Case No: 1302311/2019

EMPLOYMENT TRIBUNALS

Claimant: Mrs Toni Ellis

Respondent: Robert Jones and Agnes Hunt Orthopedic NHS Foundation Trust

Heard at: **Midlands West** **On:** **17 - 21 24 -28 and 31 October 1 November 12 - 14 December 2022 (13 and 14 in Chambers) and 17 and 18 January 2023 (in Chambers) and 9 March 2023**

Before: Employment Judge Woffenden
Members: Mr K Hutchinson
: Mrs M Stewart
Representation
Claimant: In Person
Respondent: Ms S Bowen of Counsel

JUDGMENT having been sent to the parties on 17 March 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1 The claimant (accepted by the respondent to be a disabled person within section 6 Equality Act 2010 ('EQA') from October 2017 to 6 May 2019 because of transverse myelitis and dyslexia) was employed by the respondent as a staff nurse from 19 February 2007 until her dismissal on 16 July 2019.She was absent from work due to ill health from 8 July 2017 until her dismissal except for a period in 2019 when she was working a trial period as a trainee clinical coder. She presented a claim to the Employment Tribunal on 7 May 2019 . she was

permitted to add a claim of unfair dismissal by Employment Judge Dimbylow at a preliminary hearing on 14 January 2020.

Claims and Issues

2 The claims and issues were set out in a list of issues agreed by the claimant's solicitors . It was amended during the course of the hearing and addressed liability **Polkey** and contributory fault issues only) and set out below.

Time limits limitation issues – Discrimination

2.1 Were all of the claimant's complaints presented within the time limits set out in section 123 of the Equality Act 2010 ("EQA") Dealing with this issue may involve consideration of subsidiary issues including:

(a) When did the alleged treatment take place?

(b) In respect of any alleged omission, was the complaint brought within 3 months of when the person in question decided on it or failing that when that person did something inconsistent with doing it or upon expiry of the period in which that person might reasonably have been expected to do it pursuant to s.123(3) and (4) EQA?

(c) Was the claim brought within 3 months of the relevant act or omission pursuant to s.123(1)(a) EQA?

(d) Was there a continuing act the last of which was brought within 3 months pursuant to s.123(3) EQA?

(e) Would it be just and equitable to extend time to accept jurisdiction for the complaint under s.123(1)(b) EQA?

Unfair dismissal

2.2 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's capability arising out of her long-term sickness absence. The claimant explained that her case was based upon her assertion that the respondent had failed to take sufficient reasonable steps to redeploy her during her sickness absence which commenced in October 2017, such as is demonstrated in her discrimination claims. The claimant confirmed that she was not alleging any procedural failures by the respondent.

2.3 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'? The claimant asserts that dismissal was not within the band of reasonable responses and that the respondent should have given the claimant a phased return to work in place of dismissal.

Polkey and contributory conduct

2.4 If the claimant was unfairly dismissed and the remedy is compensation:

(a) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: **Polkey v AE Dayton Services Ltd [1987] UKHL 8;** Paragraph 54 of **Software 2000 Ltd v Andrews [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604**;

(b) Should any compensation awarded be reduced on the grounds that the claimant's actions caused or contributed to their dismissal by not applying for and/or reluctance to explore Band 2 or 3 roles and/or discounting them and/or not taking steps to obtain IT training, and, if so, what reduction is appropriate under s.123(6)ERA? And of should any basic award be reduced on the basis of that conduct or otherwise under s.122(2) ERA?

Disability

2.5 Was the claimant a disabled person in accordance with the EQA at all relevant times (being from October 2017 to 6 May 2019) because of the following conditions: (1) transverse myelitis and (2) dyslexia? The respondent accepted that the claimant was disabled in respect of both conditions during that time, and it had the relevant knowledge. The claimant produced an impact statement in the bundle of documents that she provided to the tribunal and the respondent today.

EQA, section 13: direct discrimination because of disability

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

(a) On 21 August 2018 the claimant sat a test (the claimant understands that the test had been created for her and set her up to fail including by being timed and not having a screen suitable for her dyslexia) for a job as a Pathway Coordinator; but was informed on 29 November 2018 that she had been unsuccessful. The decision-maker and perpetrator was Lynne Morris.

(b) On 2 April 2019, following a six-week trial, a decision was conveyed to the claimant that she would not be given the job of Clinical Coder. The decision-maker and perpetrator was Jan Makinson .

(c) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different

circumstances? The claimant relies on the hypothetical comparator in both instances.

(d) If so, was this because of the claimant's disability through the condition of dyslexia and/or because of the protected characteristic of disability more generally?

EQA, section 15: discrimination arising from disability

2.7 Did the following 2 things arise in consequence of the claimant's disability (specifically her dyslexia)?

(a) Causing the claimant difficulty/stress when working under pressure of time(this was conceded by the respondent).

(b) Causing the claimant to require longer time in completing tasks, for example, the paperwork required when admitting a patient or discharging a patient took longer(this was conceded by the respondent).

2.8 Did the following 4 things arise in consequence of the claimant's disability (specifically her transverse myelitis)?

(a) The inability to work full-time hours (this was conceded by the respondent).

(b) The inability to work in an active/mobile, as opposed to sedentary, role(this was conceded by the respondent).

(c) The inability to work in a clinical role which required all but minimal physical activity(this was conceded by the respondent).

(d) The inability to work as a band 5 nurse, therefore requiring training for a new role.

2.9 Did the respondent treat the claimant unfavourably by not appointing her to any of the 7 positions of:

(a) Pathway Coordinator
(b) Trainee Clinical Coder
(c) Ward Clerk
(d) Imaging Department Nurse
(e) Assistant Performance Manager
(f) Trainee Information Analyst
(g) Divisional Governance Assistant

2.10 Did the respondent treat the claimant unfavourably in not appointing her to the 7 posts because of any of the 6 things related to either or both of her disabilities?

2.11 If so, has the respondent shown that the unfavourable treatment in not appointing her to the 7 posts was a proportionate means of achieving a legitimate aim?

2.12 The legitimate aims relied upon by the Respondent are the requirement to managing sickness absence to ensure adequate attendance levels and seeking to improve claimant's attendance in order to meet the needs of the organisation and/or to effectively carry out delivery of the services. In the interests of clarity the respondent further particularises this as including:

(a) The first 2 aims include appropriately supporting staff with health and wellbeing, ensuring adequate attendance levels and seeking to improve attendance in order to meet the needs of the respondent and its services through safe and effective delivery.

(b) Effectively carrying out delivery of the services of the respondent includes matters such as: Appointing suitably qualified/experienced/skilled individuals to roles who meet the job's requirements, job specifications, demands and functions of the role and/or are able to perform the role to support delivery of the services; Meeting, balancing and/or efficiently using departmental/services/resourcing needs; Ensuring and/or meeting patient care and safety; Working within the resources available to the respondent (whether financial, people or other resources); Ensuring welfare, health and safety of staff; Operational integrity; accurate billing and financial stability; and operational integrity of the trust.

EQA, section 19: indirect disability discrimination

2.13 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP: its sickness absence policy (SAP)? The respondent accepts that it did.

2.14 Did the respondent apply the PCP to the claimant at any relevant time? The respondent accepted that it did, from August 2018.

2.15 Did the respondent apply (or would the respondent have applied) the PCP to persons with whom the claimant does not share the characteristic i.e. non-disabled people?

2.16 Did the PCP put persons with whom the claimant shares the characteristic, i.e. disabled people at one or more particular disadvantage when compared with persons with whom the claimant does not share the characteristic, i.e. non-disabled people? The claimant advances the following alleged disadvantages:

(a) The claimant and persons in the group are likely to be on long term sickness absence and are therefore at a group disadvantage in that there is a requirement to maintain attendance at work in order not to suffer disciplinary proceedings and ultimately dismissal; and/or

(b) There is a requirement for consistent attendance; and/or

(c) The operation of the triggers in the sickness absence policy result in capability proceedings and ultimately dismissal.

(d) The claimant and persons in the group are likely to be so disabled that they can no longer fulfil their roles and are therefore, contrary to s19 EQA 2010 at a group disadvantage in that they are more likely to be required to be considered for redeployment/redeployed. The respondent's redeployment policy (clauses 15.2 –15.5) in reality the sickness absence policy consists of providing vacancy lists to employees only, it

i. does not provide for taking account of an employee's views about the suitability of an alternative role;

ii. does not allow for treating such persons more favourably when considering redeployment;

iii. does not allow for flexibility in the recruitment process such as waiving competitive interview for example and expressly states that posts will not be created.

2.17 Was the claimant put to the above disadvantages in that:

(a) She had to take part in a redeployment process;

(b) The respondent's redeployment efforts consisted of providing the claimant with vacancy lists;

(c) The respondent did not make reasonable adjustments to the vacant roles which the claimant suggested as she believed would have allowed her to perform them;

(d) She was not given preference for roles which she raised as being suitable as compared to other non-disabled candidates for the role;

(e) She was required to attend competitive interview, despite the fact that her dyslexia caused her difficulty in processing information and formulating responses, especially under the pressure and anxiety of a redeployment process and competitive interview;

(f) Her views on how she could be retained in employment by the respondent were not or not properly considered and/or were dismissed.

2.18 Did the PCP put the claimant at that/those disadvantage(s). The claimant states that she was put at those disadvantages as she was a balancing of the needs of the respondent in the context of the legitimate aim found to be pursued by the dismissal and the discriminatory impact on the claimant and ultimately dismissed. The respondent does not accept that the application of the PCP put the claimant at a particular disadvantage when compared with non-disabled people.

2.19 If so, has the respondent shown the PCP to be a proportionate means of achieving a legitimate aim? The respondent relies on the legitimate aim of the requirement to manage sickness absence to ensure adequate attendance levels and seeking to improve the claimant's attendance in order to meet the needs of the organisation and/or to effectively carry out delivery of the service. **[see above for details]**

Reasonable adjustments: EQA, sections 20 & 21

2.20 A "PCP" is a provision, criterion or practice.

a. Did the respondent have the PCP arising out of the SAP? Again, the respondent accepts that it did.

b. Did the respondent have a PCP of determining the claimant's suitability for redeployment roles without any or any proper/sufficient consultation with the claimant and/or Occupational Health?

2.21 Did such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that her applications for the following 7 positions were unsuccessful:

(a) Pathway Coordinator

(b) Trainee Clinical Coder

(c) Ward Clerk

(d) Imaging Department Nurse

(e) Assistant Performance Manager

(f) Trainee Information Analyst

(g) Divisional Governance Assistant

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

2.23 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows (each adjustment is identified as relating to dyslexia (D), transverse myelitis (TM) or both (B) disabilities, albeit she was placed at all of the disadvantages because of the need to seek redeployment due to her (TM):

a. The respondent should have allowed the claimant more time to learn from past papers before her test for the Pathway Coordinator post. (D)

b. The respondent should have allowed the claimant more time to undertake the test. (D)

c. The claimant should have been given a quiet office to undertake the test. (D)

d. The claimant should have been allowed to carry out a working trial before she took the test. (D)

e. The claimant should have been allowed the use of noise reduction headphones in the test. (D)

f. The claimant should have been allowed to use the adapted laptop (with coloured filters) for both the test and the trial for the Trainee Clinical Coder post. (D)

g. The claimant should have been provided with training, including in Microsoft Office packages for the Patient Pathway Co-ordinator test and role and/or Assistance Performance Manager role and/or Divisional Governance Assistant role. (D)

h. In the trial period for the Trainee Clinical Coder post the respondent should have adopted the adjustments which were set out in the confidential workplace assessment dated 15 April 2016. (D)

i. During the trial period for the Trainee Clinical Coder post the Respondent should have:

a. provided training on the computer systems that were used in relation to clinical coder areas prior to commencing her trial, or in the very early stages. This was supposed to have been sent to the claimant before she started the trial but she did not receive this until 5 weeks into the trial; (D)

b. allowed the claimant to work in a quieter corner of the office to minimise distractions; (D)

c. allowed the claimant to use noise cancelling headphones; (D)

d. ensure that colleagues were aware not to distract the claimant from performing her tasks; (D)

e. provided SK/GR screen overlays; (D)

f. provided Dyslexia in the Workplace training and/or guidance to managers who dealt with the claimant; (D)

g. allow the claimant to take regular rest breaks, including allowing her to walk/stretch her legs; (B)

h. allow the claimant in the region of 50 per cent more time to complete tasks and training involving reading and writing; (D)

i. allow the claimant to use the same desk, which ought to have been set up correctly for her disability related needs, rather than requiring her to move to different desks; (B)

j. as she was learning a new role, provided the claimant with additional guidance and support with the work to be undertaken, such as searching for correct codes; (D)

k. provided pre-filled forms to identify frequently used codes for regular searches; (D)

l. ensuring that the claimant understood one task or area of procedure before being asked to learn another; (D)

m. facilitate a DSE assessment; (B)

n. arrange an Access to Work referral for the claimant. (B)

j. The trial period for the Clinical Coordinator post should have been extended for longer than 6 weeks. (B)

k. The respondent should have provided training for the claimant in an administrative job involving some, but minimal physicality. (TM)

l. Training should have been provided for the Trainee Information Analyst role, which was a trainee role. (B)

m. The respondent ought to have arranged a meeting between the claimant and hiring manager for the Imaging Department Nurse role to consult on whether the role was suitable. (B)

n. The respondent ought to have provided the claimant with a development plan and/or training to work towards the required competences in the Assistant Performance Manager role. (D)

o. The respondent ought to have provided the claimant with more time for her unit visit related to the Admission Booking Clerk role. (D) (this allegation was withdrawn) .

p. The respondent ought to have extended the time for the claimant to apply for the Imaging Department Nurse role beyond the 3 days which she was provided with when she was informed about the role once the HR returned from annual leave. (B)

q. The respondent ought to have provided the claimant with a mentor to assist her with working in a governance environment for the Divisional Governance Assistant role. (D)

r. The respondent ought to have consulted with the claimant before determining whether a role was suitable for her to be redeployed into. (B)

s. The respondent ought to have consulted with Occupational Health before determining whether a role was suitable for the claimant to be redeployed into. (B)

t. The respondent ought to have offered the claimant roles with reduced hours and/or a job-share. (TM)

u. The respondent ought to have considered whether support could have been provided to reduce any physical aspects of a role. (TM)

v. The respondent ought to have offered the claimant a trial period for each role. (B)

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

EQA, section 26: harassment related to disability

2.25 Did the respondent engage in conduct as follows?

a. The claimant asserts and said that: "On 29 November 2018 Lynne Morris mentioned to me that she had a major issue regarding my sickness absence record and the length of my absences [since October 2017]." The claimant asserts that this was said to her in a discussion regarding the claimant joining Lynne Morris's team.

b. The claimant also asserts and said: "During the Clinical Coordinator trail period (February to April 2019) Tara Bright and Leanne Sharpe engaged in a telephone conversation in the office in my presence, wherein I was discussed, and this was with other colleagues in the room when the conversation could be heard by them. It concerned the test, and my personal issues could be heard. This was a breach of confidentiality"

i. The claimant asserts that on the Wednesday before the trial finished on a Friday, Tara Bright said to her that "you are not to come into the office on Monday" in a direct, rude and aggressive manner, despite the claimant not having finished the trial; she understood this to mean she was not going to be successful. The claimant then contacted her previous manager in tears, she contacted Leanne Sharpe. Tara Bright then engaged in call with Leanne Sharpe in front of the claimant and 5 other employees. Tara Bright was shouting and red in face, verbally expressing that she was annoyed by Leanne Sharpe, who it seemed was questioning Tara Bright as to why she had said this to the claimant. Tara Bright loudly asserted that she had been "put in place" to manage the claimant's trial in Jan Makinson's absence (who was Clinical Coding Team Manager). These actions by Tara Bright led the claimant to feel very intimidated.

2.26 If so, was that conduct unwanted?

2.27 If so, did it relate to the protected characteristic of disability?

2,28 Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Equality Act, section 27: victimisation

2.29 Did the claimant do a protected act? The claimant relies upon the following:

a. The claimant's grievance made in writing, dated 30 August 2018, and

b. The claimant's appeal in writing against the grievance outcome and dated 22 May 2019 (this was conceded by the respondent)

2.30 Did the respondent subject the claimant to any detriments as follows?

a. By delay in finalising the grievance outcome, which delayed and/or prevented the redeployment deficiencies from being rectified, and

b. By the delay in finalising the appeal outcome, which delayed and/or prevented the redeployment deficiencies from being rectified.

2.31 If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

Unauthorised deductions

2.32 Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by paying the claimant less in contractual sick pay than she was entitled to be paid and if so, how much less? The claimant's case is that she was paid at half pay rather than full pay during the period February 2018 to February 2019. The respondent denies this claim and the claimant is put to strict proof. The claimant's contractual sick pay had been exhausted by 17 September 2018 notwithstanding this, the respondent exercised its discretion and the claimant was paid half pay during the period of sick leave from 18 April 2018 until 16 July 2019. The respondent asserts that the claimant received pay in excess of her contractual entitlement and she is not entitled to any further pay.

Unlawful deduction of wages – Time limits

2.33 Was the complaint brought within 3 months pursuant to s.23(2) and/or 23)(3) Employment Rights Act 1996 (ERA)?

2.34 Are any gaps between any two alleged deductions more than 3 months and does this break the series of deductions per Bear Scotland Limited v Fulton and another 2015 ICR 221, EAT.

2.35 Is the claimant able to show that it was not reasonably practicable to present the claim in time?

2.36 If so, is the Tribunal satisfied that the claim was presented within a reasonable time s.23(4) ERA?

Procedure, documents and evidence heard

3 There was an paginated indexed bundle of 1422 pages to which added pages 1423 to 1425 during the course of the hearing. We read only those documents to which we were referred by parties in witness statements or during cross-examination.

4 At the beginning of the hearing reasonable adjustments for the claimant were discussed and agreed and these were reviewed regularly during the hearing.

5 We heard from the claimant and her daughter, Ami-Louise Anderson. On behalf of the respondent we heard from Rachel Flood (former Ward Manager and now Matron) Sarah Bloomfield (who provided cover for the respondent's chief nurse and was also the respondent's interim deputy Chief Executive) Tara Bright (Senior Clinical Coder), Heather Rowley (former People Business Partner at the respondent),Mark Lowe (Operations Manager previously entitled Performance Manager in the respondent's surgery division), Jan Makinson (former Clinical Coding Manager) ,Lynne Morris(former Service Manager for the Midland Centre for Spinal Injuries and Neuromuscular Service), Amanda Peet (Theatre Services Manager (previously entitled Surgical Service Divisional Manager), Susan Pryce (Deputy Director of Human Resources), Shelley Ramtuhul (the respondent's former Director of Governance) Leighann Sharp (former Theatre Matron at the respondent), and Marilyn Shields (Assistant Performance Manager in Medicine and Rehabilitation).

6 On 4 November 2022 the claimant made an application to amend her claim to which the respondent objected .We refused her application at the hearing on 12 December 2022 .The claimant requested written reasons for that decision which have already been provided.

Fact finding

7 In general we did not find found the claimant a reliable witness. This was for a number of reasons .Her evidence under cross -examination was inconsistent and vague even allowing for the passage of time and the emotions provoked by recalling painful events. However, we also found her capable of duplicitous conduct in relation to her medical notes , something which in particular adversely affected our assessment of her credibility .She intransigently maintained

evidence even when faced with strong evidence to the contrary ie that given by her daughter. She was unwilling to assist the tribunal during her parts of her oral evidence .Under cross examination she began to adopt a stance of saying 'No comment' to various reasonable questions put to her and maintained its use for some time even after the tribunal had explained that no comment indicated you did not want to answer rather than could not answer in case the claimant was using the term having not appreciated its implications. In contrast we found the respondent's witnesses' evidence clear consistent and detailed and we were assisted in our fact finding by a substantial amount of contemporaneous documentation .To the extent that there was a conflict between the evidence of the claimant and the respondent we have preferred the latter. Nonetheless we have examined each individual allegation with care to decide whether on the balance of probabilities it occurred and what it signified.

8 On 19 February 2007 the claimant (date of birth 10 July 1968) commenced work on the respondent's Gladstone Unit as a spinal injury nurse (Band 5) part time 30 hours a week. Under her contract of employment with the respondent she was entitled to six months full pay and 6 months half pay if absent from work due to ill health.

9 Sometime in 2014 the claimant was diagnosed with partial Transverse Myelitis ('TM').TM is an inflammation of both sides of the spinal cord. An Occupational Health ('OH') physician (Dr Ratti) recommended her redeployment into a role with no manual handling ((9 June 2015) .

10 Since October 2017 the respondent applied its respondent's absence policy (the Absence Policy') to the claimant.

11 The Absence Policy states its purpose is to promote and support a culture of attendance at work and provide support to employees when they are unfit to undertake their full contractual duties and ensure sickness absence is maintained with levels acceptable to meet organisational absence targets ie wherever possible to contain sickness absence to 2%.It says any single period or combination of periods of 8 days or more sickness absence in a rolling 12 month period will trigger formal sickness absence management in accordance with the procedure.

12 As far as sick pay entitlement is concerned after completing 5 years' of service employees who are absent from work due to illness are entitled to six months' full pay and 6 months' half pay. The respondent has discretion where it deems it to be reasonable to extend the period of sick pay on full or half pay beyond this .

13 Under the heading ' Assisting Return to Work /Alternative Duties' Clause 13.1 of the Absence Policy states : 'Often employees are unable to undertake their normal duties because of physical constraints but may be fit enough to undertake adjusted/alternative work, either on the trust site or at home .Where this is appropriate ,employees' work or environment may be adjusted or alternative duties allocated until they are fit to return to their substantive post.'

14 Clause 15 of the Absence Policy is headed 'Employee unlikely to return to work in their substantive post'. It states that where it is established that an

employee is unlikely to return to his/her usual duties ,the following should be considered by management in consultation with the employee.

'Redeployment

Redeployment will be considered only from those available posts the trust has at the time ,and posts will not be created in this respect to address redeployment.

Suitability for alternative employment may require further input from OH or from an external organisation (Disability Advisory Service/PACT).

The Human Resources department will be made aware of employees in need of redeployment and will scrutinise vacancies prior to being advertised and Managers will give prior consideration to such employees.

There will not normally be any protection of pay under these circumstances.'

15 Under the heading 'Disability' the Absence Policy states that 'sickness absence may result from a disability. At each stage of the sickness absence procedure ,particular consideration will be given to whether there are reasonable adjustments that could be made to the requirements of a job or other aspects of working arrangements that will provide support at work and/or assist a return to work.' A Stage 1 sickness absence meeting is held after any combination of 8 days or more sickness If the employee's attendance does not improve and /or long term absence within 4 weeks of half pay without an agreed return to work date a Stage 2 meeting sickness absence meeting is held ad a manager can issue the employee with a final written warning or unsatisfactory attendance and advised their attendance is expected to improve and a failure to maintain good attendance will result in dismissal. Stage 3 is the final sickness absence meeting the purpose of which is to review the meetings that have taken place and matters discussed with the employee consider any further matters the employee might want to raise, to consider whether there is a resaonble likelihood of achieving the desired level of attendance within a reasonable time and to consider the possible termination of the employment.

16 The availability of redeployment opportunities is usually considered by the respondent over a period of no more than 12 weeks.

17 In due course in November 2015 the claimant was redeployed to the respondent's Menzies unit as a Band 5 nurse. Her line manager was Rachael Flood. The claimant respected her and regarded her as a very good manager. It was apparent during the hearing that she continues to hold her in esteem.

18 On 4 February 2016 the claimant told Ms Flood at a meeting to discuss her progress that she had a diagnosis of dyslexia. An assessment was carried out and a report prepared on her dated 15 April 2016.That report recorded her weaknesses as in her working memory reading speed inhibited information processing and phonological skills. It was said among other things she might be able to improve her concentration by wearing noise reduction headphones when doing paperwork. As far as work processes were concerned it was said it might be pertinent to allow longer for completion of tasks and consideration should be given to giving up to 50% extra time with tasks involving reading and writing. It was also said it would help her if a colleague could support her to rehearse

navigation of the screens on the computer and it might be some prefilled in forms could be used as a template /reference point to help her. Recommendations for training included making trainers aware of her dyslexia and appropriate adjustments to accommodate her learning style. Suitable exam access arrangements should be made including the provision of extra time. She might benefit from further training using the computer software .Extra time in training might be considered .Written notes should be made available to her in advance of training sessions and meetings.

19 On 23 August 2016 the claimant transferred to the respondent's Baschurch unit as a staff nurse working 30 hours a week. She was reviewed by Dr Ratti on 14 September 2016. She was at that time unfit for work and it was recommended that she worked shifts no longer than 8 hours.

20 A further report on the claimant dated 16 March 2017 was prepared by Dr Ratti in which it was recorded she was currently working as a staff nurse on the day care unit ,a larger working area which she was said to be 'by her own admission, struggling with' . Dr Ratti said this led to the question of potential ill health retirement. He also said previously she had been very keen to remain at work and this was the first time they had discussed this. Further enquiries were to be made with the respondent ,the pensions department and the claimant's General Practitioner ('GP') to get an up to date medical report on her and she would be reassessed in 3 months' time.

21 That reassessment duly took place and Dr Ratti prepared another report on the claimant dated 9 June 2017.He said the claimant had remained at work but had had time to reflect on the overall situation ,had come to an informed decision and wished to be considered for ill health retirement . He advised that before progressing this it might be sensible to ensure there were no redeployment opportunities available in the respondent. It would have to involve less physicality in view of her limitations –'in essence more sedentary in nature.' He also said he had advised the claimant that an ill health retirement application had a 50/50 chance of being successful though she was said to be highly unlikely to achieve a Tier 2 retirement 'for understandable reasons'.

22 To qualify for ill health retirement under the NHS Pension Scheme an employee must satisfy one of two conditions. Under Tier 1 the condition is that there is a physical or mental infirmity which gives rise to permanent incapacity for the efficient discharge of the duties of the NHS employment. This means she was unable to undertake her current job as a band 5 nurse (30 hours) though was able to do other work. Under Tier 2 the condition is that there is a physical or mental infirmity which gives rise to permanent incapacity for regular employment of like duration (regard being had to the number of hours ,half days and sessions the applicant worked in the NHS employment) in addition to meeting the Tier 1 condition. One form is used to apply for ill health retirement. We understand that Tier 1 pension is paid at a lower rate than a Tier 2 pension.

23 On 8 July 2017 the claimant commenced a period of ill health absence. On 26 July 2017 she told Ms Flood that she had not yet made up her mind to proceed with an application for ill health retirement .

24 At a Stage 1 absence meeting under the Absence Policy on 10 August 2017 the claimant told Ms Flood she had pain weakness in her right hand side and had been stumbling. Ms Flood noted 'Too much walking -as the day went on she got tired but mornings were good.'

25 On 29 August 2017 Ms Flood sent C a Stage 1 long term first written warning under the Absence Policy in which she was warned **'**of the consequences of there being no reasonable prospect of her return to work within the foreseeable future'. She was told a Stage 1 review meeting would take place on 14 September 2017 and that half pay would commence on 1 October 2017.

26 In the event the Stage 1 review meeting took place on 5 October 2017 and the claimant was placed on half pay from 1 October 2017.Ms Flood recorded in a letter to her of that date that the claimant wanted to try and return to the ward. She felt good in the mornings and pain was high in the afternoon. She was afraid of stumbling. A phased return to work was agreed and it was noted that the claimant was still exploring ill health early retirement .

27 The claimant returned to work on14 October 2017 but by 15 November 2017 she had been referred again to Dr Ratti by Ms Flood who felt her condition was deteriorating. He confirmed in his report that the claimant had indicated she wished to be considered for ill health early retirement and asked that her application form be processed .He repeated his assessment of her chances of success on application and said that Tier 2 is certainly not possible. When she returned to work after the appointment with Dr Ratti Ms Flood discussed the appointment with her and told her to go home and rest and then escorted her out of the building.

28 On 12 December 2017 the claimant's GP certified her as unfit for work for a period of 3 months. Ms Flood had signed her ill health retirement application form and she collected it from her. Ms Flood invited her to attend a Stage 2 meeting under the Absence Policy on 25 January 2018 and she was told if there was no improvement and they were unable to plan a return to work she might be issued with a Final Written Warning and Ms Flood would ask for a Final Stage meeting to be convened if there was no evidence of her return to work in the foreseeable future.

29 By 1 February 2018 the claimant had submitted her application form to NHS Pensions applying for ill health early retirement.

30 On 7 February 2018 the claimant was again placed on half pay.

31 The Stage 2 meeting took place on 1 March 2018 conducted by Ms Flood. Notes were made of that meeting. The claimant's application for ill health retirement had not yet been determined and the claimant said she wanted to return to work in some capacity. It was agreed that permanent redeployment would be explored as her role on Baschurch was not suitable. She said she would consider any ward on any band or hours which required limited mobility but was not restricted to one position. Heather Rowley (Human Resources Business Partner) was to send her the respondent's vacancy bulletin on a weekly basis .If the claimant felt a role was suitable then she should let Human Resources know so it could be explored further. If it was agreed that the role might be suitable

then she would be able to undertake a work trial to help determine the suitability of the role before a permanent change was made. Another Stage 2 meeting was to be in 5 weeks' time to review progress as far as ill health retirement redeployment and her health was concerned . Ms Flood said in her letter to the claimant after an (unspecified) period of actively exploring redeployment if unsuccessful the decision not to issue a final written warning would be reviewed. If she was still absent within 12 after weeks of receiving no sick pay (3 May 2018) her absence would be at stage 3 of the Absence Procedure which could result in her dismissal from the respondent.

32 On 8 March 2018 having been sent the vacancy bulletin the claimant enquired about the role of Assistant Performance Manager (Rehabilitation and Medicine) Band 5.

33 On 12 March 2018 the claimant enquired about the post of Senior Clinical Coder and was provided with the relevant contact details the next day.

34 On 19 March 2018 Heather Rowley told the claimant that **if** she did not have the necessary qualifications and training or experience for the Senior Clinical Coder role this would not be considered a reasonable alternative role for her and provided the Job Description for the Assistant Performance Manager post.

35 On 29 March 2018 Jan Makinson emailed the claimant to explain (as had been discussed with her the previous day) why the role (a 12 month fixed term contract to cover maternity leave) could not be offered to her because of her lack of clinical coding experience (the role needed a minimum of 3 years)and the need as part of the role to mentor 2 trainee clinical coders.

36 On 5 April 2018 the Stage 2 meeting which had been arranged was postponed because the claimant had no update on her ill health retirement application ;however it was confirmed in Ms Flood's letter to her the following day that the claimant had not felt a role of Assistant Performance Manager(rehabilitation and medicine) was appropriate for her due to the degree of mobility required and that she was not able to be considered for the role of senior clinical coder because she did not have the requisite level of clinical coding experience. It said that Ms Flood had referred her to OH for their advice on suitable redeployment and she was told that if there was no prospect of her return to work in the foreseeable future she may be issued with a Final Written Warning and a further 4 weeks of actively exploring redeployment would be pursued before consideration was given to progressing to a Stage 3 sickness meeting ,the outcome of which could result in dismissal.

37 Following the referral to OH a report was prepared on the claimant dated 16 April 2018 which found her to be fit for work ;redeployment was recommended. Her TM was said to be affecting her comfort mobility and dexterity but she was fit for part time work in some administrative capacity (desk based sedentary). Its recommendations were to meet with the claimant to discuss the OH findings and to contact Access to Work.

38 On 23 April 2018 the claimant was awarded Tier 1 ill health retirement. It was said that the relevant medical evidence indicated that, on the balance of probabilities , 'the applicant was permanently incapable of the NHS employment.

The applicant is not permanently incapable of regular employment of like duration'. The Tier 2 condition was said not to be met. It went on to say that 'Given the course that Mrs Ellis' condition has followed and given the diagnostic uncertainty ,it is certainly possible that the point could be reached in the next few years where Mrs Ellis became unfit for regular employment and such incapacity might then be considered likely to be permanent .For that reason, it would be reasonable to offer Mrs Ellis the opportunity of reassessment against the Tier 2 condition in accordance with the regulations'.

39 On 24 April 2018 Dr Ellis (a consultant neurologist) reported that the claimant's neurological symptoms had worsened and the fact she was getting progressive symptoms would be against it being a 'one off TM'.

40 On 3 May 2018 a stage 2 Long term meeting took place conducted by Rachel Flood. The claimant told Rachel Flood she was 'gutted' about her Tier 1 award of pension and was considering appealing the decision. Heather Rowley explained to the claimant that if she wanted to take her ill health retirement benefits her employment in her current role would have to end to enable her retirement to be processed. She had been actively seeking redeployment for 8 weeks and would be given a further 4 weeks to actively explore redeployment before consideration was given to progressing to a final Stage 3 Sickness meeting. It was agreed that if a suitable vacancy arose and a work trial commenced progression to a Stage 3 meeting would be delayed to enable the claimant to complete an appropriate work trial .She was given a final written warning and told of her right to appeal which she did not exercise. A further Stage 2 meeting was arranged for 31 May 2019.

41 On 27 September 2018 the claimant told her GP that she wanted 'Tier 2 pension'. The pension was discussed and it was suggested the claimant could then do voluntary work.

42 On 19 March 2019 the claimant told her GP that she had a trial at work and was 'wanting to leave really'. During the course of these proceedings the claimant's medical records were disclosed to the respondent by her former solicitors but she then removed the above comments from her medical records and disclosed the edited version to the respondent. When cross examined about this she explained that it was by way of highlighting but a yellow highlighter was used in other sections of the disclosure. We found her explanation inherently implausible and reject it. We find that she consciously and deliberately removed the sections in question because she feared their inclusion would damage her case .

43 On 16 May 2018 the claimant expressed interest in a Trainee Information Analyst post. This was a full time post (Band 5) with a 12 month training program. In the job description A key requirement of the post was advanced knowledge and understanding of Microsoft office applications especially Excel , and experience of using SQL would be 'an advantage'. She spoke about it to Claire Jones (senior divisional and performance Information Analyst) who asked her about her computer skills . On 21 May 2018 Claire Jones told her that although it was a trainee post an initial level of skill set was required (Excel skills) which the claimant did not have. She only had basic knowledge of Excel and no

experience of Pivots IF statements vlookups or SPC. She had no experience in SQL**.** The claimant said she would come in for two hours of her own time but Claire Jones repeated that the initial skills were required .Claire Jones reported back to Heather Rowley about this conversation the same day. On 25 May 2018 in a letter to Heather Rowley the claimant accepted she had told Claire Jones that she had a basic knowledge of Excel.

44 On 31 May 2018 the claimant expressed interest in a nurse surgical site surveillance ('SSS') post. Heather Rowley contacted Sue Sayles (Infection Prevention and Control Nurse) to make enquiries about it, explaining the claimant was seeking redeployment .She said that to determine if the post may be suitable an informal discussion is held between the individual concerned and the recruiting manager to ensure the individual has the relevant skills and experience for the post (essential criteria as per the person specification) .If agreed it may be suitable and OH advice supports this, a work trial would be arranged to ensure suitability for the post .If successful the individual would be transferred into the post. until suitability was established the recruitment process was to be held in abeyance.

45 An OH report dated 22 June 2018 was prepared on the claimant for the respondent to give advice on redeployment to the Surgical Site Surveillance ('SSS') post. She was again found to be fit for work redeployment recommended but although it was noted the post involved office work it also required manual handling of patients and a moderate amount of walking around the hospital and the required duties would carry a high risk of aggravating her condition. She was unfit to carry out her role as a staff nurse and redeployment to a part time sedentary role was required to facilitate a return to work. The role of SSS nurse was not ideal due to the amount of walking and manual handling of patients. It was recommended that continued efforts were made to find a part time non clinical role 'asap'.

46 On 28 June 2018 at a sickness absence review meeting Rachel Flood made the claimant aware of the availability of a Band 2 administrative assistant / receptionist role and she stated she had worked in the department in question before and did not want to return to it.

47 On 1 July 2018 a medical report was prepared on the claimant by a doctor in relation to her entitlement to Employment and Support Allowance (a state benefit). The claimant was assessed and the opinion given was that the claimant met the criteria for limited capability for work related activity as they have 'severe functional disability'. It was said she had a back problem and a neurological problem for 5 years was under specialist care and took high dose pain relief. She coped with bathroom tasks and dressing but had help with housework and cooking .She could walk 3 to 5 metres with a stick before she had to stop and rest due to pain and weakness rests for 2/3 minutes and then continue walking. Severe disability was likely due to restriction in mobility. The claimant under cross examination denied that this was an accurate assessment in that the effects of her condition were overstated but what she said about this was wholly unconvincing and we reject it.

48 There was a Stage 2 long term sickness absence meeting on 28 June 2018 at which redeployment was discussed. The letter Rachel Flood wrote to the claimant on 12 July 2018 recorded her symptoms had increased and she was to receive some steroid injections and potentially a nerve block or epidural in her leg and that the claimant had accepted the SSS nurse role was not a suitable alternative role. They had reviewed vacancies available. There was a Band 2 vacancy working as an admin assistant/receptionist but the claimant had said she did not want to return to the department in question. It noted they had discussed temporary support required in the respondent's Access team booking patients for pre-op appointments but this was not a permanent role and there was no information about future demand. It was noted she agreed to give consideration to the Band 2 role in the Access team and that there would be some training and a shadowing day arranged for her to get insight into that role.

49 A further stage 2 meeting took place on 26 July 2018 by which time the claimant had had the training and shadowing day in Access team arranged by Rachel Flood . She had found the nature of the work she had undertaken frustrating in that she was filling envelopes and having to desk hop. She was also concerned that the role would result in a substantial drop in her earnings. A fixed term vacancy had arisen for a booking team role but this was not felt to be ideal by the claimant because it was temporary. However it was anticipated that permanent vacancies would become available shortly. It was recorded that the claimant had met with Mark Lowe to discuss an Assistant Performance Manager (full time) (Band 5) vacancy. The claimant could not work full time and had asked if it could be done on a part time basis .Mr Lowe had said it could not because it would have an effect on quality and performance because of the nature of the role which could be mitigated by a detailed and thorough hand over but that would create a unacceptable costs pressure.

50 Mr Lowe was a thoughtful and clear witness. He had met with the claiamnt having been approached by Heather Rowley about the claimant in June 2018. The role required a detailed analysis of informatics and waiting lists to optimise the use of consultant time ; the post holder would be responsible for looking after 30 consultants and a large part of the role was getting consultants to carry out overtime and tracking them down . We accept his evidence that he had considered whether a job share would work but he decided that the nature of the role would require a handover process of a full day between postholders (2 staff working 3 days a week in a 5 day role) which would create an unacceptable additional costs pressure. It was a critical role with the respondent to maximise efficiency in the service to reduce waiting times as much as possible and was not sedentary in that it required locating consultants who were not readily available by phone involving 2 hours on one's feet and lengthy walks around outpatients departments and theatres.

51 The claimant indicated her intention to discuss a nursing vacancy in the Imaging Department with the relevant manager .Her evidence was that she contacted the manager in question by telephone but he had not returned her calls. She provided no salient details about this nor about any deadline for applications. There is no evidence that she ever sought an extension of any such deadline. However the role was not sedentary and when it was discussed on 29

November 2018 the (unchallenged) notes of the meeting record that she confirmed she was not pursuing the role. We find that the claimant simply decided not to pursue this role and if there was a deadline this was not a factor which caused or contributed in a material way to that decision. She felt a Band 2 ward clerk role (to be advertised) was not suitable because of 12 hour shifts .A patients admissions coordinator role was also discussed but this was not sedentary and so was not a reasonable alternative post. An employment break of between 3 months to 5 years was suggested as an option should the respondent be unable to redeploy the claimant .

52 As far as the ward clerk role was concerned the team had experienced tension in working relationships because of shift working patterns resulting in an informal mediation the outcome of which was all staff agreed to work 12 hours shifts with 2 ward clerks in post having their existing flexible working arrangements honoured. The claimant was not able to work a 12 hour shift but in any event the role was for 37 hours a week when the claimant only wanted to work 30 hours. It was Rachel Flood's evidence that the claimant was not interested in a job share .The claimant under cross examination could recall discussing the role with her but could not recall discussing a job share. We prefer Rachel Flood's evidence on the point. Rachel Flood did not think it would be possible to find someone who would be willing to work only 7 hours a week . When a permanent position in the booking team did arise as anticipated, the claimant declined to be considered for it telling Rachel Flood she did not want to be managed by a 'porter' and that she did not want to do a Band 2 role.

53 On 4 August 2018 the claimant expressed interest in the role of pathway coordinator (Band 4) in Lynne Morris' team and Heather Rowley told Lynne Morris about this, explaining redeployment options were being explored and there would need to be an informal discussion with the claimant to see if the post would be suitable. This required that recruitment would have to be put on hold until it was determined whether the claimant was suitable. Lynne Morris was an impressive witness, at pains to assist the tribunal in providing very detailed evidence both in her statement and under cross examination. She was wholly credible .Her team was under pressure and she wanted to fill the vacant post right away and was encouraged at the claimant's interest and optimistic because a predecessor in the role (now Assistant Performance Manager and the claimant's prospective Line Manager) had also previously been a nurse before leaving and retraining. Heather Rowley told Lynne Morris if there was a work trial it should last 4 weeks though it could be extended for the purpose of retraining an member of staff.

54 On 7 August 2018 the claimant met with Lynne Morris and the Assistant Performance Manager to talk about the role its duties and how the team worked. The claimant told her that she was dyslexic. There was a detailed discussion about the requisite IT skills for the role. Lynne Morris told the claimant that she would need to use Electronic Patient Record software Microsoft Excel Microsoft Word Microsoft Powerpoint the respondent's PAS system (used for recording referrals the referral to treatment ('RTT') pathway setting up clinics attaching letters scheduling patients into clinics recording outcomes including referral to treatment). The claimant acknowledged her knowledge of the PAS system was

limited. She had no knowledge of RTT. The person specification for the role identified one of the essential criteria as being 'in depth experience of Referral to Treatment and PAS'. The claimant also confirmed she did not have experience in producing management reports .The person specification for the role required someone who had previous experience of producing reports to a high standard. She told Lynne Morris she had no experience in Microsoft Excel but was willing to learn. The person specification for the role identified as one of the essential criteria immediate /advanced level of Microsoft Excel. Lynne Morris explained that was limited capacity within the team for support because this was a prerequisite of the postholder. Lynne Morris also demonstrated on Microsoft Ecell the patient database and patient target list and how information could be extracted, explaining how the postholder would use that information and analyse the multiple reports they would receive on a daily basis in relation to the Patient Target List ('PTL').She spoke to her about the team and the need for the post holder to liaise with other hospitals outpatient staff and multidisciplinary teams to set up clinics and schedule in the diagnostic element and the need for the post holder to prepare demand and capacity modelling ,responsible for the achieving the RTT (where patients were seen within an 18 week pathway) .Having discussed the claimant's IT skills with her, Lynne Morris found that she was not able to demonstrate a basic level of experience and understanding which she felt would be a risk to service delivery.

55 What the claimant took away from that meeting was that some training was needed and OH needed to be contacted .She sent an email to Heather Rowley after it but did not mention in the email that during that conversation Ms Morris had said she had major concerns about the claimant's sickness. Her own evidence was she felt the meeting went extremely well .After the meeting with the claimant and having conferred with the clinical lead Professor Willis, Lynne Morris contacted Heather Rowley. She and the Assistant Performance Manager had assessed the claimant's experience and skills against the job description and essential criteria for the role and documented that assessment. She was concerned that the claimant did not have the required IT skills and experience of administration in a non clinical setting. She fed this back to Heather Rowley. Heather Rowley spoke to the claimant about this and told Lynne Morris that the claimant was happy and willing to undertake an assessment to demonstrate she had the requisite skills.

56 Lynne Morris devised a test to assess the claimant's skills and knowledge in respect of the layout and presentation of a report ,demonstration of analytical skills, and understanding of a task including the challenges faced ,accuracy and attention to detail working to a deadline and updating a data base. It required the updating of a database using Microsoft Word and Excel. What was included was what had been discussed at the meeting on 7 August 2018.The test was arranged for 21 August 2018.There were no past papers. The claimant had told Lynne Morris (who had told the claimant her son was dyslexic and used coloured sheets which she confirmed she had too) that she would arrange to bring any equipment she needed for the test. The issue of the timing of the test was never raised with her.

57 On 20 August 2018 the claimant explained to a colleague of Lynne Morris that she was dyslexic and asked for a copy of the test paper in advance so she could familiarise herself with its layout. The request was refused by the colleague on the basis this would give her an unfair advantage and she was already familiar with the respondent's computer systems.

58 On 21 August 2018 the claimant sat the test. She did not raise any concern about the test being timed but did asked for more time and was given an extra 15 minutes (30 minutes in all) for the test in accordance with her disability statement. She used the respondent's computer not her laptop which she had brought with her with the filtered screen overlay on it . We find she did not ask to use her own laptop .She was provided with test instructions and a ruler highlighters and paperwork. The claimant's evidence is that she was not given a quiet office or noise cancelling headphones. The test was conducted in a large office which had two secretaries in it. She did not request any noise cancelling headphones or complain about the conditions in which she sat the test or the equipment (or lack of it) with which she was provided. We accept that an office occupied by 2 other people is unlikely to be entirely free from disturbance by way of sound or movement but given her lack of complaint or query about this at the time we find that the location and/or the noise levels were not such as to be matters of concern for the claimant on the day. She was feeling anxious and scared before the test and panicked when she had to consider computer reports on a subject about which she had no knowledge and could not understand the process or where to find the information .She got zero in the test. The claimant firmly maintained the view that the test had been created for her intentionally for her to fail because she believed others had not been asked to sit the test despite an email from Lynne Morris dated 29 August 2018 in which she stated the average result was 29% and the highest achieved was 43 %. There is no evidence to support the claimant's assertion that Lynne Morris had manufactured the email dated 29 August 2018. We find that 4 others also sat the test .Further there is no evidence to support her assertion that the test was set up by Lynne Morris intentionally for her to fail or that the timing of the test and or not having a screen suitable for her dyslexia could be attributed to Lynne Morris. The claimant had told her she would bring the equipment she needed and did not raise the issue of the test being timed. We find Lynne Morris devised a test to assess the claimant's IT skills and experience, the claimant having volunteered her willingness to undertake an assessment when Lynne Morris was concerned she did not have the requisite skills and experience. She did not set it up intentionally for the claimant to fail as alleged or at all.

59 A report was written about the test outcome on 22 August 2018 and Lynne Morris decided that ,given the claimant's scoring and having explored her skills and experience against the skills criteria for the role during her earlier meeting with her, the role was not suitable for her. She needed someone who could hit the ground running and support was not available to train her up. The extensive training she needed to bring her IT skills and experience up to the advanced level required prohibited on the job training. The claimant did not have the basic experience and skills for the role .

60 On 25 August 2018 the claimant sent to Rachel Flood a statement for consideration at the stage 3 Sickness review meeting. She accepted in that statement that her skills in relation to the Information Systems Analyst were not transferrable but notwithstanding there should have been consideration of a 4 week trial period. She summarised the redeployment process to date as she saw it and concluded by saying that she felt she would have really benefitted 'in line with the disability and equality act' some additional further adjustments and would like the respondent to consider the points she made at the stage 3 meeting. She also stated that :'I feel I have been pushed to accept a Band 2 role within the trust ….I don't feel I should take a drop to a band 2 level within this trust when I have now been here for 12 years and feel I should have these skills already'.

61 The stage 3 sickness review meeting took place on 30 August 2018 before Kirsty Evans (Matron) .The claimant was represented by a Royal College of Nursing representative. Ms Evans decided to adjourn the meeting to review the information provided by the claimant and her representative for which she felt more time was needed. Before doing so there was a discussion in which an update about redeployment was provided and the claimant was asked to explain her skills and competencies what areas of nursing she had been in and the IT systems she had used. She said she was literate on Word but not Excel. Her representative said that if the claimant had the time to have appropriate training to learn at her pace she could do some of the jobs which would be more suitable. The claimant remarked that Lynne Morris had said at an informal meeting that she had major concerns about her sickness. When asked about Band 2 permanent positions in booking, details of which had been sent to her, the claimant said this would have a massive financial impact on her. She was told that in all likelihood redeployment into administration would not be at a Band 5 level. She confirmed she wanted to work 30 hours a week and that she was good 7 am to 11 am but then started dragging her leg. She said she could work with Rachel Flood 4 x 3 days a week at Band 5 and in an administrative role at Band 2, 2 x 8 hours.

62 On 7 September 2018 OH prepared another report on the claimant about her suitability for the post of Patient Pathway Coordinator. She was found to be fit for work and redeployment was recommended. However the report noted that since the referral was made the claimant had been interviewed and was unsuccessful. The report also said that consideration be given to the fact that she was likely to require some initial training in any administrative role that she applied for.

63 On 10 September 2018 the claimant was told she would move on to 'no pay' from 17 September 2018 .

64 On 26 September 2018 the claimant was told the Stage 3 meeting would be reconvened on 4 October 2018 chaired by Leighann Sharp. She was warned the potential outcome of the meeting might be the termination of her employment on the grounds of ill health capability. It was postponed till 11 October 2018 .On that day the claimant's GP wrote to the respondent to say that in the absence of her trade union representative her daughter should attend the meeting with her to provide personal support.

65 By this time the claimant had obtained advice from non union solicitors and her trade union representative felt she needed to get advice from their regional manager to see if they could continue representing her . She asked that the Stage 3 meeting be postponed which was agreed. She was however happy to support the claimant in a 'catch up' and the claimant agreed that she was 'happy' with the delay. Despite the misgivings she had about her ability to do the role of Divisional Governance Assistant she was encouraged to draw on experience she already had which she could bring to a new role. Heather Rowley was to discuss this with the relevant manager . The claimant said she would need training in Microsoft Office and an HR business partner said that she should look at the experience and qualities she had and that she could do and not the things she cannot do. The claimant confirmed she was not interested in the Band 2 Booking Clerk vacancy because on her shadowing day she had ended up putting leaflets in envelopes and they had not been expecting her when she turned up. They had looked stretched and needed a new office. She was told in relation to Band 2 roles that there was the potential to move up the grading with experience/training and guidance and she said it was not for her. She was offered shadowing again and said she would look at going 'for an hour'. She was told that would not be a realistic time frame. She said she would have a think. She was interested in a vacancy for a Shropshire Orthopaedic Outreach Service. (18 hours a week permanent role).Heather Rowley agreed to look into the claimant's representative's request that the respondent exercise its discretion to extend her entitlement to sick pay and said she would look at the rationale to support the case being put forward to the respondent's Executive Team (responsible for making such decisions).

65 The request about extension of sick pay entitlement was made on 12 October 2018.The claimant did not pursue the Band 2 Booking clerk vacancy.

66 The reconvened Stage 3 meeting was to take place on 8 November 2018.She was asked if she had anything else to submit and if so send it to LeighAnn Sharp by 6 November 2018.

67 On 6 November 2018 Heather Rowley emailed the claimant to say she had spoken to Shelley Ramtuhul (the relevant manager) about the post of Divisional Governance assistant and she had said she did not feel the claimant met the person specification as far as advanced knowledge in Microsoft Office Word Excel PowerPoint Access Outlook or experience in working in an integrated governance team was concerned. The claimant took issue with this and said she would benefit from a mentor to bring her up to speed on the systems and from training on Microsoft.

68 We accept Ms Ramtuhul's evidence that having had a discussion with the claimant she decided she was not suitable for the role. This role was to provide support for all governance activity within the respondent assisting with governance projects including effective complaint handling auditing gathering patient feedback patient safety matters incident reporting and meeting various regulatory standards set externally. Advanced knowledge in the use of Microsoft Office Excel PowerPoint Access Outlook Word was an essential criteria .The applicant would also need to use the respondent's own systems and be able to extract data analyse it and format it appropriately .Daily reports were required. It

became apparent to Ms Ramtuhul the claimant did not have the basic level of IT skills -she told her she had never used Excel. The deficit in IT skills would require extensive training on Microsoft Office and the R's systems. She thought it would take 12 months or more maybe longer to train the claimant because the claimant would be part time and that would put an unacceptable pressure on the department; while a team member was training the claimant they would not be carrying out their own role. This was not an entry level administrative role (which would have been at Band 2).but a Band 4 role which was a senior administrative role indicating a high level of IT skills.

69 On 16 November 2018 an OH report said the claimant was fit for management meetings but under recommendations it was stated that she would need a suitable person to support her at meetings to decrease feelings of anxiety /intimidation and that she has no union representation or trusted colleague to attend with her. On 28 November 2018 this was discussed with the claimant who told HR that she had been exploring a family member/friend being on site to suit outside the meeting for support as needed and she was sent an agenda for the meeting.

70 On 29 November 2018 the reconvened Stage 3 hearing took place before Leighann Sharp. The claimant (who attended without a representative) was asked if she was happy to continue on that basis .She agreed she was and said the meeting needed to go ahead that day. She was told she could ask for a break at any time. Heather Rowley told the claimant that her contractual sick pay had been reinstated to half pay from 17 September 2018. She agreed that she was satisfied that the Divisional Governance assistant role was not a suitable role to pursue. She confirmed she had agreed not to pursue the ward clerk role . She also confirmed she was happy not to pursue the post of Assistant Performance Manager and was no longer pursuing the role of Imaging Department Nurse. It was explained to the claimant that in relation to a post of trainee clinical coder that the meeting would be adjourned pending new information about this.HR was to arrange a meeting with Jan Makinson to discuss a potential 4 week trial assessment. The claimant asked for 50% more time because of her dyslexia (and 6 weeks was agreed as a reasonable request. It was noted that the trial would need clear defined guidelines ;support in place and expectations addressed .The objectives needed to be measurable have clear defined actions and there were to be adjustments to the trial.HR could share that the claimant had dyslexia. It was also explained that her Tier 1 pension could not yet be 'signed off' by the respondent because its effect would be to terminate the claimant's employment and redeployment was being pursued.

71 The claimant has alleged that on 29 November 2018 in a discussion regarding her joining Lynne Morris' team, Lynne Morris mentioned to the claimant she had a major issue regarding her sickness absence record and the length of her absences . Any such conversation between the claimant and Lynne Morris must have predated 30 August 2018 ,the date of the Stage 3 meeting at which the claimant brought it up (see paragraph 60 above). The date relied on by the claimant is plainly wrong. The claimant sought to persuade us in oral evidence the remark had been made on 7 August 2018 (the date of her meeting with Lynne Morris).However, if that was the correct date, the claimant did not raise

any concern to the respondent about it at the time ,although she was in immediate correspondence with Heather Rowley about their meeting and described it as having gone very well (see paragraph 54 above). We accept Lynne Morris 's evidence that no such remark was ever made.

72 On 9 January 2019 the claimant raised a grievance in writing which she said was in relation to the whole of the stage 3 meetings.

73 On 18 January 2019 OH prepared another report on the claimant ;she was said to be fit for work with permanent adjustments recommended. The advised date for return to work was 21 January 2019.It said that having reviewed her and the proposed job description for the clinical coding administrative post the opinion was the claimant was fit for the role but would require adjustments to support her return to work in a fundamentally new and challenging role. Those were a DSE assessment a phased return to work over a 4 week period ,regular breaks for stretching and exercising back, extra time for training reading and instruction due to pain and medication although her functional level and concentration were said to be good. The author of the report said they were unable to comment on dyslexia but noted that the claimant was educated to degree level and able to fulfil the high level of administrative work required by a nurse.

74 The person specification for the trainee clinical coder role said that the essential skills and knowledge included attention to detail and the essential aptitudes and attributes included the ability to work to a high degree of accuracy under pressure ability to learn and remember complex information and excellent concentration skills. The draft proposals (which included reasonable adjustments in accordance with the claimant's assessment- see paragraph 18 above) for the 6 week work trial for the post of trainee clinical coder were sent to the claimant by HR on 20 January 2019. It also set out what the trial would consist of (historical data that the claimant would be expected to analyse and interpret into codes using the books provided .The claimant would be provided with a copy of the coding manuals and coding classification and would be supported along the way. Her progress would be monitored and the claimant would be supported by one of the senior coders .The historical data would include simple day case procedures along with primary hip and knee replacements. It was said any trainees joining the department would start at this point however 'we will take into account the extra time required by the claimant to read the text and become familiar with the manuals.' At the end of the 6 week period the claimant would be expected to pass a test 90% accuracy (current standard being 95%).An assessment was normally used at interview stage to assess a candidate's ability to use the coding manuals index terms and arrive at the correct code. The assessment at the end of the claimant's trial period was to be a similar kind of test. There would be regular reviews to discuss the role support required achievements and action required to achieve a successful work trail. At the end of the trial if either the claimant or the manager considered the post did not offer suitable alternative employment ,this would be discussed. On successful completion of the trial the claimant would be substantively employed into Trainee Clinical Coder (Band 3) on a permanent basis working 32 hours a week and would be expected to undertake the required coding qualification within 6 months.

75 Jan Makinson and Tara Bright met with the claimant on 24 January 2010 in order to discuss the arrangements for the trial period. She would be expected to analyse and interpret historical data using the codes in the coding classification books and would not be subject to deadlines as she would not be allocated any time critical work. As far as overlays for reading and computers were concerned the claimant was allowed to use her adapted laptop which had such a screen over lay fitted. The adjustments which were agreed were based on her dyslexia assessment dated 15 April 2016 which the claimant had shared with Jan Makinson. It was agreed interruptions be kept to a minimum and the claimant could take breaks as and when needed. It is common ground no DSE assessment was carried out on the claimant because the respondent did not have anyone who could do them. In the event the claimant carried out a DSE self-assessment of her workstation in which she explained that she used a laptop provided by the respondent and an assessment needed to be done 'asap' because she had been doing the role in question for 4 weeks already. She said she did not have a large enough workstation, had not been provided with a document holder or footrest the chair was not suitable and stable and did not have adjustable seat height back rest height and tilt and she had experienced pain in the back/neck and shoulders while using the computer. The claimant accepted under cross examination that these were comfort issues relating to her work station ,that she had not raised any of them with either Jan Makinson or Tara Bright during her work trial and that these issues were not why she was not appointed to the post or failed the test.

76 The claimant had returned to work on a phased basis on 21 January 2019 to enable her to prepare for her work trial and was reinstated on full pay (25% contracted hours without loss of pay) .

77 On 24 January 2019 HR wrote to the claimant about the work trial for Trainee Clinical Coder post. It would begin on 28 January 2019 and end on 8 March 2019.

78 Having sadly suffered a bereavement the claimant was then on a period of special leave at full pay from 28 January 2019 to 1 February 2019 with a further days special leave on 18 February 2019 .The work trial began on 4 February 2019 and she was paid full pay from that date until it ended on 18 March 2019. Tara Bright was the claimant's mentor during the work trial. The claimant was provided with training (including on Synopsis (a preoperative digital system) and ongoing support throughout the work trial. Tara Bright told her how the coding books worked and how to search for the relevant codes so that she could become familiar with the coding books and arrive at the correct codes using the historical data. The only computer software she was required to use during this period was the patient database with which she had familiarity as a result of her time as staff nurse. She was not required to use the coding IT system because she was looking at historical data and was not required to input any codes onto the system and all her work was handwritten on pro formas so no further computer training was required. The claimant's own evidence was that the work consisted of being given printouts of lists of patients and trying to find the relevant codes in the coding books. Review meetings took place with the claimant during the work trial and included discussion of her adjustments and the claimant raised

no concerns about them nor did she suggest other reasonable adjustments should have been made. The claimant would sit at the desk next to Ms Makinson or ,when Ms Makinson was absent – she worked 3 days a week and was on annual leave for the first 2 weeks of the work trial-, at her desk during the work trial . She did not have her own desk. In her evidence she said this was not ideal but under cross-examination it became apparent that the issue was the size of the desk although she did not raise this. Team members were asked to keep interruptions to a minimum but this was difficult because the office was very small and there would be telephone calls and discussions between team members. The claimant's evidence was that she did not ask for breaks because she thought to do so would make her look as if she were lazy. Tara Bright's evidence was that she could recall the claimant taking regular breaks when in the office. We prefer the evidence of Tara Bright on this point.

79 ACAS Early Conciliation began on 4 January 2019 and ended on 4 February 2019.

80 Tara Bright devised a test paper for the claimant based on what she had been learning over the previous 6 weeks. The test involved her being given 3 historical patient cases and carrying out various coding exercises. The questions were simple straightforward and based on the work that the claimant had done in the work trial. It was paper based and the claimant did not require her laptop. The claimant asked for a sample of a test paper but there wasn't one in existence. She sat the test on 15 March 2019.It lasted 45 minutes. A junior clinical coder had been asked to sit the test in order to ascertain what would be a reasonable time for the claimant to complete the task. That person finished the test in 20 minutes but in the light of the claimant's lack of experience the time set was 30 minutes. However Tara Bright ensured a further 15 minutes was allotted, taking into account the claimant's dyslexia .The claimant was also afforded 5 minutes reading time at the start of the test. The day before Tara Bright had sent her an example of an e- learning module which had to be completed before attending the standards course. The claimant achieved a score of 32%.

81 On 15 March 2019 the claimant alleges Tara Bright said to her ' You are not to come into this office on Monday' in what was a direct rude and aggressive manner. She became upset taking this to mean she had not been successful in the trial and contacted Rachel Flood who contacted Leighann Sharp .This resulted in Tara Bright's and Leighann Sharp engaging in a telephone conversation which the claimant said was heated on Tara Bright's part and during which she was discussed with other colleagues in the room when the conversation could be heard by them concerning the test and her personal issues could be heard. However her witness statement did not address what was said in that conversation or how it was said or explain how the conduct of either Ms Bright or Ms Sharp was related to her disability or was she able to do so under cross-examination. We find that Tara Bright told the claimant not to come into the office on Monday and that there was a conversation between LeighAnn Sharp and Tara Bright in which the claimant was discussed in earshot of the claimant and her colleagues.

82 On 18 March 2019 the claimant met with Jan Makinson. The claimant was accompanied by her daughter. The claimant said she was happy with the support

she had had from Jan Makinson in relation to her dyslexia and that reasonable adjustments had been put in place prior to and during the work trial. She told Jan Makinson she thought there was a personality clash between her and Ms Bright. They discussed her performance against the objectives she had been set and the test and her mark. Jan Makinson explained that as far as her suitability for the role was concerned that working accurately under pressure was an essential requirement for the role because the department had to reach 90% efficiency and there were concerns about her accuracy and attention to detail during the trial. Accuracy was fundamental because the correct inputting of information dictated the cost that the respondent was able to claim and be paid for the procedure carried out on patients. The claimant had not been able to obtain the objectives set over a 6 week period normally achieved in 4 weeks. The key issue for her was the lack of accuracy of her work. The claimant said she understood and thanked her for her support.

83 The claimant was absent from work due to sickness from 19 March 2019 to 21 April 2019 and in receipt of full pay .She took a period of paid annual leave from 22 to 29 April 2019 .She was then on sickness absence from 30 April 2019 to 17 July 2019 when her employment was terminated.

84 On 2 April 2019 HR told the claimant in writing that Jan Makinson had felt the trail had been unsuccessful and she would not be given the job of Trainee Clinical Coder. It had been agreed with the claimant that the respondent would continue to explore suitable alternative employment and she would get a copy of the vacancy bulletin. If a role became available that she wished to consider she should notify HR asap for further discussions and a work trial to be arranged where agreeable.

85 We find that the claimant labours under the misapprehension that her skills and experience as a Band 5 nurse fit her for the high level of administrative specialisation required in Band 4 and 5 administrative roles within the respondent. She lacks insight about the level of IT skills and experience required for such roles above Band 2 compared to her own skill set or about how long it would take for such skills to be acquired. We have preferred the evidence of her daughter (an experienced administrator having worked in administration all her working life with good IT skills) who under cross examination was unequivocal in her evidence that no matter what adaptions were made to higher level administrative roles the claimant would find them very difficult .She went on to say that the claimant would definitely struggle with any administrative position and no reasonable adjustment would make it work. In particular she accepted that the claimant could not do the job of trainee clinical coder because she lacked the ability to concentrate for long periods of time ,analytical skills and accuracy. She knew the claimant would fail the work trial 'drastically'. The claimant had told her she was struggling. No reasonable adjustment would have enabled her to do the role. She also accepted that the respondent had been trying its best to get the claimant redeployed.

86 A grievance meeting (Stage 2) arranged for 9 April 2019.Before the meeting began the claimant told Leighann Sharp that she had been seen by her GP who recommended she be admitted to hospital due to a query about equine corda(a very serious medical condition) which she had declined to do. Leighann Sharp

decided having regard to the claimant's health and well-being needs that a written response should be provided to which the claimant agreed. Leighann Sharp provided this in a letter to the claimant of 24 April 2019.The grievance was not upheld.

87 The claimant appealed against this outcome in a letter to the respondent dated 30 April 2019. She said she wanted to continue in the nursing profession. She said she had no representation but accepted that the respondent had allowed her daughter (to attend) for 'peace of mind'. She said more than once in her appeal letter that she had been offered little or no support to be able to fulfil a comparable role. She said she would even have taken the Assistant Governance post at a 'lower band' if training was provided. She felt as an absolute minimum she should have the opportunity to another work trial at a Band 5 level and all reasonable adjustments should be 'concluded' to provide her with such an opportunity.

88 An OH report was prepared on the claimant dated 30 April 2019.It stated that she was temporarily unfit for work pending a management meeting .It was confirmed that she was unfit for her contracted role as a staff nurse. She could be fit for a part time morning only sedentary role ,if one was available to try. A meeting with the claimant was recommended to discuss what she felt she could do. It was said that the Equality Act 2020 was likely to apply to her physical symptoms in reply to the question 'would this person's condition be supported as a disability under the provision of the Equality Act 2010?'.

89 The reconvened stage 3 meeting under the sickness policy was arranged for 2 May 2019.The claimant submitted in her written case prepared for that hearing that the grievance 'should be closed prior to the decision to end my employment.' She accepted during that meeting that her health had deteriorated and said she believed that Dr Ratti should be contacted by the respondent about her Tier 2 Ill Health Early Retirement.

90 On 6 May 2019 the claimant presented her claim to ET (when her employment was continuing).

91 The grievance hearing took place on 2 May 2019 and was conducted by Amanda Peet. She informed the claimant there was a concern about her attending alone and her daughter was contacted and also attended.

92 Ms Peet wrote to the claimant on 15 May 2019 and told her that her points were rejected.

93 The claimant appealed in writing against the grievance outcome on 22 May 2019. This is accepted by the respondent to be a protected act .She said her health had changed significantly and deteriorated since her sickness absence began. She repeated she wanted to continue in the nursing profession and any support in helping to achieve this would greatly help improve her mental well-being. It was agreed with the claimant that the Stage 3 meeting due to take place on 11 June 2019 be postponed to enable her grievance appeal to be concluded. It was rearranged for 16 July 2019.

94 On 11 July 2019 Sarah Bloomfield wrote to the claimant to tell her the outcome of her grievance appeal following a meeting which she had conducted

on 3 July 2019 and at which the claimant was accompanied by her daughter .She concluded that the redeployment period was not managed as well as the respondent would have liked. The respondent could have reviewed the opportunities more thoroughly with you to allow you to make an informed decision as to whether they were a suitable opportunity and the process could have been conducted in a more timely manner. She had not been supported in the way the respondent would have hoped. Extending the period had raised her hopes although this was not the respondent's intention .She concluded by stating that 'we will consider how we support staff during the redeployment period and ensure matters are managed in a more timely manner'. Ms Bloomfield was unable due to the ongoing effects of long Covid to recall much under cross-examination but we accept her denial that any delay was because of the claimants grievance outcome appeal.

95 The Stage 3 meeting took place on 16 July 2019 conducted by Leighann Sharp. It had been agreed the claimant could be accompanied by her daughter. The claimant confirmed that she had received the respondent's vacancy bulletins and had engaged in the redeployment process and was disappointed a role could not be found .She said that her union representative had wanted her to take the pension and the Band 2 job and she had said no. She wanted to remain in a nursing or Band 5 role at Baschurch. She had thought the trainee clinical coder and assistant performance manager roles were suitable though in relation to the latter she acknowledged a job share could not be offered.

96 Ms Sharp considered the contents of and the advice in the OH report dated 30 April 2019 and concluded that options to enable the claimant to continue in a nursing role was contrary to its advice .The redeployment options were unsuitable because the claimant did not satisfy the essential criteria due to her lack of IT skills and knowledge needed for the specific roles .The claimant did not want to reduce her salary so had rejected roles at a lower bands .She was satisfied that redeployment had been thoroughly explored and adjustments had been made for her TM and dyslexia. Her health had not improved and there was no treatment path to enable her to get better and return to work in the foreseeable future. Her entitlement to sick pay had been extended till the end of the process. She was satisfied that the claimant's sickness absence had been managed fairly and reasonably .The redeployment process having been exhausted and the grievance concluded she did not consider any further delay in terminating the claimant's employment would change the position. The claimant had been absent for 18 months. She could not return to her substantive post. A suitable alternative role could not be found for her. She was not willing to explore lower banded roles and she did not have the experience or knowledge for a higher banded one. During the adjournment Leighann Sharp discussed with Sue Pryce whether the respondent had done everything it should as far as redeployment was concerned and she confirmed it had .Ms Pryce also expressed the view that given the length of time that had elapsed it was preferable to make a decision rather than delay and leave the claimant 'dangling'. Leighann Sharp decided to terminate the claimant's employment on the grounds of ill health capability and reconvened the meeting to tell the claimant of this. The claimant became very emotional and Leighann Sharp told her she had the right to appeal which would be confirmed in writing . The decision to dismiss was

confirmed in writing in Leighann Sharp's letter dated 18 July 2019.It is common ground the claimant did not appeal against the decision to dismiss her.

97 On 13 September 2019 the claimant asked that her request for ill health retirement be reconsidered by NHS Pensions.

98 On 1 November 2019 NHS Pensions wrote to the claimant to tell her appeal had been successful and the claimant's Tier 2 ill health retirement was approved. The claimant was found to be permanently incapable or regular employment of like duration backdated to 7 August 2019.

Law

99 Section 98(1) and (2) of ERA provide that:

"(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 –

(b) relates to the capability of the employee."

100 Section 98(4) of ERA provides that:

"(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."

101 We remind ourselves that it is not for the tribunal to substitute its view of what was the right course for the employer to adopt. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair **(Iceland Frozen Foods Ltd v Jones 1982 IRLR 439 EAT).** In the case of **Taylor v OCS Group Ltd [2006] EWCA Civ 702** tribunals were reminded they should consider the fairness of the whole of the process. They will determine whether ,due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness or not of the decision –maker the overall process was fair, notwithstanding any deficiencies at an early stage. Tribunals

should consider the procedural issues together with the reason for dismissal . The two impact on each other and the tribunal's task is to decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.

102 In **Spencer v Paragon Wallpapers[1976]IRLR 373** the Employment Appeal Tribunal stated in cases of ill health usually what needed is a discussion of the position between manager and employee so that the situation can be weighed up bearing in mind employers need for work to be done and the employee's need for time to recover his health. It was said in that case '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? Every case will be different, depending upon the circumstances." 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".

103 In **East Lindsey District Council and Daubney IRLR 181** it was said that in relation to ill health dismissal it is necessary for the employee to be consulted and the matter discussed and that steps should be taken by the employer to discover the true medical position.

104 Under section 122 (2 ERA) 'Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.'

105 Under section 123 (1) ERA:

'(1)Subject to the provisions of this section and sections 124 124A and 126 , the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

106 The tribunal may reduce the compensatory award to reflect the chance that the employee may have been dismissed in any case at some point **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**,

107 Under section 123 (6) ERA:

'*(6)Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*.'

108 For the purposes of section 123 (6) ERA the following factors need to be established:

a) the conduct must be culpable or blameworthy;
b) the conduct must have actually caused or contributed to the dismissal ;and

c) it must be just and equitable to reduce the award by the proportion specified (**Nelson v BBC (N0 2) 1980 ICR 110 CA).**

109 In **Morrish v Henlys (Folkestone) Ltd** [1973] IRLR 61 Sir Hugh Griffiths said , 'It includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved'.

110 It will only be in exceptional circumstances that a finding of contributory fault can properly be made where the employee is dismissed for ill health or other reasons relating to capability but beyond his control (see **Slaughter v C Brewer & Sons Ltd [1990] IRLR 426, [1990] ICR 730, EAT).**

111 Under section 13 EQA '*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.*'

112 Under Section 15 EQA:

'*(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.'

113 The meaning of the word 'unfavourable' cannot be equated with the concept of 'detriment' used elsewhere in EqA. It has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person because of something which arises in consequence of their disability. It is necessary to identify the relevant treatment before deciding if it is unfavourable (**Williams**).

114 In the case of **Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305,** Mr Justice Langstaff held that there were two separate causal steps to establishing a claim under section 15 EqA. Once a tribunal had identified the treatment complained of, it had to focus on the words "because of something" and identify the "something" and then decide whether that "something" arose in consequence of the claimant's disability.

115 In the case of **Hall v Chief Constable of West Yorkshire Police [2015] IRLR** the EAT held that the tribunal had erred in concluding that it was necessary for the claimant's disability to be the cause of the respondent's action and that it was sufficient for the claimant's disability to have been a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause, but was nonetheless an effective cause of the unfavourable treatment.

116 In the case of **Pnaisner v NHS England [2016] IRLR 170** the EAT stated that (a) the tribunal had to identify whether there was unfavourable treatment and by whom; (b) it had to determine what caused the treatment. The focus was on the reason in the mind of the alleged discriminator, and an examination of the conscious or unconscious thought processes of that person might be required; (c) the motive of the alleged discriminator acting as he did was irrelevant; (d) the tribunal had to determine whether the reason was " something arising in consequence of [the claimant's]disability", which could describe a range of causal links; (e) that stage of the causation test involved an objective question and did not depend on the thought processes of the alleged discriminator; (f) the knowledge required was of the disability; it did not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

117 In **Hensman v Ministry of Defence UKEAT /0067/14/DM** the Employment Appeal Tribunal applied the justification test as described in **Hardy and Hansons Plc v Lax [2005] ICR 1565 ,CA** to a claim under section 15 EQA .Singh J held that when assessing proportionality while an employment tribunal must reach its own judgment ,that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer .

118 In **Department of Work and Pensions v Boyers UKEAT /0282/19/AT** tribunals were reminded that in assessing the proportionality of the means of achieving a legitimate aim that it is an error of law to focus on the process by which the outcome was achieved. Its analysis should not be based on the actions and thought processes of the respondent's managers but on a balancing of the needs of the respondent in the context of the legitimate aim found to be pursued by the dismissal and the discriminatory impact on the claimant.

119 Section 39(5) EqA imposes a duty to make reasonable adjustments upon an employer. Where such a duty is imposed sections 20, 21 and 22 and Schedule 8 apply. Section 20(2) states that duty comprises three requirements. Insofar as is relevant for us, the first of those requirements is that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, that the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. It is for the claimant to establish the provision criterion or practice and that it led to a substantial disadvantage . The question of whether there is a disadvantage and whether it is substantial is a question of fact for the tribunal (**Project Management Institute v Latif).**

120 Section 21(1) EQA states that the failure to comply with one of the three requirements is a failure to comply with a duty to make reasonable adjustments. Section 21(2) EQA provides that a failure to comply with a duty to make reasonable adjustments in relation to the disabled person constitutes discrimination by the employer.

121 As far as knowledge for the purpose of the claimant's claim of a failure to comply with the duty to make reasonable adjustments is concerned in **Secretary of State for the Department of Work and Pensions v Alam [2010]IRLR 283** (EAT) (again a case that preceded EQA) it was held that two questions needed to be determined:

Did the employer know both that the employee was disabled and that his/her disability was liable to affect him/her in the manner set out in section 4A (1) DDA?
Only if that answer to that question is no then ought the employer to have known both that the employee was disabled and that his /her disability was liable to affect him/her in the manner set out in section 4 A(1)?
If the answer to both questions was also negative, then there was no duty to make reasonable adjustments (see also the comments of Underhill P at [37] in **Wilcox v Birmingham CAB Services Ltd [2011]EQLR 810 EAT).**

122 Schedule 8, para 20(1) EqA states that a respondent is not under a duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to .It would seem therefore that the analysis in **Alam** remains good law. The test for knowledge for reasonable adjustments is therefore a different test to that for section 15 claims.

123 However in relation to either claim the employer must do all they can reasonably to find out whether this is the case and what is reasonable will depend on the circumstances. The Equality and Human Rights Commission has prepared a Code of Practice on Employment (2011) ('the Code'). Tribunals and courts must take into account any part of the Code that appears relevant to any questions arising in proceedings.

124 The Code states at paragraph 5.15 and 6.19:

" The employer must ,however ,do all they can reasonably be expected to do to find out [whether this is the case].What is reasonable will depend on the circumstances .This is an objective assessment .When making enquiries about disability ,employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

The burden is on the employer to show that it was unreasonable for it to have the required knowledge.

125 In **Gallop v Newport County Council EWCA Civ 1583** it was held that the responsible employer has to make his own judgment as to whether the employee is or is not disabled .In making that judgment the employer will rightly want assurance and guidance from occupational health or other medical advisers .That assistance and guidance may be to the effect that the employee is a disabled person; and unless the employer has good reason to disagree with the basis of such advice ,he will ordinarily respect it in his dealings with the employee. In other cases, the guidance may be that the opinion of the adviser is that the employee is not a disabled person the employer must not forget that it is still he, the employer, who has to make the factual judgment as to whether the employee is or is not disabled ;he cannot simply rubberstamp the adviser's opinion that he is not. It cautioned that employers when seeking advice from clinicians. It cautioned that employers when seeking advice from clinicians should not simply ask in general terms whether the employee is a disabled person within the meaning of the legislation but to pose specific practical questions directed to the particular circumstances of the case. In **Donalien v Liberata UK ltd [2018] IRLR 535 (CA)** it was made clear that the value of OH advice should

not be generally discounted -rather an employer should not rely unquestioningly on an unreasoned report.

126 In **Environment Agency v Rowan [2008] IRLR 20** a case concerning the provisions of the DDA the Employment Appeal Tribunal, His Honour Judge Serota QC, presiding stated as follows:-

*"*27 …..In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or

(b) the physical feature of premises occupied by the employer,

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant.

It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.' "

127 It was held that an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters at a) to d) above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person at a substantial disadvantage.

128 Paragraph 6.2 of the Code says that the duty to make reasonable adjustments is a cornerstone of the Equality Act and requires employers to take positive steps to ensure disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers ,job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled . It applies during all stages of employment. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's (Paragraph 6.16 of the Code).

129 Simler P in **Sheikholeslami v University of Edinburgh [2018] IRLR 1090, EAT,** held:
"It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with

people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question … For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.

The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see s 212(1). The EHRC Code of Practice states that the requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people: see para 8 of App 1. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

130 Once the duty is engaged employers are required to take such adjustments as it is reasonable to have to take, in all the circumstances of the case. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

131 Paragraph 6.28 of the Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:
whether taking any particular steps would be effective in preventing the substantial disadvantage;
the practicability of the step;
the financial and other costs of making the adjustment and the extent of any disruption caused;
the extent of the employer's financial or other resources;
the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
the type and size of the employer.

132 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

133 Arranging for an OH or other assessment of an employee's needs is not in itself a reasonable adjustment because such steps do not remove any disadvantage (**Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664 EAT**).

134 Under section 19 EqA

(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.'

The relevant protected characteristics include disability. The burden is on a claimant to establish the first three elements of the statutory test (**Dziedziak v Future Electonics Ltd EAT 0271 /11** and **Essop and Others v Home Office (UK VBorder Agency) and another case 2017 ICR 640 ,SCJ**).

135 Under section 26 EqA

'(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.

(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'.

The relevant protected characteristics include disability.

136 There are three different elements to the statutory test to be considered. In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, a case bought under the RRA, it was explained that it is a healthy discipline for a tribunal specifically to address each of the three elements and to ensure that clear factual findings are made on each in relation to which an issue arises.

(1) The unwanted conduct. Did the respondent engage in unwanted conduct?

(2) The purpose or effect of that conduct. Did the conduct in question either:

(a) have the purpose or

(b) have the effect

of either (i) violating the claimant's dignity or (ii) creating an adverse environment for her ? ("the proscribed consequences".)

(3) The relationship of the conduct to the protected characteristic. Was that conduct related to the claimant's protected characteristic?

137 So far as effect cases are concerned, in the case of **The Reverend Canon Pemberton v The Right Reverend Inwood [2018] EWCA Civ 564** Lord Justice Underhill reformulated the guidance that he had given, whilst sitting in the EAT, some years previously in **Richmond** as to the approach to be taken by Tribunals to harassment claims. It is now as follows, paragraph 88;

138 In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4) (a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4) (b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then (even if the claimant did feel that his dignity was violated or an adverse environment created) it should not be found to have done so.

139 Under section 27 EqA

(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.

The tribunal has to make three findings: whether a protected act was done and, if so, whether the claimant was subjected to a detriment; and, if so, whether that was because of doing the protected act. There is no requirement under the EqA for a comparator. “Because of” has the same meaning as for direct discrimination. This requires it to have an influence which is more than trivial.

140 Under section 136 EQA if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred but that does not apply if that person shows the person did not contravene the provision.

141 The proper approach to the burden of proof has been addressed by the Court of Appeal in **Igen Ltd v Wong [2005 IRLR 258, Madarassy v Nomura International plc [2007] ICR 867 and Laing v Manchester City Council [2006] IRLR 748**.
However it was explained in **Amnesty International v Ahmed [2009] ICR 1450** that where explicit findings as to the reason for the claimant’s treatment can be made this renders the elaborations of the “Barton/Igen guidelines” otiose. This approach was expressly endorsed by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37. Lord Hope emphasised again that the burden of proof provisions have a role to play where there is room for doubt as to the facts necessary to establish discrimination, but that in a case where the tribunal is in a position to make positive findings on the evidence one way or another, they have no role to play.

142 Accordingly although a two stage approach is envisaged by s.136 it is not obligatory.
Where the two stage approach is adopted Mummery LJ explained in **Madarassy** that the approach is as follows:
55. In my judgment, the correct legal position is made plain in paras 28 and 29 of the judgment in Igen Ltd v Wong:
'28 … The language of the statutory amendments [to section 63A(2)] seems to us plain. It is for the complainant to prove facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the respondent 'could have committed' such act.
29. The relevant act is, in a race discrimination case …. that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example in relation to employment in the circumstances specified in section 4 of the Act),(b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All those are facts which the complainant, in our judgment, needs to prove on the balance of probabilities.’
56. The court in Igen Ltd v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate 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 had committed an unlawful act of discrimination.”
Therefore, the burden is on the claimant to establish facts from which a tribunal could conclude on the balance of probabilities, and absent any explanation, that

the alleged discrimination had occurred. At that stage the employer's explanation for the treatment - the subjective reasons which caused the employer to act as he did - must be left out of the account. It was also explained in Madarassy that the facts from which discrimination could be inferred can come from any evidence before the tribunal, including evidence from the respondent, save only for the absence of an adequate explanation.

143 The need for there to be something more than a difference in treatment and a difference in status has been emphasised repeatedly by the EAT, see for example **Hammonds LLP & Ors v Mwitta [2010] UKEAT 0026_10_0110** and Mr Justice Langstaff in **BCC & Semilali v Millwood UKEAT/0564/11**, paragraph 25.

144 Whilst something else is therefore needed to reverse the burden "not very much" needs to be added to a difference in status and a difference in treatment in order for the burden to be on the respondent to prove a non-discriminatory explanation, paragraph 56 **Veolia Environmental Services UK v Gumbs UKEAT/0487/12**. This might include the fact that the respondent has given inconsistent explanations for the treatment, although it is the fact of the inconsistency not the explanations themselves that move the burden across, paragraph 57 **Veolia**, as well as a finding that an explanation for the treatment is a false one or a witness is lying in relation to the explanation, paragraph 59 **Veolia**. There is certainly no requirement that there needs to be a finding of something happening that is obviously and blatantly discriminatory to reverse the burden, paragraph 55 **Veolia. Metropolitan Police v Denby UKEAT/0314/16:** "The authorities do not require the tribunal at the first stage to blind itself to evasive, economical or untruthful evidence from the respondent which may help the tribunal decide there are facts which suffice to shift the burden, paragraphs 43 and 49".

145 The issue of precisely what can be taken into account at stage 1 was revisited by the EAT in **Nasir and anor v Asim [2010] ICR 1225.** In this case it was said that, paragraph 70:
It is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of sex or race. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of sex or race. The Tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed.
See also Metropolitan **Police v Denby UKEAT/0314/16**, paragraph 48, "there is nothing wrong with the tribunal…. considering all the relevant evidence at the first stage … even if some of it is of an explanatory nature and emanates from the employer".

146 In considering the burden of proof each allegation or complaint should be looked at separately, **Essex County Council v Jarrett UKEAT/0045/15**, although in the event that a particular complaint is found to be substantiated that in itself may well be such evidence as justifies the reversal of the burden of proof in respect of other allegations, **Jarrett**. Likewise if a particular complaint is not substantiated that may equally inform a decision on the reversal of the burden of proof on another complaint, although it will not be decisive of it, **Jarrett.** It is always important to look at the totality of the evidence. The Court of Appeal in

London Borough of Ealing v Rihal 2004 IRLR 642 paragraphs 31 – 32, applying the approach of the Employment Appeal Tribunal in **Qureshi** is authority for the proposition that in determining whether the less favourable treatment was on the proscribed ground, a tribunal is obliged to look at all the material put before it which is relevant to the determination of that issue, which may include evidence about the conduct of the alleged discriminator before or after the act about which complaint is made. The total picture has to be looked at.
At the second stage, the respondent is required to prove that they did not contravene the provision concerned if the complaint is not to be upheld. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever because of, in this case, race since "no discrimination whatsoever" is compatible with the Burden of Proof Directive. That requires the tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that (in this case) race was not a reason for the treatment in question. If the respondent fails to establish that the tribunal must find that there is discrimination.

147 In **Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16**, in the context of whether unreasonable treatment supports an inference of discrimination the EAT said, paragraph 97;
It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings. Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.

148 In **London Borough of Islington v Ladele [2009] IRLR 154** Mr Justice Elias said this about unreasonable treatment;
"It may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one." As Lord Browne-Wilkinson stated in **Zafar v Glasgow City Council [1997] IRLR 229**:
" it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances."

149 Section 123 EqA provides that:

"(1) Subject to sections…140B, proceedings on a complaint within section 120 (which relates to a contravention of Part 5 (Work) of EQA)may not be brought after the end of –

(a) The period of three months starting with the date of the act to which the complaint relates ,or
(b) such other period as the employment tribunal thinks just and equitable .

…..
(3) For the purposes of this section –
(a) conduct extending over a period is to be treated as done at the end of the period:
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

150 In **Matuszowic v Kingston –upon Hull City Council [2009] EWCA Civ 22** the Court of Appeal found that a failure to make a reasonable adjustment is an 'omission' rather than a 'continuing act' so that the time limit for presentation of a claim starts from the expiry of the period within which the employer might reasonably have been expected to make the adjustment. In the case of **Secretary of State for Work and Pensions (Jobcentre Plus) v Jamil and others UKEAT /0097/13BA** the then President of the EAT Langstaff P held that where an employer refused to make a particular adjustment but agreed to keep it under review rather than making a 'once and for all' refusal ,the failure to make that reasonable adjustment was capable of amounting to a continuing act ,although the refusal to make the reasonable adjustment had occurred more than three months prior to the presentation of the claim. In **Viridor Waste v Edge UKEAT 0393/14/DM** the EAT distinguished **Jamil** and held each case was to be decided on its facts. In that instance it was a refusal and that it might be reconsidered was irrelevant. It was not a case of a policy to review as in **Jamil**.

151 It was held in **Hendricks v Commissioner of Police for the Metropolis [2003]IRLR 96 CA** that in determining whether there was an act extending over a period ,as distinct from a succession of unconnected or isolated specific acts ,for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme of regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period.' Further 'the burden is on the claimant to prove, either by direct evidence or by inference from primary facts ,that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period.''

152 The burden is on the claimant to persuade a tribunal that it is just and equitable to extend time **(Robertson v Bexley Community Centre [2003] IRLR 434.**

153 In the case of **British Coal Corporation v Keeble [1997] IRLR 336 EAT** it was suggested that in exercising its discretion the tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980 .Those factors are consideration of the prejudice which each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case ,in particular the length of and reasons for the delay ;the extent to which the cogency of the evidence is likely to be affected by the delay ;whether the party sued had cooperated with any requests for information ;the promptness with which the

claimant acted once he or she knew of the facts giving rise to the cause of action ;and the steps taken to obtain appropriate advice once he or she knew of the possibility of taking action. However a tribunal is not required to go through the matters listed in section 33 (3) of the Limitation Act, provided that no significant factor is omitted **(London Borough of Southwark v Afolabi [2003] IRLR 220).**

154 Under section 13 (1) (a) Employment Rights Act 1996 ('ERA') an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract.

155 Section 13 (3) ERA provides that where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

156 Under section 23 (1) ERA

'*A worker may present a complaint to an employment tribunal—*

(a)that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2))',

156 Under section 23 (2) ERA

'*Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*

(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or…

(3)Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.'

157 Under section 23 (4) ERA

'Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.'

Time limits in the employment tribunal are strictly enforced as a matter of public policy.

158 Section 207B Employment Rights Act 1996 ('ERA') extends the above time limits by not counting the period beginning with Day A (the day on which the prospective claimants contact ACAS to request Early Conciliation) and ending with Day B (the day they get the Early Conciliation Certificate) and if the relevant time limit would (if not extended by subsection 207B (4) ERA) expire during the period beginning with day A and ending one month after Day B the time limit expires instead at the end of that period.

159 However that extension does not apply if by the time the prospective claimant contacts ACAS to request early conciliation the above three-month period has already expired. It is too late. In **Pearce v Bank of America Merill Lynch and others UKEAT/0067/19/LA** it was held that although time may be extended to allow for ACAS Early Conciliation that is only possible where the reference to ACAS takes place during the primary limitation period.

160 What is '*reasonably practicable* 'is a question of fact for the tribunal. The burden of proof lies on the claimant.

161 The word' *practicable* 'is to be given a liberal interpretation in favour of the employee **(Dedman v British Building and Engineering Appliances Ltd [1974] 1AER 520).** May LJ described the relevant test in this way: '*We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done - different, for instance, from its construction in the context of the legislation relating to factories compare Marshall v Gotham Co Ltd[1954]AC 360,HL. In the context in which the words are used in the1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable as the equivalent of "feasible" as Sir John Brightman did in [Singh v Post Office [1973],CR437 NIRC] and to ask colloquially and untrammelled by too much legal logic-"was it reasonably feasible to present the complaint to the employment tribunal within the relevant 3 months?"-is the best approach to the correct application of the relevant subsection*.**"(Palmer and Saunders v Southend-on-Sea Borough Council [1984] ICR at 384,385).** He said the factors could not be described exhaustively but listed a number of considerations which might be investigated including the manner of, and reason for the dismissal, whether the employer's conciliatory appeals machinery have been used, the substantive cause of the claimant's failure to comply with the time limit whether there was any physical impediment preventing compliance, such as illness, or a postal strike, whether, and if so when, the claimant knew of his rights, whether the employer had misrepresented any relevant matter to the employee, whether the claimant had been advised by anyone, and the nature of any advice given, and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

162 Tribunals were reminded in **Chapman v Simon [1994] IRLR 124 CA** that the jurisdiction of the employment tribunal is limited to the complaints which have been made to it. It is not for us to find other acts of which complaints have not been made if the act of which complaint is made is not proven. His Honour Judge

Richardson made it clear in **Newcastle City Council v Spires 2011 UKEAT 0334 10 2202** in the context of a reasonable adjustments claim that a tribunal should consider only complaints that were defined at the commencement of the hearing ,following **Sainsbury's Supermarkets Ltd v Tarbuck** and **Chapman v Simon**.

Submissions

163 We thank the parties for their oral and written submissions which we have carefully considered.

Conclusions

Time Limits - Discrimination

164 We have found that the allegation of direct disability discrimination and harassment related to disability at paragraph 2.6 (a) and 2.25 a and b above did not occur as alleged. However, if we are wrong about those conclusions they are out of time.

165 As far as the complaints under section 15 EqA are concerned in relation to the Trainee Information Analyst post the claimant was informed of this decision in May 2018 and any claim in respect of this is out of time. In relation to the post of Assistant Performance Manager the claimant was informed this was not suitable redeployment on 7 August 2018 and she confirmed on 29 November 2018 that she was happy not to pursue it so any claim in respect of this is out of time. The ward clerk post was discussed in or around July 2018 so a complaint in respect of this is also out of time. The decision not to appoint the claimant to the post of Pathway Coordinator was made on or around 22 August 2018 so any claim in respect of this is out of time. In relation to the post of Imaging Department Nurse by 29 November 2018 she confirmed she was not pursuing the post so any decision or failure to decide in respect of it must have predated this .It follows this claim is also out of time as is any complaint in relation to the post of Divisional Governance Assistant since the decision predated 6 November 2018 when the claiamnt was informed of it. They are each 'one off' acts or omissions committed by different individuals at the respondent .

166 As far as the complaints of a failure to make reasonable adjustments are concerned in relation to the above posts, such claims are omissions ;there was no deliberate decision as far as the reasonable adjustments were concerned and if section 123 (4) is applied in each case the claims are out of time.

167 We remind ourselves that any allegation not found to be discriminatory cannot form part of continuing state of affairs. Looking at the substance of the complaints (whether pursued as complaints of discrimination arising from disability or a failure to make reasonable adjustments) there was no evidence before us that they were linked to one another and constituted a continuing state of affairs or an ongoing situation such that we could find there was conduct extending over a period within section 123 (3) (a) EqA.

168 The claimant has not provided any evidence about why we should exercise our jurisdiction to extend time in her favour on just and equitable grounds. Her witness statement contained no evidence about why such an extension should be granted although this was identified as an issue the tribunal would address at the final hearing. She had the benefit of trade union representation and had

obtained legal advice and clearly knew she had to go to ACAS to get a certificate before commencing a claim. There is no evidence that her health incapacitated her such that she was unable to make her claims in time. The claimant has provided no reasonable explanation why the claims which were out of time were not presented in time.

169 We remind ourselves there is a public interest in the enforcement of time limits which are exercised strictly in employment tribunals.

170 As far as the balance of prejudice is concerned the claimant cannot pursue those claims which are out of time ; the respondent has not identified the nature of particular prejudice in addition to the obvious prejudice of having to defend the claims .However, prejudice is not a determinative factor and ,having considered all of the above relevant circumstances, the claimant has not persuaded us that it would be just and equitable to extend time in her favour and allow any out of time claims of disability discrimination to proceed. They are therefore dismissed. Nonetheless in the event we are wrong about that we have gone on to consider those claims below.

Unfair dismissal

171 The respondent has asserted that the reason for the claimant's dismissal related to the claimant's capability arising out of her long-term sickness absence. The claimant did not allege there was another reason for her dismissal nor that the decision to dismiss her amounted to a claim of disability discrimination under EQA. We conclude that the respondent has shown the principal reason for the claimant's dismissal was a reason relating to the claimant's capability (ill-health) and that is a potentially fair reason for dismissal (section 98 (2) (b) ERA 1996).

172 The respondent having shown the reason for dismissal, we now consider whether the dismissal was fair or unfair under section 98 (4) ERA having regard to that reason.

173 The claimant had been absent from work since 15 November 2017 and remained absent until 17 July 2019 save for the 6 week trial period for the Trainee Clinical Coder role. At the time Leighann Sharp took her decision to dismiss the claimant on 16 July 2019 she had available to her the OH report dated 30 April 2019 which confirmed the claimant was unfit for her contracted role. The claimant did not challenge the contents of that (or any other) OH reports at the time. The claimant was informed that the Stage 3 meeting might result in her dismissal. She had been invited to submit any evidence she wanted to rely on but did not do so .During the hearing she did not contend that the medical evidence before Ms Sharp was out of date or that her medical position had improved such that it was likely that she would be able to return to work in a nursing role in the foreseeable future. On 23 April 2018 she had been awarded Tier 1 ill health retirement which indicated she was permanently incapable of the NHS employment. Redeployment had been considered but there was no suitable alternative employment available for the claimant which was in accordance with OH recommendation (that she could be fit for a part time morning only sedentary role ,if one was available to try) or her abilities or skills. She was on half pay (her sick pay having been reinstated).

174 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position. 6 OH reports had been obtained from November 2017 to 30 April 2019 and the claimant was given the opportunity but raised no matters which would warrant further investigation into her medical position.

175 The respondent adequately consulted the claimant throughout the application of the Absence Policy. Stage 1 took place between October 2017 and January 2018 ,Stage 2 took place between 25 January 2018 to 26 July 2018 and Stage 3 meetings took place between 30 August 2018 and 16 July 2019.There were numerous informal and 13 formal meetings with the claimant during which the claimant's health was discussed. OH reports were reasonably considered as were redeployment opportunities and adjustments.

176 Ms Sharp took the decision to dismiss for the reasons set out in paragraph 96 above. Although there was no evidence before us about the impact of the claimant's absence on the respondent, the claimant's period of sick leave was very lengthy with no prospect of a return to work to a nursing position or redeployment opportunities which were in accordance with OH advice and which the respondent and the claimant would be likely to consider suitable and the respondent was continuing to incur the costs of sick pay. The respondent had taken reasonable steps to redeploy her . Ms Sharp was also mindful of the deleterious impact on the claimant of a further period of uncertainty before a decision was made .

177 No reasonable employer could reasonably be expected to wait longer in those circumstances before dismissing the claimant. No reasonable employer would have entertained a phased return to work to an unspecified role at some unspecified time in the future during which half pay would continue to be paid. We conclude that Ms Sharp's decision to dismiss the claimant was within the range of reasonable responses.

178 The claimant's claim of unfair dismissal therefore fails and is dismissed.

Direct Disability discrimination

179 The claimant has made 2 allegations of less favourable treatment in relation to the pathway coordinator role and the decision not to give her the clinical coder role(paragraph 2.6 (a) and (b) above). We did not find that Lynne Morris created the test for her or that it was put in place intentionally to set her up to fail as alleged.

180 As far as the decision not to give the claimant the role of clinical coder is concerned there is no evidence from which we could conclude or infer that Jan Makinson did so because of any disability of the claimant (absent an explanation).If we are wrong about that and the burden of proof has passed to the respondent we conclude that Jan Makinson did not give the role to her because of her performance in the trial period as far as accuracy was concerned, a key requirement of the job, and because she failed the test ,and not because of her disability or because of the protected characteristic of disability more generally. A hypothetical comparator whose performance in the trial period was

the same as the claimant and who failed the test would also not have been given the role. The claims fail and are dismissed.

Harassment related to Disability

181 We did not find that on 29 November 2019 Lynne Morris made the comment she is alleged to have made about the claimant's sickness. We have found that a remark was made by Tara Bright from which the claimant inferred she had failed her test and that a conversation about the claimant ensued (see paragraph 81 above) . We can understand that a conversation about you in earshot of you and your colleagues could in itself be embarrassing and therefore unwanted conduct. However there are no facts from which we could conclude this was unwanted conduct which related to the claimant's disability. It is not enough that the claimant is a disabled person. The claims fail and are dismissed.

Victimisation

182 We conclude that there was no written grievance dated 30 August 2018 as alleged. We have no jurisdiction to consider a complaint of victimisation in relation to any alleged detriment to which the claimant says she was subjected because of it. The respondent accepts the claimant's written appeal 22 May 2019 was a protected act .Nothing that happened before that date can be a detriment to which the claimant was subjected because of it. It follows that the only delay in finalising the outcome must be in the period from 22 May 2019 to the provision of the outcome on 11 July 2019 and the allegation must lie against Ms Bloomfield. The claimant did not address the issue of delay or why she contends the delay was because of the written appeal 22 May 2019 in her witness statement nor did she put this to Ms Bloomfield. We do not conclude that there was any undue delay in in finalising the outcome of the claimant's appeal. The hearing took place on 3 July 2019, 6 weeks after the appeal was made and the outcome was given 6 working days later. But even if there was delay there is no evidence before us from which we could infer or conclude that any delay was because of the protected act. The claims fail and are dismissed.

Discrimination Arising from Disability

183 We first turn to whether the claimant's inability to work as a Band 5 nurse and therefore required training was a 'something arising' in consequence from her TM. It seems to us that what is being alleged is the something arising is the requirement for training and that there is a causal link between it and the claimant's inability to work as a Band 5 nurse which is because of her TM. So why does she require training ? It seems to us that she requires training because she needs to be redeployed into another role . Why does she need to be redeployed into another role? It seems to us that she needs to be redeployed because she is unable to work as a band 5 nurse. She is unable to work as a band 5 nurse because she has applied for and obtained her Tier 1 retirement pension and she did so because of her TM. However since the claimant is saying that in relation to each of the 7 roles the unfavourable treatment is not being appointed to the role we needed to know from the claimant exactly what training she needed for each of the roles in question to see if this was the something arising that arose in consequence of her TM or for example because of her underlying skills knowledge and experience that does not arise from her

TM and whether that caused the unfavourable treatment. She has failed to do this.

184 We have considered whether she was not appointed to the roles in question in relation to the other conceded 'somethings arising' .

Trainee Information Analyst

185 We conclude that the claimant did not get appointed to this role by Claire Jones because she did not have the requisite initial level of IT skills required and not because of any of the 'somethings arising' in consequence of disability.

Assistant Performance Manager

186 We conclude that the claimant did not get appointed to this role because of her inability to work full time hours and her inability to work in an active/mobile as opposed to sedentary role (both 'somethings arising' in consequence of her disability of TM.

187 However the respondent has shown that the non-appointment to the role was a proportionate means of achieving a legitimate aim namely effectively carrying out the services of the respondent including the appointment of staff who are able to perform the role and balancing and /or efficiently using departmental resourcing services needs and working within financial resources available and ensuring and/or meeting patient care and safety. We accepted Mr Lowe's evidence about the costs and detrimental impact on quality and performance of a job share and the critical nature of the role as far as the efficiency of the service was concerned. As far as the claimant was concerned the impact of not being appointed to the role was that ,although she remained in employment, she was not redeployed. However she had previously excluded another such role as not suitable (assistant performance manager (rehabilitation and medicine) due to mobility requirements and even if appointed given the requirements of this post and the obvious physical limitations to which the claimant was subject at this time (see paragraph 47 above) it seems to us unlikely that she would have been able to undertake the role for any substantial length of time whatsoever. We conclude that the needs of the respondent in the context of the legitimate aim found to be pursued by not appointing the claimant outweigh any discriminatory impact on the claimant.

Ward Clerk

188 We conclude that the claimant did not get appointed to this role because she wanted to work 30 hours a week when the role required 37 hours a week and declined to entertain a job share. This was not something which arose in consequence of her TM.

Pathway Coordinator

189 We conclude that the claimant did not get appointed to this role because she had failed the test set by Lynne Morris to assess her IT skills and did not have the skills and experience for the role set against its criteria and was unable to hit the ground running. She had not worked as an administrator but as Band 5 nurse

and had only basic IT skills. These issues were not because of the alleged 'somethings arising' in consequence of her dyslexia or TM.

Imaging Department Nurse

190 We conclude that there was no unfavourable treatment of the claimant as alleged because she did not pursue an application for this role.

Divisional Governance Assistant

191 We conclude that the claimant was not appointed to this role because she did not have the high level of IT skills required and no previous experience of governance and could not be trained within a period of less than 12 months the provision of which would put operational and resource pressures on the governance team. These issues were not because of the alleged 'somethings arising' in consequence of her TM or dyslexia as pleaded.

Trainee Clinical Coder

192 We conclude that the claimant was not appointed to this role because she had failed the test set for her and during the work trial had not demonstrated the high level of accuracy required in a role where the accurate inputting of information dictated payments to the respondent. These issues were not because of the alleged 'somethings arising' in consequence of the] claimant's disabilities of TM or dyslexia as pleaded. The claims under section 15 EqA fial and are dismissed.

Indirect Discrimination

193 The PCP relied on is the respondent's sickness absence policy which the respondent has conceded it had and that it was applied to the claimant and it was not disputed that the PCP was applied to all its staff generally. However the claimant has wholly failed to identify any particular sections of the sickness absence policy she complains of so that we can judge what exactly it is about the sickness absence policy that is said to put persons with whom with whom the claimant shared the protected characteristic of disability at the particular disadvantage which is pleaded as set out at paragraph 2.16 a) to d) . Further the claimant has failed to establish the group advantage as pleaded in those paragraphs.

194 There was no evidence to support the assertion that the claimant and persons in the group are likely to be on long term sickness absence and are therefore at a group disadvantage in that there is a requirement to maintain attendance at work in order not to suffer disciplinary proceedings and ultimately dismissal.

195 There is no requirement under the sickness absence policy for consistent attendance ; absence is managed (see paragraph 11 above).

196 The operation of the triggers in the sickness absence policy could ultimately result in dismissal but there is no evidence of group disadvantage.

197 There is no evidence to support the assertion that those in the group are likely to be so disabled that they can no longer fulfil their roles or that therefore

they are more likely to be required to be considered for redeployment/redeployed.

198 We are unable to conclude that the sickness absence policy consists in reality of providing vacancy lists to employees. The starting point for consideration of redeployment is what posts are available as set out in the vacancy lists. The process as agreed with the claimant is set out in paragraph 31 above. The respondent did take account of an employee's views about the suitability of an alternative role with a view to reaching agreement as to the suitability of a role and vacancies were discussed in meetings with the claimant in order to identify suitable roles. Further treating persons more favourably is allowed when considering redeployment in that while a role was being assessed when identified as a potentially suitable role recruitment was paused. The redeployment policy does not require competitive interviews .It does expressly state that posts will not be created but there is no evidence that that gives rise to a group disadvantage. The claimant has failed to establish that the PCP relied on causes a particular disadvantage to any actual or hypothetical group.

199 Further the individual disadvantage pleaded is impermissibly not the same disadvantage as the pleaded disadvantage for the group. The claimant alleges as far as that individual disadvantage is concerned she had to take part in a redeployment process but there is no evidence that she was compelled to do so. It came into play pending the determination of the claimant's application for ill health retirement. The respondent's efforts as far as redeployment was concerned did not consist of providing the claimant with vacancy lists. The process as far as redeployment of the claiamnt was concerned was set out in paragraph 31 above. We are unable to conclude that a failure to make reasonable adjustments is a disadvantage to which the claimant was put which arose from the PCP. The claimant was not required to attend any competitive interviews and her views were sought and taken into account concerning the suitability of roles even though the respondent may not have agreed with her. This claim is dismissed.

Failure to make reasonable adjustments

200 In relation the second alleged PCP we conclude that there was no such PCP applied to the claimant. In relation to the first PCP there is no evidence that it was the PCP relied on that put the claimant at the substantial disadvantages of which she complained ie that she was not appointed to the 7 roles in question compared to people who are not disabled . There is no evidence that the respondent knew, or could not reasonably be expected to know that the claimant was likely to be placed at the alleged substantial disadvantage .Further we cannot see how it was that the effects of the claimant's disabilities in question meant the PCP put the claimant at that disadvantage. If it was not the PCP that put the claimant at a substantial disadvantage then we cannot objectively assess any reasonable adjustments which are meant to avoid that disadvantage. We conclude the claims must fail .However if we are wrong about that we have considered the reasonable adjustments contended for.

201 As far as the role of Pathway Coordinator is concerned the claimant contends for time to learn from past papers in relation to the test devised by

Lynne Morris. However there were no such past papers .This is not a step as is reasonable for the respondent to have to take to avoid the substantial disadvantage of not being appointed to the role. There is no evidence that it would have been effective in alleviating or avoiding that disadvantage or have any prospect of doing so nor in the absence of any past papers do we consider that such a step was practicable. She also contends for more time to take the test but such an adjustment was sought and made at the time (see paragraph 57 above). The claimant has not identified how much more time she contends for than she was actually afforded but again there is no evidence that more time would have been effective in alleviating or avoiding the disadvantage given she did not have the requisite IT skills and experience for the role. As far as the provision of a quiet office and noise reduction headphones are concerned given our findings at paragraph 58 above these steps would not have been effective in alleviating or avoiding the substantial disadvantage or have any prospect of doing so. As far as a working trial before the test was concerned it had already been agreed between the claimant and the respondent that a work trial would follow agreement as to the suitability of the role. The test devised by Lynne Morris was to enable her to assess the claimant's IT skills and experience and therefore suitability for the role so that a work trial at this stage would not be a reasonable step for the respondent to have to take. On the evidence before us it would not have enabled the claimant to have acquire the level of IT skills and experience required to pass the test or be appointed to the role and on that basis would not have been effective in alleviating or avoiding the disadvantage or have any prospect of doing so. As far as training was concerned on the basis of the evidence before us the claimant's IT skills and experience were of a level that would have required extensive training before she would reach the advanced level (an essential criterion of the job) prior to undergoing the test. This would have caused delay (of an uncertain duration) and placed operational burdens on the team both in terms of providing the training and an unfilled role. This was not a practical step and therefore not a reasonable one for the respondent to have to take.

202 As far as the Trainee Clinical Coder role is concerned the claimant contends she should have been allowed to use the adapted laptop (with coloured filters) for both the test and the trial for the Clinical Coordinator post .There is no evidence that she was not permitted to do so during the trial and the claimant had the relevant equipment. The test was paper based and the claimant did not have to use her laptop. There was no failure on the respondent's part to take a step that it was reasonable for it to take.

203 The claimant also contends that during the trial period for the Trainee Clinical Coder post the respondent should have adopted the adjustments which were set out in the confidential workplace assessment dated 15 April 2016 but we have accepted the claimant's daughter's evidence that there were no reasonable adjustments that would have enabled her to do the role. Any such adjustments would not have been effective in alleviating or avoiding the substantial disadvantage nor was there any prospect of them doing so. We reach the same conclusion in relation to the adjustments in paragraph 2.23 i. a. to v. of the list of Issues.

204 As far as the adjustment at paragraph 2.23 i a is concerned we conclude the claimant received such training on the respondent's computer systems as was reasonably needed for the purpose of the work trial (see paragraph 78 above). In relation to the adjustment at paragraph 2.23 i b (to allow the claimant to work in a quieter corner of the office to minimise distractions) we conclude that this was not in the circumstances practicable given the size of the office (which the claimant accepted under cross-examination) and the nature of the work done by the team which necessitated interactions between team members and callers. There is no evidence she was told where she had to sit. Further there is no evidence on which we could conclude that this adjustment would have been effective in alleviating or avoiding the substantial disadvantage or that there was any prospect of it doing so. As far as the adjustment at paragraph 2.23 i c is concerned the claimant accepted under cross examination no one told her she was not allowed to use noise cancelling headphones and that she had not raised it during the work trial nor did she provide any evidence about colleagues distracting her and what effect it had on the work trial. As far as ensuring that colleagues were aware not to distract the claimant from performing her tasks is concerned (paragraph 2.23 i d) and the provision of SK/GR screen overlays such adjustments were made (see paragraphs 75 and 78 above) .In relation to paragraph 2.23 i f were concerned the only relevant managers were Jan Makinson and Tara Bright .Both of them were aware of the claimant's dyslexia and had agreed reasonable adjustments with her in the light of her dyslexia assessment. There is no evidence on which we could conclude that dyslexia training for managers would in any alleviate the substantial disadvantage or have any prospect of doing so. There is no evidence that the claimant was not allowed to take rest breaks allow the claimant to take regular rest breaks, including allowing her to walk/stretch her legs. Breaks (for any reason) had been agreed with Jan Makinson and Tara Bright on 24 January 2019 and the claimant took regular breaks. As far as paragraph 2.23 i g was concerned (allowing the claimant in the region of 50 per cent more time) she was not subjected to any deadlines (see paragraph 75 above and was given 50% more time as far as the work trial and the test were concerned. In relation to allowing the claimant to use the same desk and the facilitation of a DSE assessment (paragraphs 2.23 i i and m) the respondent did not facilitate the latter; it left the claimant to carry out her own .We found it surprising that this particular respondent was not in a position to execute such an assessment and do so promptly ;however we conclude that this would not be a reasonable adjustment (**Tarbuck v Sainsury's Supermarkets Ltd 2006 IRLR 664 EAT)** and there is no evidence that allowing the claimant to have her own desk or a larger one would have been effective in alleviating or avoiding the substantial disadvantage or have any prospect of doing so. Under paragraphs 2.23 j and l (providing the claimant with additional guidance and support with the work to be undertaken and ensuring that the claimant understood one task or area of procedure before being asked to learn another). the claimant's mentor during the work trial was Tara Bright whom she may not have found congenial but there is no evidence that she or Jan Makinson did not provide the claimant with the guidance and support needed or without ensuring the claimant had understood the task or procedure in question. In paragraph 2.23 i k the adjustment contended for is pre-filled forms to identify frequently used codes for regular searches but there was no evidence from the claimant

about how this would have had been in any way effective in alleviating or avoiding the substantial disadvantage or have any prospect of doing so. The claimant also contends the trial period for the Clinical Coordinator post should have been extended for longer than 6 weeks (paragraph 2.23 j) but there was no evidence of improvement in the claimant's performance as the work trial progressed nor did the claimant ask for the work trial to be extended such that we could conclude that this would have had been in any way effective in alleviating or avoiding the substantial disadvantage or have any prospect of doing so. In any event we have accepted the claimant's daughter's evidence that there were no reasonable adjustments that would have enabled her to do the role. The arrangement of an Access to Work referral for the claimant (paragraph 2.23 i n) would not be a reasonable adjustment (**Tarbuck v Sainsury's Supermarkets Ltd 2006 IRLR 664 EAT).** In relation to paragraph 2.23 k (training in an administrative job) as OH noted the claimant was educated to degree level and was able to carry out the administrative demands placed on a nurse. What particular training in an administrative job or when that training should have been provided or how that would have assisted the claimant has not been identified at all nor addressed in evidence and in those circumstances we find ourselves unable to judge its effectiveness or practicality. It cannot be a reasonable adjustment.

205 In relation to paragraph 2.23 l 'Training should have been provided for the Trainee Information Analyst role' ,the claimant was not appointed to the role because she did not have the initial level of skill required. It is not a reasonable step to provide training for a role for which the claimant did not meet an essential requirement.

206 In paragraph 2.23 r (the respondent ought to have consulted with the claimant before determining whether a role was suitable for her to be redeployed into) we conclude that it is not a reasonable adjustment to consult with an employee in determining suitability of a role because the duty on the employer concerns the taking of substantive steps (**Tarbuck**). We reach the same conclusion in relation to paragraph 2.23 s (consultation with Occupational Health before determining whether a role was suitable for the claimant) but in any event the respondent did consult with Occupational Health about suitability for redeployment in relation to those matters within the latter's sphere of expertise. As far as the reasonable adjustments contended for at paragraphs 2.23 t. u. v. are concerned the lack of specificity about the roles to which these adjustments are said to apply or how this would have had been in any way effective in alleviating or avoiding the substantial disadvantage or have any prospect of doing so and in those circumstances we find ourselves unable to judge their effectiveness or practicality.

207 As far as the Assistant Performance Manager role is concerned the claimant contends that the respondent ought to have provided her with a development plan and/or training to work towards the required competences .We conclude that this is not a reasonable adjustment for the respondent to have to take because it would not have been effective in alleviating or avoiding the substantial disadvantage. The role was non sedentary and was a similar role to that which

the claimant had already rejected as suitable for her because of the degree of mobility it required.

208 As far as the Imaging Department Nurse role is concerned the claimant contends that the respondent ought to have arranged a meeting between the claimant and hiring manager to consult on whether the role was suitable and ought to have extended the time for the claimant to apply for the role beyond the 3 days which she was provided with when she was informed about the role once the HR returned from annual leave. However the claimant was going to contact the hiring manager herself and in those circumstances this is not a reasonable step for the respondent to have to take. Further as we have already concluded above consultation on the suitability of a role is not a reasonable step (**Tarbuck**). An extension of time for the application (if one was in fact required) could not be considered an adjustment in the circumstances as it would not alleviate the disadvantage of not being appointed to the post. The claimant was not appointed to the post because she decided not to pursue it.

209 As far as the Divisional Governance Assistant is concerned the claimant contends that the respondent The claimant has also contended that she should have been provided with training, including in Microsoft Office packages for the Divisional Governance Assistant role but we conclude it is not a reasonable step for the claimant to have to take if it would take as long as 12 months for the claiamnt to be trained to meet one of the essential criteria for the job. She also contends the respondent ought to have provided her with a mentor to assist her with working in a governance environment for the Divisional Governance Assistant role. We conclude that this was not a reasonable step for the respondent to have to take because she did not meet one of the essential criteria of the role as far as her IT skills were concerned and a mentor would not be able to overcome this such that the substantial disadvantage would be alleviated or avoided nor was there any prospect of this, given the period of training in those skills would take 12 months. The claims of a failure to make reasonable adjustment fail and are dismissed.

Polkey

210 Although we have found that the respondent did not unfairly dismiss the claimant, if we were wrong in that conclusion we have gone on to address the question of whether a deduction should be made from any compensatory award under Polkey**.** The award of a Tier 1 pension on 23 April 2018 meant she was unable to undertake her current job (30 hours) though was able to do other work . She was disappointed that at that stage she had not been awarded Tier 2. She asked the NHS Pensions to reconsider its decision. By 1 November 2019 the claimant's Tier 2 application was approved and the claimant was found to be permanently incapable of regular employment of like duration backdated to 7 August 2019. She did not work after her employment ended and the medical evidence after the termination of her employment indicates that she was not fit to work because of her worsening back condition. She did not appeal against her dismissal. The claimant had told her GP that she wanted her Tier 2 pension and no longer wanted to work for the respondent. We conclude that had she not been dismissed she would have asked NHS Pensions to reconsider its decision and on being awarded her Tier 2 pension within a matter of weeks thereafter

either the claimant would have terminated her employment or the respondent would have terminated her employment on the grounds of her ill health. In the interim she would have continued on half pay only.

Contributory Conduct

211 Although we have found that the respondent did not unfairly dismiss the claimant if we are wrong about that conclusion we have addressed the issue of contributory conduct. The respondent has submitted that a reduction should be made to both the basic and compensatory award because during the redeployment process the claimant took a restrictive approach to redeployment which ultimately contributed to her dismissal . In our judgment a restrictive approach is not enough; it must carry with it the necessary degree of unreasonableness or amount to perversity foolishness or bloody mindedness. The claimant was unwilling to accept under cross-examination during the hearing that she considered Band 2 roles unsuitable for her. However her claim form presented on 6 May 2019 much nearer in time to the events in question encapsulates in our judgment her true view about Band 2 roles 'Unreasonable job roles in relation to pay' (paragraph 7) and 'I have actively explored roles relevant to my pay banding and also without a heavy drop in financial circumstances' . We understand and sympathise with the claimant finding it hard to accept that she could no longer undertake the demands of a clinical nursing role and to want a role of equivalent status and income to her band 5 nursing role. However in our judgment to have persistently set her face against Band 2 roles rejecting her trade union advice to take her Tier 1 pension and a Band 2 role and ignoring the strong steer she was given on 11 October 2018 as to the likely suitability and future prospects of Band 2 roles when she knew or ought reasonably to have known she could not return to a clinical nursing role and that the consequence of an unsuccessful redeployment process would be her dismissal was unreasonable in all the circumstances or was foolish . This was not something outwith her control ;it was a choice she made. Her unwillingness to explore lower banded roles was a factor Leighann Sharp took into account in deciding whether to dismiss the claimant. We consider that a 30 % deduction should be applied to the compensatory award and to the basic award under section 122 (2) ERA.

Unauthorised Deduction From Wages

212 The claimant's claim is for the period February 2018 to February 2019.She says she is entitled to full pay during that period. Her contractual entitlement and the absence policy are clear; the entitlement is to 6 months' full and 6 months' half pay and the respondent has the discretion to extend. Her entitlement to sick pay having been exhausted ,on 23 October 2018 the respondent exercised its discretion in the claimant's favour in that the claimant was paid half pay until she commenced a work trial or a final review was concluded, the claimant having applied on 12 October 2018.This continued until 21 January 2019 when she was reinstated to full pay .She was on special leave at full pay from 28 January 2019 to 1 February 2019 and on full pay from 4 February 2019 during her work trial as a clinical coding trainee. She had no legal (either express or implied) entitlement to full pay after her entitlement to sick pay was exhausted and the claimant has not argued before us that the respondent's exercise of discretion in deciding to

pay her half pay was unreasonable or that she had reasonable expectations that the sick pay would be reinstated in full or that the respondent took into account in the exercise of its discretion irrelevant considerations or acted in a way no rational employer would act ;she did not contest the decision to reinstate her sick pay at half pay at the time nor has she addressed the issue of non-payment of full pay in her witness statement . We accept the respondent's submission that the claimant has no legal entitlement to full pay in the period in question . These were not wages properly payable to her. Further the claimant has failed to establish the date of any last deduction in the series i.e. the last date of payment of wages on which she relies. The burden of proof in these matters fall on the claimant . In those circumstances her claim for unauthorised deduction from wages fails and is dismissed.

Employment Judge Woffenden

Date 28th June 2023