick and that she was likely to be unfit to work for the foreseeable future, he reached the conclusion there was no alterative but to dismiss the Claimant on health grounds.

98. Mr Harris discussed with the Claimant at the hearing whether she was fit to work or whether any accommodations could be made and there was nothing positive in that conversation about the Claimant being able to return to work.

99. Whilst it was confirmed that the OH Adviser had not contacted the Claimant's GP, he based his decision on the OH report.

100. The Claimant had suggested that she was considered by Mr Harris to be an excellent employee. Mr Harris stated that he had little recollection of the Claimant but that he was happy to confirm that he had heard nothing negative regarding the Claimant's performance. Mr Harris also stated that, during the time the Claimant had been absent, the Company had been required to recruit agency staff. When it was put to Mr Harris that someone other than an agency worker had taken the Claimant's place, Mr Harris confirmed this may be the case but it meant that, in turn, an agency worker would have had to have substituted for the person who had taken on the Claimant's duties.

101. The Tribunal accepted Mr Harris's evidence when he described the decision to dismiss the Claimant as a difficult one to make and it was in this context that he stated that if she did become well enough at any stage in the future to return, they would certainly consider an application from her. He also confirmed that he did not know of any other case where, in light of all the evidence before him, he would then decide to go to yet another specialist for a report.

102. Mr Harris did not accept that the Respondent did little or nothing to help the Claimant back to work. There were numerous conversations with Occupational Health about what could be done to enable a return. The purchase of boots or alternative footwear was easily done but only when the Claimant indicated that she was fit to return. However, the Claimant kept putting in Fit Notes from her GP confirming that she was unfit to work and this was supported by the conclusions reached by the OH Advisers.

103. The Tribunal accepted the evidence of Mr Harris with regard to the Respondent's preparedness to obtain appropriate footwear only when it was known that the Claimant was fit to return to work. The same applied to a phased return. The Tribunal took into consideration, when reaching such a finding, the examples of such arrangements and adjustments being made in respect of other employees (pages 97A, 171-173)

104. It was suggested by the Claimant that she should have been afforded the same opportunity as those other employees for a phased return to work but, unlike those other employees, the Claimant had continued to submit Fit Notes from her GP stating that she was not fit to work. By contrast, for example, the employee who is the subject of the email on 25 January 2017 (page 97A) was someone whose orthopaedic specialist had confirmed was happy for him to return back to work.

105. It was disputed by Mr Harris that the Claimant had said at the hearing on 9 April 2019 that she was fit to work and that all that she needed was appropriate footwear. The Tribunal accepted the evidence of Mr Harris and found that the provision of boots was not discussed. Indeed Mr Harris stated that if it was just a matter of boots to be provided, *"that would have been a very easy solution to sort out".*

106. Mr Harris denied that he had formed any opinion prior to the meeting. The Tribunal accepted his evidence that by far the most advantageous solution for the Respondent would be for the Claimant to return to work. Mr Harris had said that he was not aware of anything negative regarding the Claimant as an employee, and her return to work would avoid the need to recruit and train a replacement.

107. Finally, Mr Harris confirmed, and the Tribunal found, that he discussed with the Claimant the most recent OH report and that the Claimant did not raise any issues with its content and she confirmed that she was currently not fit to work. Again, Mr Harris did not accept that the Claimant had said that she was fit for work and all that was needed was some appropriate footwear.

108. The notes, albeit very brief, confirm the substantive matters discussed (page 152). It refers to the Claimant having, *"been to Poland for tests no 100% decision not back to work".* It also confirmed Mr Harris indicating that the Respondent would terminate her employment on medical grounds and *"when fit to work would welcome application".*

109. At the meeting, there was a discussion about whether there were any reasonable adjustments that could be made depending on whether she was fit to work. However, Mr Harris was getting very little back from the Claimant who gave no indication that she was fit to return.

110. By a letter incorrectly dated 2 April 2019 (page 148) Mr Harris wrote to the Claimant confirming his decision and the reasons for reaching such a decision. The Claimant was informed that she had a right of appeal but that she should write to HR within five days. The Tribunal accepted Mr Harris's evidence when he stated that the misdating of the letter did not suggest that he had reached any decisions before the meeting on 9 April 2019 and that it was simply a typographical error.

111. It was not until 23 April 2019 that the Claimant wrote to the HR team indicating her desire to appeal against the decision (page 151) but, despite being out of time, the Respondent sent a letter dated 8 May 2019 (page 156), setting out a detailed response to the points raised in the Claimant's email. Ms Florence confirmed that, as the appeal letter had been received out of time, the Respondent did not consider holding an appeal but just provided a full response to the Claimant's submissions having consulted with her Line Manager, Gerry O'Neill.

112. It was confirmed by Ms Florence that, when it was known that the Claimant was not fit to return to work, there would be no point in ordering boots or alternative footwear because there was no guarantee of when and if the Claimant was going to return to work.

The Law

Unfair Dismissal

113. By virtue of section 94 of the Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by his employer. In respect of what constitutes an unfair dismissal the relevant law is to be found within section 98 of the ERA 1996.

114. Section 98(1) requires that in deciding whether a dismissal was unfair it is for the employer to show the reason for that dismissal. That reason must fall within a list of potentially fair reasons to be found within Section 98(2) of which subsection (2)(a) states:

"A reason falls within this subsection if it –

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

115. Section 98(3) of the ERA 1996 further defines 'capability' as being assessed by reference to an employee's "*skill, aptitude, health or any other mental or physical quality."*

116. Section 98(4) of ERA 1996 requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for one of the reasons in section 98(2).

Discrimination arising from a disability

117. Section 15 of the EqA 2010 defines discrimination arising from a disability as follows:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

118. In accordance with guidance from Langstaff J in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14, there are two distinct steps to the test:

a. did the Claimant's disability cause, have the consequence of, or result in "something"?
b. did the Respondent treat the Claimant unfavourably because of that "something"?

119. The principles in relation to unfavourable treatment and justification in claims under section 19 EqA apply to claims under section 15.

Burden of Proof

120. Statutory provision is now made by Section 136 EQA:

> 136 Burden of proof
>
> (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.
> But subsection (2) does not apply if A shows that A did not contravene the provision.

121. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. The guidance may be summarised in two stages: (a) the Claimant must establish on the totality of the evidence, on the balance of probabilities, facts from which the Tribunal 'could conclude in the absence of an adequate explanation' that the Respondent had discriminated against her. This means that there must be a 'prima facie case' of discrimination including less favourable treatment than a comparator (actual or hypothetical) with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was because of the protected characteristic; (b) if this is established, the Respondent must prove that the less favourable treatment was in no sense whatsoever because of the protected characteristic.

122. It was also said by Mummery LJ in Madarassy:

"The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case."

123. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: **Nagarajan v London Regional Transport** [1999] IRLR 572

124. The tribunal's focus "must at all times be the question whether or not they can properly and fairly infer... discrimination.": **Laing v Manchester City Council**, EAT at paragraph 75.

125. In considering what inferences can be drawn, tribunals must adopt a holistic approach, by stepping back and looking at all the facts in the round, and not focussing only on the detail of the various individual acts of discrimination. We must "see both the wood and the trees": **Fraser v University of Leicester** UKEAT/0155/13 at paragraph 79.

Failure to make reasonable adjustments

126. Section 20 sets out the duties to make reasonable adjustments in respect of disabled persons.

127. So far as relevant, section 20 states:

(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 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.

128. Schedule 8 to the EqA 2010 provides more details as to the duty to make reasonable adjustments. In addition, section 212 EqA 2010 defines "substantial" as "*more than minor or trivial."*

129. If a person fails to comply with the duty to make reasonable adjustments, that person discriminates against the disabled person (per section 21 EqA 2010).

130. Whether adjustments are reasonable is a fact-sensitive question. The test of reasonableness is objective and to be determined by the tribunal: *Smith v Churchill's Stairlifts plc* [2006] IRLR 41.

131. There is no objective justification defence available under this head of claim. The proposed adjustments were either reasonable or they were not. The EHRC Code states at para. 6.28 that the following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

a. whether taking any particular steps would be effective in preventing the substantial disadvantage;
b. the practicability of the step;
c. the financial and other costs of making the adjustment and the extent of any disruption caused;
d. the extent of the employer's financial or other resources;
e. the availability to the employer of financial or other assistance to help make the adjustment; and

f. the type and size of the employer.

132. The Code goes on at para. 6.29 to state that "*ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case*".

Analysis and Conclusions

133. Addressing each issue in turn, the Tribunal has carried out an analysis of the facts and, applying the legal framework, has reached the following conclusions.

1 Unfair dismissal

1.1 **What was the reason or principal reason for dismissal? The Respondent says the reason was capability (ill health);**

1.2 If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

1.2.1 The Respondent genuinely believed the Claimant was no longer capable of performing their duties;

1.2.2 The Respondent adequately consulted the Claimant;

1.2.3 The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

1.2.4 Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant;

1.2.5 Dismissal was within the range of reasonable responses.

134. On the basis of its findings of fact, the Tribunal was satisfied that the reason for dismissal was capability based on the Claimant's long-term absence from work due to ill-health with no indication of when the Claimant may be fit enough to return to work.

135. The Tribunal was also satisfied that the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant.

136. The Respondent genuinely believed the Claimant was no longer capable of performing her duties for the foreseeable future. In support of that belief, the Respondent had consulted with the Claimant through OH assessments on 15 August 2018, 11 October 2018, 10 January 2019, 7 February 2019 and 20 March 2019.

137. Whilst the Claimant had suggested that all of those OH reports were inaccurate, and had even made an allegation that the initial report of 15 August 2018 had been fabricated by Ms Florence, the Tribunal was satisfied that the Respondent was entitled to rely on the OH reports, all of which concluded that the Claimant was not fit to return to work.

138. Furthermore, in the most recent OH report of 20 March 2019, the opinion provided by Mr Thomason was that the Claimant would not be fit to work for at least a further six months.

139. The OH reports were consistent with the Fit Notes from the Claimant's GP which the Claimant herself would have provided to the Respondent. Therefore, it was entirely understandable that

the Respondent would place reliance on Fit Notes on which, in turn, the Claimant herself relied to justify her absence from work.

140. The Tribunal noted that only seven days before the OH report of 20 March 2019 which led to the invitation from the Respondent to the Claimant to attend the Medical Capability hearing on 9 April 2019, the Claimant had submitted a Fit Note from her GP dated 14 March 2019 which again advised her that she was not fit for work based on *"? Arthritis. Foot pain high severity".*

141. The day before the Medical Capability hearing on 9 April 2019, the Claimant submitted a Fit Note from her GP dated 8 April 2019 stating that she was not fit for work as a result of foot pain and that this would be the case for one month. It also stated that the Claimant was awaiting carpal tunnel surgery which is again consistent with what is said by Mr Thomason in his report of 20 March 2019 and his reference to the prospect of future surgery.

142. Whilst not directly relevant to the Respondent's decision, the Tribunal noted that on 14 June 2019, the Claimant met the eligibility criteria for a support group which meant her health issues were so severe that the DWP considered it unreasonable to expect her to look for work. This is in conflict with the Claimant's suggestion that, had she been provided with appropriate footwear, she would have been able to return to work.

143. The Tribunal was satisfied that the Respondent had carried out a reasonable investigation. The up-to-date medical position had been known to Mr Harris when he had reached his decision in the form of the Fit Notes of 14 March 2019 and 8 April 2019 together with the OH report of 20 March 2019.

144. It was suggested by the Claimant that there had been a misdiagnosis of her condition and that, had there been a correct diagnosis, the appropriate medication would have been administered to her which may have enabled her to have returned to work more quickly. However, the Tribunal did not consider that the Respondent could be held responsible for any misdiagnosis which may have occurred relating to whether or not the Claimant suffered from Morton's neuroma. The decision was taken by Mr Harris on the basis of the information available to him and he had before him evidence of ongoing foot pain and, indeed, other physical conditions which, in the opinions of the OH advisors and the Claimant's GP, rendered the Claimant unfit to work.

145. The Tribunal concluded that it would not be reasonable to expect the Respondent to wait longer before dismissing the Claimant. It may be that another employer may have been prepared to wait longer. However, it was not unreasonable for the Respondent to base its decision on the fact that the Claimant went on sick leave on 31 July 2018 and had remained absent from work until her dismissal on 9 April 2019, the evidence suggesting that the Claimant would not be able to return to work for up to a further six months.

146. The Tribunal was satisfied that the Respondent genuinely believed that the Claimant was not capable of carrying out her employment, that such a belief followed consultations with the Claimant via Occupational Health, and that the OH reports, together with the numerous GP Fit Notes submitted by the Claimant herself, represented an appropriate level of investigation prior to Mr Harris reaching his decision on 9 April 2019.

147. In all the circumstances, the Tribunal concluded that the Respondent's decision to dismiss the Claimant on the grounds of capability fell within the range of reasonable responses.

148. As to the fairness of the procedure followed, the Tribunal noted that the Claimant had been invited to a Medical Capability Hearing by letter of 2 April 2019 and that, whilst denied by the Claimant, the letter contained an indication of the possible outcome of dismissal. She attended and was assisted by an interpreter who was a work colleague and was able to state her position.

149. In relation to the appeal, the Tribunal accepted that the letter from the Claimant was out of time but, nevertheless, the Respondent had provided a full written response, answering each of the points raised by the Claimant. As for not holding an appeal hearing, the Tribunal took account of Ms Shaw's reference to the guidance contained in Holmes v Qinetiq Ltd UKEAT/0206/15/BA. The Respondent was not required to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures as there was no suggestion that the Claimant's conduct or performance gave rise to a disciplinary situation or involved culpable conduct. The Tribunal therefore found the dismissal procedurally fair.

150. The Claimant's claim of unfair dismissal is therefore dismissed.

Discrimination Arising from Disability

3. Discrimination arising from disability (Equality Act 2010 section 15)

3.1 Did the Respondent treat the Claimant unfavourably by:

3.1.1 Dismissing the Claimant

3.2 Did the following things arise in consequence of the Claimant's disability:

3.2.1 Her sickness absence

3.3 Was the unfavourable treatment because of any of those things? / Did the Respondent dismiss the Claimant because of that sickness absence?

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

3.4.1 [To be set out by Respondent in their amended grounds of resistance]

3.5 The Tribunal will decide in particular:

3.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 could something less discriminatory have been done instead;

3.5.3 how should the needs of the Claimant and the Respondent be balanced?

3.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

151. It was accepted by the Respondent that the decision to dismiss the Claimant meant that it had treated the Claimant unfavourably. It was also accepted by the Respondent that it dismissed the Claimant in consequence of her disability in that it was as a result of her sickness absence.

152. However, it was maintained by the Respondent that the Claimant's dismissal was a proportionate means of achieving a legitimate aim.

153. The legitimate aim was particularlised in the Respondent's amended grounds of response dated 15 December 2022 (page 52), namely the management of staff absence and ensuring that the tasks the Claimant was employed to do were completed.

154. At the time of the Claimant's dismissal, she had been absent for over eight months. The Respondent had been entitled to rely on medical evidence which indicated that there was no realistic prospect of the Claimant returning to work for a further six months. The Respondent had taken account of its Absence Policy where it states that *"absence due to sickness is a matter of concern for the Company, as it impacts upon the operational effectiveness and overall success of that business."* (Page 70).

155. The Tribunal was satisfied that the Respondent had reached the conclusion that it was necessary for someone to undertake the Claimant's role on a permanent basis as opposed to moving staff around to accommodate the Claimant's absence and which also included the employment of agency staff at additional cost. Whilst that is not an exclusively decisive factor, the Tribunal had taken account of all the circumstances and concluded that managing staff absence and ensuring that the tasks the Claimant was employed to do were completed were legitimate aims. It had further concluded that the dismissal of the Claimant was a proportionate means of achieving those aims. The impact of the absence on the employer would be a significant factor and employers were entitled to some finality. The Tribunal was satisfied that those aims could not be achieved by less discriminatory measures.

156. The Claimant's claim of discrimination arising out of her disability is therefore not well-founded and is dismissed.

Reasonable Adjustments

4. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

4.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs at the time of the Claimant's dismissal:

4.2.1 A practice of requiring the Claimant to return to work before appropriate, bespoke, footwear (insulated, higher footwear with proscribed insoles) was arranged and/or provided;

4.2.2 A practice of requiring employees to wear standard issue footwear;

4.2.3 A practice of requiring the Claimant to return to work in the same role and working conditions as immediately before her sickness absence;

4.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that she was unable to perform the essential duties of the role when wearing standard issue footwear/ without being provided with bespoke insulated, higher footwear with proscribed soles. The Claimant says without the specialist footwear her symptoms would remain and be exacerbated in work so that she was unable to return to work in her existing role and working conditions (which were cold and wet), and was at risk of having to stay on sick leave and at risk of dismissal.

4.4 Did the lack of an auxiliary aid, namely appropriate footwear (insulated, higher footwear with proscribed soles), put the Claimant at a substantial disadvantage

compared to someone without the Claimant's disability, in that she was unable to perform the essential duties of the role when wearing standard issue footwear/ without being provided with bespoke insulated, higher footwear with proscribed soles. The Claimant says without the specialist footwear her symptoms would remain and be exacerbated in work so that she was unable to return to work in her existing role and working conditions (which were cold and wet), and was at risk of having to stay on sick leave and at risk of dismissal.

4.5 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

4.6 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

4.6.1 Order and/or arrange and/or provide the Claimant with the specialist footwear before she was required to return to work;

4.7 Was it reasonable for the Respondent to have to take those steps and when?

4.8 Did the Respondent fail to take those steps?

157. It was accepted that the Respondent knew that the Claimant had the disability of a foot condition throughout the material time.

158. The PCPs suggested by the Claimant set out at paragraph 4.2 above were rejected by the Respondent.

159. Under paragraph 4.2.1, it was not the practice of the Respondent to require the Claimant or any other employee to return to work before appropriate footwear was arranged and/or provided.

160. There is ample evidence to support such a finding. In the OH report of Ms Baynham under Past History (page 106), it states: "*I advised her this condition is treatable and when she is fit to return back to work she will be fitted and provided with support shoes and any other recommendations made from the orthopaedic specialist.*"

161. On 11 October 2018, Mr Thomason states, "*When she is able to return to work I advise she be provided with appropriate footwear that will give her appropriate support, comfort and warmth."* (page 112).

162. The Tribunal is satisfied that the Respondent would have supplied appropriate footwear if and when there had been a prospect of the Claimant being declared fit to return to work but the GP Fit Notes and Occupational Health reports were all clear that she was not fit to return.

163. As for paragraph 4.2.2 and the claim that it was the Respondent's practice to require employees to wear standard issue footwear, again the evidence simply did not support the Claimant assertion that this was a PCP.

164. First, back in 2014, the Claimant had indicated that the wellies that had been given to her to wear in the course of her work were found by her to be inappropriate and the Respondent had duly arranged for a change of footwear for her.

165. Secondly, the Respondent had provided evidence of three other employees who required different footwear because of their particular condition and this illustrated clearly that the Respondent did not require employees to wear standard issue footwear.

166. The Tribunal considered paragraph 4.2.3 and the assertion that it was the Respondent's practice to require the Claimant to return to work in the same role and working conditions as immediately before her sickness absence. The Tribunal concluded that there was no evidence to support the fact that this was a PCP imposed by the Respondent. Indeed, the evidence is quite the reverse and related to the Claimant herself.

167. The Claimant confirmed in her written and oral evidence that, in 2016, she went to her GP when she was experiencing pain in her spine. The GP issued a Fit Note on 15 August 2016 (page 91) which indicated that the Claimant may be fit for work if she were put on amended duties. An OH adviser was also provided with the Fit Note. The OH adviser spoke with the Claimant's manager and she was given different type of work which did not give her pain.

168. In the Claimant's own evidence, she confirmed that, in February 2018, she asked her manager if she was able to change her role and such a change was accommodated.

169. These were illustrations of the Respondent's preparedness to respond to a request from an employee to be placed on lighter, and different, duties even though the changes were implemented for reasons not related to her disability affecting her feet.

170. Further, the Tribunal had accepted Mr Harris's evidence and had found that it would have been normal practice and straightforward for the Respondent to have made arrangements for appropriate bespoke footwear to be arranged and provided to the Claimant if it had been concluded that she was fit to return to work subject to such footwear being made available to her. The Tribunal had concluded, based on Mr Harris's evidence, that the Respondent would have considered any adjustment in order to accommodate the Claimant as it was clearly in the Respondent's interests for the Claimant to return to work but both the GP Fit Notes and the OH reports confirmed that the Claimant was not fit to return in any capacity. As Mr Thomason said in his report of 20 March 2019, *"I advise she continues to remain unfit for all work."* (page 145)

171. Even had the Tribunal found that the Respondent applied the PCP's as alleged by the Claimant, it did not find that this would have put the Claimant at a substantial disadvantage. As stated, the evidence before Mr Harris in the form of her GP Fit Notes which had been provided by the Claimant and on which she therefore relied, and the OH reports, the most recent of which on 20 March 2019 was not disputed by the Claimant at the time, meant that the Claimant was not fit to return in any capacity. Therefore the Claimant could not have been significantly disadvantaged in that, even if an adjustment could have been made, due to the Claimant's inability to return in any capacity, it would not have been effective in removing or reducing that disadvantage.

172. Simply by ordering appropriate and bespoke footwear when the medical evidence says the Claimant was not fit to return would not have avoided the disadvantage. Bearing in mind that the disability related to the foot condition, the GP Fit Notes, the OH report of 20 March 2019 and the PIP assessment all give no indication at all that any type of footwear would have enabled the claimant to return to work.

173. For these reasons, the Claimant's claim that the Respondent failed to make reasonable adjustments is not well-founded and is dismissed.

Employment Judge R Havard
Dated: 12 May 2023

JUDGMENT SENT TO THE PARTIES ON 15 May 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche