# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms A Harutunian**

**Respondents:** **(1) GlaxoSmithKline Service Unlimited**
**(2) Mr J Ball**

**Heard at:** **London South Employment Tribunal**

**On:** **13 – 17, 20 - 23 November 2023**
**In chambers 24, 27 November 2023 & 1 December 2023**

**Before:** **Employment Judge Dyal sitting with Non Legal Members Ms Louise Gledhill and Mr Thomas Harrington-Roberts**

**Representation:**

**Claimant:** **in person**

**Respondents:** **Ms Bell, Counsel**

**NOTE ON PRIVACY ORDERS (RULE 50):** Privacy orders have been made under separate cover. Pursuant to those orders redactions are made from the public version of this document.

# RESERVED JUDGMENT

1. The Claimant was unfairly dismissed.

2. The Claimant's dismissal was an act of discrimination arising from disability within the meaning of s.15 Equality Act 2010.

3. There was a breach of the s.20 Equality Act 2010 duty to make reasonable adjustments in the manner alleged at paragraphs 22.1.3 and 22.3 of the list of issues. It is just and equitable to extend time in respect of those complaints if they were presented out of time.

4. The duty to make reasonable adjustments was not otherwise breached.

5. The Respondents did not directly discriminate against the Claimant because of disability within the meaning of s.13 Equality Act 2010.

6. Remedy remains at large and will be determined at a further hearing if not agreed.

# REASONS

1. The matter came back before the tribunal for its final hearing following the postponement in March 2023 which is the subject of a separate judgment.

*The issues*

2. The issues were agreed to be as follows:

**UNFAIR DISMISSAL**

1. C was dismissed by R1 on 4 December 2019 and placed on garden leave until 4 March 2020.

Issues
2. What was the reason or principal reason for C's dismissal by R1 and was it a potentially fair reason within the meaning of section 98(2) of the ERA 1996? R1 contends that the reason for C's dismissal was capability.
3. If C was dismissed for a potentially fair reason, did R1 act reasonably in all the circumstances of the case by treating that reason as sufficient reason to dismiss her (section 94 ERA 1996)?
4. If C was unfairly dismissed, would she have been dismissed in any event? [deferred to remedy stage].

**DISCRIMINATION CLAIMS**

*Status and knowledge*

Disability status (section 6 Equality Act 2010): resolved in Claimant's favour at a Preliminary Hearing.

The disability is impairment of nerve root impingements involving two nerves between the spine and right hand.

Knowledge of disability at the relevant times was conceded in closing submissions.

**Time Limits (s.123 Equality Act 2010)**

8. Key Dates:

8.1. C was dismissed on 4 December 2019, effective 4 March 2020.
8.2. C commenced ACAS Early Conciliation (both Rs) on 11 February 2020.
8.3. C was issued ACAS Early Conciliation certificate (both R's) on 11 March 2020.
8.4. C presented her ET1 on 2 April 2020.

9. Issues

9.1. Were the claims presented more than 3 months (plus any relevant early conciliation period), after any of the conduct complained of? [not in dispute that complaints in respect of dismissal are in time]
9.2. If so, did that conduct form part of a chain of continuous conduct which

ended within 3 months (plus any relevant early conciliation period) of the claim form being presented?
9.3. If not, would it be just and equitable for the Tribunal to extend time?

**Direct Discrimination (section 13 Equality Act 2010)**

10. C alleges that she was directly discriminated against because of disability.

11. C relies upon the following alleged detriments:

11.1. The emails of 15 November 2017 communicating to management, HR and Occupational Health that C was incapable of using computer and emails.
11.2. C was told by R2 in January 2018 that her role involved only Change Control Tasks.
11.3. R2 communicated to management and HR that C was incapable of performing her role or doing any work that involved Change Control tasks.
11.4. C made requests to be transferred to alternative roles, as per the OH reasonable adjustments recommendations, from November 2017 (See Annexure 1 of the C's Further and Better Particulars) and those requests were denied.
11.5. C was dismissed on 4 December 2019, effective 4 March 2020.

Issues

12. Did C suffer any of the alleged detriments?
13. If so, was this because of disability? C relies upon a hypothetical comparator.

**Discrimination Arising from disability (section 15 Equality Act 2010)**

14. C says her inability to perform 'Change Control Tasks' (to the extent of R2's requirements) was something arising in consequence of her disability. [Conceded in closing submissions]

15. C says that R1 treated her unfavourably by dismissing her. [Conceded in closing submissions]

16. R1 says that it:
16.1. Made reasonable adjustments to alleviate the effect of C's disability.
16.2. Needed to ensure that it had a full headcount of staff who were able to perform the key change control tasks associated with C's role.

Issues

17. Did C's inability to perform 'Change Control Tasks' to the extent of R2's requirements arise in consequence of her disability? [Conceded in closing submissions]
18. Did R1 dismiss C because of her inability to perform Change Control Tasks to the extent of R2's requirements? [Conceded in closing submissions]
19. Was that a proportionate means of achieving a legitimate aim?

**Reasonable Adjustments (sections 20 & 21 Equality Act 2010)**

20. C alleges that R1 applied the 'PCP' of requiring her to perform 'Change Control Tasks'.
21. C alleges she was unable to perform Change Control Tasks and was subsequently dismissed.

22. C alleges that R1 should have made the following reasonable adjustment(s):
    22.1. Permitted C to carry out the following alternative roles:
        22.1.1. A role/opportunity in GDPR (first raised by C in November 2017)
        22.1.2. A permanent role as Service Manager in the wider team, that was given to CW who was working in R2's team, but not to her.
        22.1.3. Roles/opportunities in Smart Control (raised by C in 2018). The opportunities were given to dozen other individuals in the team and wider team , but not to her.
        22.1.4. Roles/opportunities as IT/Quality Project Manager which required less Change Control (raised by C in December 2018 – January 2019).
    22.2. Permitted C to use Dragon Speak software.
    22.3. Found an alternative role for C which she was capable of undertaking with or without reasonable adjustments.
    22.4. Removed some or all of the Change Control Tasks from her role and allocated that work to others.

Issues

23. Did R1 apply the alleged PCP?
24. If so, did C suffer substantial disadvantage compared to persons who are not disabled, as a result of the alleged PCP?
25. If so, did R1 take such steps as it was reasonable to have taken to avoid the disadvantage?

*Further application to postpone and yet further applications to postpone*

3. The final hearing was postponed in March 2023 as set out in our previous judgment. The Claimant further applied to postpone the final hearing on 18 October 2023. Judge Dyal determined that application on the papers on 10 November 2023 (it was unfortunate the application was not deal with more swiftly. This happened because of a combination of Judge Dyal being on annual leave and the matter not being dealt with by another judge in his absence, Judge Dyal then sitting in another jurisdiction (from which he dealt with the application as swiftly as he was able) and on account of him asking the Claimant for further information to assist in making a just decision). Since the application to postpone was renewed at the hearing, it is necessary and convenient to recite the basis on which Judge Dyal refused the application on the papers.

4. The decision was as follows:

> *"Summary*
>
> *(1) The application to postpone the final hearing is refused;*
> *(2) The hearing will commence at **12 pm** on 13 November 2023;*
> *[…]*
>
> *Postponement*

*On 18 October 2023 the Claimant applied to postpone the resumed final hearing listed on 13 November 2023. The final hearing has been postponed twice before.*

*There were three strands to the application:*

*(1) Medical / fitness to attend the final hearing*
*(2) Lack of information.*
*(3) Appeals to the EAT [in the message as originally drafted this was omitted but Judge Dyal later wrote to the parties stating that the appeals to the EAT were the third strand on this list – he had dealt with this third strand substantively as appears below but had omitted it from the list here]*

*The application was supported by a bundle of documents which I have considered carefully. It does not in my view contain any medical evidence that the Claimant is unfit for medical reasons for the final hearing. The redacted letter from her GP dated 17 October 2023 does not say that she is unfit. It simply says that the hearing would ideally be postponed to clarify the level of fitness following appointments in December. The narrative of the letter deals with several medical conditions and in each case it indicates that the position is improving. No reference is made to any* [redacted]

*Following this application I wrote to the parties as follows:*

*The Claimant must provide the following:*

*(1) The fit-note of 14.04.23: the Claimant has redacted from this document the medical condition which the GP was assessing and caused the GP to sign her off for 8 days. Why has she redacted this part of the certificate? What was the medical condition that has been redacted? Please provide a further copy of the certificate that does not redact this section.*
*(2) There is a letter that appears to be from a GP practice dated 17.10.23. The practice and the name of the doctor who wrote the letter as well as the type of doctor he/she is, have been redacted. Please provide a copy of the letter in which that information is not redacted.*
*(3) In her application, the Claimant says nothing at all about whether, what and to what extent she is suffering from* [redacted] *of the sort she reported at the hearing in March 2023 (summarized at paragraph 77.1.3) of the tribunal's reasons. The doctor's letter of 17 October 2023 also says nothing at all about this. The Claimant must state the current position. Have those symptoms resolved? If not give a full account of what they are now."*

*In her response in relation to (1) the Claimant provided the fit note unredacted. 'Stress and anxiety' were the conditions that had been redacted. She dealt with (2). While I do not agree that there was any need to make redactions to the letter I do agree that ultimately nothing turns on that. As to (3) she does not say that she has ongoing* [redacted] *of the kind*

*referred to at paragraph 77.1.3 of the tribunal's judgment, nor does she explain the extent of them. Generally her account is that symptoms are improved albeit that the cause of them remains under investigation. I accept what she says that there have been delays outside of her control in her appointments.*

*The legal framework for deciding an application to amend is as previously identified in the tribunal's judgment.*

*On the evidence and representations before me, I do not accept that the Claimant is unfit to attend and participate in the final hearing.*

*In any event, there are extremely weighty and powerful factors that mean this case now needs to be heard:*

*(1) A reasonable opportunity was given for the medical position to be investigated;*
*(2) The case is going stale;*
*(3) It is has been postponed twice before;*
*(4) If it were postponed again there would inevitably be a further long delay. In all probability the matter would not be heard until at least 2025 such are the pressures on the list;*
*(5) The Respondents have a right to a fair trial too and delay is the enemy of the same. This is a case in which oral evidence plays a significant role and the more time that passes the greater the risk of memories fading to the point of unfairness.*

*Lack of information*

*I do not accept that the Claimant needs the notes of the last hearing to fairly participate in the final hearing. The tribunal produced exceptionally detailed written reasons that outline all of the important things that happened at the last hearing and their resolution. It is important also to recognize that the evidence did not commence at the last hearing – we did not begin to consider the substantive issues.*

*More generally, the Claimant has the information that is needed for there to be a fair hearing. She has the bundle. On the last occasion she was permitted to produce her own bundle which contained the further documents she wanted the tribunal to see. She has that too. She has the witness statements both her own and the Respondent's. The list of issues was agreed at a Preliminary Hearing in December 2021. It was confirmed at the last hearing in March 2023, in the Claimant's presence, that they remained the issues.*

*If the Claimant's previous counsel has not shared his correspondence with the Respondents with her, that seems odd but there is nothing before me that suggests that the Claimant needs that correspondence to have a fair hearing:*

- *The evidence did not commence in March 2023.*

- *No substantive issues (other than the striking out of the victimization claim which is fully explained in the tribunal's judgment) were determined. They remain entirely at large.*
- *The tribunal did not form any view of the substantive issues in the case.*

*The Claimant was present for all of the last hearing save for a short part of it (see the tribunal's judgment). She missed a part of the application to strike out the victimization claim. That has no bearing on the hearing that is commencing next week because the victimization claim is no longer before the tribunal. It was struck-out. The Claimant has already applied for reconsideration and that application was refused.*

*Appeals to the EAT*

*I understand that the Claimant has lodged several appeals with the EAT. I am not certain how many. I am aware that three have recently been rejected because they were presented out of time albeit that the Claimant may or may not seek to pursue those appeals further.*

*In any event, I do not accept that the fact of appealing, however many appeals there are, is a sufficient basis in this case to postpone the final hearing. I refer to the very weighty factors mentioned above against postponement.*

*[…]*

*Attendance on 13 November 2023*

*The tribunal anticipates that it will principally use the day for reading back into the case but requires the parties attendance at **12 pm** to discuss administrative matters (e.g. timetable) and other preliminary matters (such as reasonable adjustments).*

5. On 10 November 2023, at 14.51 (after receiving the decision on her application to postpone. the Claimant emailed the tribunal again. In the email she said the following about her health:

*77.1. The medical problems of three kinds – these continue, have provided detailed information and status in the previous communications*
*77.1.1. The nerve entrapment issues that cause musculoskeletal pain – improved with physiotherapy which is ongoing, however it gets worse as I have been working on preparing EAT appeal.*
*77.1.2. Unexplained weight-loss which is being investigated as a matter or urgency – stabilised so not continuing to lose weight, but still unexplained and very low*
*77.1.3* [redacted]

[redacted]

6. She said the following about documents and notably said nothing about not having the hearing bundles/witness statements:

   *<u>Documents status</u>*

   *There have been documents that I had requested disclosure of over a year ago, evidence that these documents do exist and evidence that Respondents withheld these, were pertinent at the Full Hearing as per the Judgment and reasons stating that it was found overnight just before the Respondents legal representatives making her submission etc.*
   *Yet the Respondents and their legal representatives unceasingly refuted and stated these do not even exist, however they did exist and there are more but they refuse to disclose*

   *Regarding notes and documents, appreciate that the judgment and reasons are detailed. However, it is very different and as evident the Respondents had a dedicated person who was continuously transcribing as well as their counsel making notes and the ET panel. All of you are experienced and have legal background. I am not and I did not take any notes and under the circumstances could not have taken any note.*

   *References of being there, I was not physically at the Full Hearing as stated and recorded when the victimisation submission was made. Furthermore, as again recorded in the judgement and reasons even when I was the symptoms and circumstances were as that I did not.*

   *There are more points but in the interest of time, and today being Friday almost 3pm, I will not be able to include everything and send this in time for consideration of relisting of the Monday Full Hearing.*

7. On day 1 of the hearing, the Claimant renewed her application to postpone. She did so on many bases:

   7.1. That she was unfit for the hearing;
   7.2. That she did not have the hearing bundles;
   7.3. That she did not have a legal representative;
   7.4. That she did not have someone to accompany her and take notes;
   7.5. That she was not prepared for the hearing and had been told by a member of tribunal staff that they could not find a record of the hearing.

8. The legal framework for an application to postpone remains as set out in the tribunal's judgment and reasons of March 2023 and we remind ourselves of it.

9. Dealing with the Claimant's points in turn:

9.1. Unfitness: since Judge Dyal ruled on this matter on 10 November 2023, matters have only moved on only to the extent that the Claimant sent in the email of 10 November 2023 which said was she was still having some [redacted]. There is no explanation as to why she did not report these [redacted] problems in her application of 18 October 2023 nor in her response to Judge Dyal's direct question about this in his correspondence of 3 November 2023. The analysis remains the same. The tribunal is entitled to be satisfied by medical evidence that the Claimant is unfit to participate in the hearing but it is not. There is no medical evidence stating that she is unfit. A reasonable opportunity has been given to obtain that evidence (the c.8 month period between the last hearing and this one). There is no prospect of that medical evidence being provided now to inform this decision if a short adjournment were given. There are incredibly weighty factors against postponement as previously outlined:

9.1.1. The case is going stale. It was presented in February 2020. The claim involves many disputed facts and the complaints date back as far as 2017.
9.1.2. The case has been postponed twice before;
9.1.3. If the case were postponed again there would inevitably be a further long delay. The matter would not come back before the tribunal until spring 2025 at the earliest such are the pressures on the list;
9.1.4. The Respondents have a right to a fair trial too and delay is the enemy of the same. This is a case in which oral evidence plays a significant role and the more time that passes the greater the risk of memories fading to the point of unfairness;
9.1.5. There is currently no clear diagnosis and no clear prognosis in respect of the Claimant's [redacted]problems (if any). It could not be said with any confidence we would be in a different position in the future in terms of the Claimant's actual fitness to proceed.

9.1.6. The Claimant says she is not prepared because she was unwell following the last hearing. She says she was signed off work for 6 weeks. In fact she has only provided medical evidence of being signed off for 8 days (the medical certificate of 14.04.23 referred to above). She says she provided another one that predated this which signed her off for the period between the last hearing and the certificate of 14.04.23. She had not in fact sent that certificate in but it makes no difference since the final medical certificate expired on 21 April 2023 [we note that the Claimant emailed the Fit-note covering a period of 22 March 2023 to 14 April 2023 on the morning of day 4: stress and anxiety]. Beyond that, we do accept that she has been under regular medical investigation for a number of matters and still is but that is not the same thing as being unfit to prepare. There was plenty of time to prepare after 21 April 2023.

9.1.7. The Claimant says she is not prepared in part because a member of tribunal staff told her they could not see the listing of the case to commence on 13 November 2023. There is a note to this effect on ECM which records that on 7 November 2023 an admin officer at the tribunal told the Claimant they could not see the listing. However, we do not

accept that is any excuse for not preparing for the hearing. The Claimant in fact knew the hearing was resuming on 13 November:

9.1.7.1. This was set out in black and white in the judgment and case management orders sent to the parties following the hearing in March 2023;
9.1.7.2. On 18 October 2023, the Claimant wrote in asking to postpone the hearing listed in November 2023. Among other things she said this "I am sending this email to provide responses regarding fitness to attend the November 2023 Full Hearing which is listed for 10 days."
9.1.7.3. On 3 November 2023, I wrote to the parties (the email requesting further information about the Claimant's application to postpone of 18 October 2023). The message included this "*I refer to the Claimant's application of 18.10.23 to postpone the final hearing scheduled to resume on 13.11.23 and note the Respondents' response opposing the application."*
9.1.7.4. In light of the above while we accept that the Claimant was told on 7 November 2023 that an administration officer could not find the listing, the Claimant in fact knew that the matter was listed. In any event, on 10 November 2023, Judge Dyal wrote to the parties refusing the application to postpone and stating the hearing would go ahead.

9.1.8. The Claimant says she is not prepared because she does not have legal representation. We adjourned the hearing last time for 8 months. We have given her a reasonable opportunity to find legal representation.

9.1.9. The Claimant says we should postpone because she does not have someone with her to assist. On her own account she only started trying to find someone on Friday afternoon before the hearing was due to begin on the Monday. She is more than welcome to bring someone with her to assist and/or support and/or observe. However, we cannot postpone this long scheduled hearing again to facilitate that.

9.1.10. The Claimant says she is not prepared because she does not have the final version of the bundles. This is very curious as they were sent to her in hard and soft copy in advance of the hearing in March 2023. At the hearing in March 2023 hard copies of the bundle were also available for the Claimant at the tribunal hearing and she was given the opportunity to take them away. She says she did not take copies away and that the hard copy bundles she had were of a previous version. Again, the fact is the bundles were sent to the Claimant and if she had any difficulty she could have said well in advance of today that she needed further copies. She said nothing about this in her correspondence with the tribunal despite as above addressing documents. The tribunal asked the Respondents' solicitor to immediately resend the link to electronic bundles (and this was done on the afternoon of day 1) and offered the Claimant a set of hard copy bundles that were in the tribunal room. She did not take the hard copies because she was

using public transport, they are big and heavy and she has a back condition. However, the fact is that if it is the case that the Claimant does not have the bundles, since reasonable steps have been made to give them to her, and given the history and context of this case, that is not an adequate basis to postpone. All we can sensibly do given the factors in favour of proceeding outlined is ask the bundles to be resent to the Claimant electronically and offer her the hard copies that are here. In short, our view was that the Claimant had had ample and fair opportunity to prepare for this hearing and if she is unprepared that cannot fairly form the basis of a postponement in the circumstances of this case. The counter-veiling factors are too weighty. (We note that on day 4, the Claimant accepted that she in fact had copies of the trial bundles at home but had simply overlooked them. She was also sent links to download the bundle by the Respondents' solicitor after the hearing on day 1, and sent the bundle by email in several tranches on the evening of day 2 when she reported being unable to download the bundle).

10. In all the circumstances, we refused the application to postpone.

11. The Claimant frequently returned to the issue of postponing during the course of the hearing (as she did in respect of other decided matters). Judge Dyal simply reminded her of the decision that had been made and tried to move things on as politely as could reasonably be done.

12. The Claimant frequently said that she was finding the hearing extremely stressful and that she was sleeping only about 2 hours per-night. It was indeed plain that the Claimant found the hearing very stressful. She was intermittently distressed and overcome by emotions. We were sympathetic. However, there no way of avoiding this. She wanted to pursue her claims. There was no reason to believe, or certainly to have any confidence, that she would be able to manage the demands of the hearing better in the future. There had been an eight month postponement already to investigate the Claimant's health/give time to obtain legal representation. Put simply, difficult as it was (for everyone, not just the Claimant), there was no sensible alternative but to go ahead.

*Adjustments to the hearing/special measures*

13. The tribunal was keen to address the issue of reasonable adjustments to the hearing itself on day 1. It did this initially by putting this items on the agenda for day 1, by proposing some adjustments for the Claimant and inviting discussion of them and any further adjustments that she or anyone else needed.

14. The adjustment we proposed were:

    14.1. Offering the Claimant a choice of chairs. Two adjustable swivel chairs with wheels were brought to the tribunal room to supplement the ordinary chairs in the room. The Claimant was told if neither was suitable the tribunal would try endevaour to find another. The Claimant was content with this. She did not ask for a different chair.

14.2. Giving the Claimant the freedom to sit, stand or adopt another position she was most comfortable in, and mobilising around the room as she needed to. The Claimant took the tribunal up on this and did all of the foregoing variously during the hearing.
14.3. Taking breaks as required: we took regular breaks. Additionally, Judge Dyal regularly checked whether the Claimant wanted a break and whether in response to such a query or not, whenever the Claimant indicated she wanted a break we took one.
14.4. Special measures (discussed below).

15. When asked what adjustments would assist her the Claimant repeatedly said a postponement.

16. Beyond that the Claimant said that she had recently found a further witness statement she had drafted that was 48 pages long and that she wanted to rely on that statement. She said she did not serve it originally because she was waiting for a final version of the bundle to update references. We refused this request:

16.1. In advance of the final hearing in March 2023 the Claimant served a 17 page witness statement. It is a very coherent and well put together document that covers the ground of her claim and sets out her case clearly. It left spaces for cross-references to be added. Thus the statement she did serve initially did not have cross-references. So the need to provide cross-references cannot explain why this statement rather than a different 48 page statement was served.
16.2. On the first day of the last hearing the tribunal permitted the Claimant to rely on an amended version of the statement. She had served the amended version that very morning. The amended version still did not include cross-references. The tribunal asked for these to be added and on day 2 of the last hearing, a further version of the statement with references added was handed up by the Claimant's side. The Respondents' side had assisted to provide the cross-references, doing its best because the Claimant's side were finding it difficult to identify the pages.
16.3. Between the last hearing and this hearing the Claimant had said nothing about needing to rely on a different witness statement. Even now the 48 page statement had not been served.
16.4. We took the view that it would be grossly unfair to the Respondents if we allowed the Claimant at this stage to rely on a new witness statement that it had not had sight of, that was more than double the length of the existing statement. Further, the existing statement is cogent. It deals with the issues in the case in a clear, concise and coherent manner. It has been put together with some skill focussing on the issues in the case and dealing only in passing with peripheral matters. We do not accept that it would be a reasonable adjustment to allow the Claman to now rely on a different and previously unseen by others statement. It would be unreasonable because it would be unfair to the Respondents for them to be ambushed with a new statement at this stage. It would also cause further delay since the Respondents would need to be given time to consider it.

17. It was agreed in March 2023 that when the Claimant gave her evidence she would not be in the same room as Mr Ball. The plan was for her to give her evidence by videolink from an adjacent tribunal room. The Claimant was now unrepresented, however, and so by agreement we adjusted the plan. We agreed that Mr Ball would observe the Claimant's evidence from another room by videolink. That would avoid the tribunal being left alone with just one party. There were a couple of occasions when Mr Ball had to ask for microphones to be turned back on but otherwise this arrangement worked well in practice.

18. When Mr Ball came to give his evidence (in person), Judge Dyal asked the Claimant if she would be assisted by a screen so that she would not be able to see Mr Ball (but the tribunal would). The Claimant said she would so the screen was put in place for Mr Ball's evidence.

19. These special measures were put in place entirely without prejudice to Mr Ball. They did not reflect negatively on him in any way or affect our assessment of his evidence. They were simply to try and make the Claimant as comfortable as possible.

20. The hearing moved to a discussion of the timetable. The matter was listed for ten days but unfortunately we had to lose one. Mr Ball had an urgent and very serious medical appoint on day 2 in the afternoon. One of the non-legal members also had a very important medical appointment on day 4 in the afternoon. We sketched out the hearing timetable and it was very tight indeed.

21. The Claimant asked for ½ day on the morning of day 2 to conduct case preparation. We thought hard on that request. We declined it:

    21.1. The Claimant had been given a postponement of the hearing in March 2023 in large part so she could prepare. She had sacked her counsel and we took the view it would not be fair in the circumstances for her to have to present her own case having not expected to do so. We were now 8 months on and it was plain from the discussion that the Claimant had done no preparation. She said she had not prepared any questions for the Respondents' witnesses and that she would not be able to answer questions in cross-examination. We took the view that we had given her 8 months to prepare and that was a full and fair opportunity. Her request had to be balanced against other factors.
    21.2. We were in any event having a half day on day 1, since the hearing started at 12.00 and finished at 14.05. That allowed the Claimant some time although we acknowledge she had a long commute. Further we would be finishing at 14.00 on day 2 for Mr Ball to attend his appointment and that too was time out of the listing at a relatively early stage in the case.
    21.3. We were extremely concerned about not having enough time to complete the case. The discussion of the timetable showed that there would be a reading day/day for preliminary issues, 5.5 days of cross-examination, there would be tribunal questions of witnesses, half a day of closing submissions. This already left far less time for the tribunal to deliberate than it wanted and would need. It precluded any possibility of allowing time to give judgment and deal with remedy. There was also every reason to fear

that there would be further delays – it was plain to us that there would be. After all this was the 7th day of tribunal time in the case and the evidence was yet to commence. We took the view that we simply did not have ½ day to give the Claimant without seriously prejudicing the prospects of completing the case.

21.4. These concerns indeed proved well founded and the evidence and submissions did not complete until day 9. This left just one day in chambers. Three were needed. This meant the judgment (liability only) had to be reserved. In short the concern the case would continue to take an inordinate amount of tribunal time was well-founded and came to pass.

22. On day 3, over lunch, the contents of the hearing bundles were moved from the three lever arch files they were in, into 4 new lever arch files. The old files were not working perfectly (in that the metal binders were not perfectly aligned so paper would sometimes catch when turning the page and this was bothering the Claimant) and they were over-filled.

*Claimant's request to record proceedings and for notes of hearing*

23. On day 2 of this hearing, we were finally due to commence the Claimant's evidence. However, she returned to the issue of the hearing being postponed and maintained it should be. We refused to postponed. She then asked if the tribunal would provide her with notes of the proceedings and suggested that she had previously been told that it would. The Claimant had never been told this. She had been told that the judge would be keeping a note of the proceedings not that the note would shared with her. This was also made plain to her in an exchange of correspondence following the hearing in March 2023.

24. The Claimant then asked if she could record the proceedings. This request was refused. It was made for the first time moments before her long-delayed evidence was due to begin and no arrangements had been put in place to facilitate and/or manage this. Judge Dyal however told the Claimant that if she needed to be reminded of any passage of evidence that he would read his note back to her. This then happened a few times in the hearing.

25. The Claimant also in fact kept notes of the proceedings including while she was being cross examined (using pen and paper).

26. The Claimant returned to this matter a number of times saying that she was finding it hard to give evidence and keep a note. Judge Dyal told the Claimant that no doubt it was hard, but that the majority of Claimants in the tribunal are unrepresented and the majority of those attend the hearing alone. So what she was doing was, though hard, routine in the employment tribunal.

27. Judge Dyal also explained that generally witnesses (including parties who are unrepresented) do not make notes while being cross-examined. We were however content to allow the Claimant to do so and had allowed cross-examination frequently to be paused while she did. This did significantly delay the cross-examination but the tribunal permitted it to assist the Claimant.

28. On day 6 the Claimant returned to the issue of recording the tribunal proceedings. As chance would have it, this was 20 November 2023, the day on which the Practice Direction and Guidance on recording hearings came into force. Judge Dyal, who very much wanted the hearing to be recorded by HMCTS if it was possible, had made inquiries of the Acting Regional Employment Judge, as to whether come 20 November 2023 the hearing could be recorded. He was told it could not and he relayed this to the parties. London South Employment Tribunal was not at that time yet ready to begin recording in person hearings:

    28.1. HMCTS had not yet, at London South, put in place the technology needed to record in person hearings and/or to store the recordings;
    28.2. The HMCTS administrative staff at London South have not yet had any training and instruction on recording proceedings.

29. The proceedings were therefore not recorded. Even if the proceedings had been recorded by HMCTS this would not have assisted the Claimant in the way she wanted. The recording itself is not made available to the parties. Transcriptions can be requested but they are not provided in real-time if they are provided at all.

*Documents before the tribunal*

30. We had before us all of the documents presented to us at the hearing in March 2023:

    30.1. Main hearing bundle running to 1578 pages;
    30.2. Claimant's 'provisional' schedule of loss and mitigation bundle;
    30.3. Respondents' opening note and appendices;
    30.4. Main witness statement bundle:
        30.4.1. Claimant's witness statement as exchanged;
        30.4.2. James Ball;
        30.4.3. Donna Wilson;
        30.4.4. Jason Lord;
        30.4.5. Roz Austin.
    30.5. Agreed chronology and cast list;
    30.6. Two documents disclosed by the First Respondent relating to the Claimant's 17 August 2018 speak up call. These documents were included in the Claimant's bundle;
    30.7. Further statements:
        30.7.1. Updated version of the Claimant's witness statement with minor changes and cross-referencing added ('Claimant's final statement');
        30.7.2. Claimant's disability impact statement, used at earlier PH;
        30.7.3. Mr Bell's witness statement in response to disability impact statement, used at earlier PH;
        30.7.4. Claimant's response to Mr Bell's response to her disability impact statement, used at earlier PH.
    30.8. Claimant's bundle running to 33 pages
    30.9. Dr Choong, letter of 24 January 2023
    30.10. Claimant's further medical evidence, referral document, two emails from GP handed upon day 6 in March 2023 and other correspondence handed up by the Claimant at that time.

31. We additionally had two documents handed up by the Claimant on day 6 of this hearing:

    31.1. One of them was already in the bundle (p433).
    31.2. The other was a version of the letter of 16 November 2018 (p491 and following) that the Claimant had marked up during her employment. This was admitted by consent.

32. On day 9 (closing submissions) as a result of something said in Ms Austen's evidence on day 8 – essentially about whether there was or was not a redeployment policy - the Respondent disclosed to the Claimant the following further documents and described them to the tribunal:

    32.1. Disability in the workplace policy 1 December 2020, rebranded on 13 October 2022;
    32.2. Reasonable Adjustments and Redeployment policy dated 1 December 2022;
    32.3. Guidance document; undated on the face of it but Ms Bell said her instructions were that it was from August 2020.

33. We indicated that we would only look at these documents if the Claimant wanted us to and that she should let us know (by email) by 10 am on day 10 whether she did or not and what if anything she had to say about them (by which point we were in chambers). In other words, we would not look at these documents at the Respondents' instance, since it had had every opportunity to disclose and rely on them previously. But we would take them into account if the Claimant wanted us to since she had only just been sent them and could not have drawn them to our attention at an earlier time.

34. The Claimant followed up by email on day 10, 24 November 2023 (tribunal in chambers):

    34.1. She sent two emails in which among other things she disputed that the undated guidance document was from August 2020.
    34.2. She attached 4 new documents of her own.
        34.2.1. 2008 redundancy policy: it includes a reference to redeployment, although it does not refer to a separate redeployment policy
        34.2.2. A message form the Claimant to the Respondents dated 20.07.22 in which she requested the Respondents include unredacted versions of evidence.
        34.2.3. *'Job interview Jan 2020'*: document shows the Claimant was invited to interview for the role of Privacy PMO Manager to take place on 21 January 2020.
        34.2.4. '*emails were being sent to my GSK account'*: email of 1 Feb 2020, 'application update' from a recruiter at GSK, saying that an email had been sent to her GSK account;

35. The Claimant also hand delivered these documents to the tribunal - she says because she wanted to make sure they had been received (the tribunal's inbox

automatically responds with an acknowledgement of receipt so this seemed unnecessary).

36. We find that the undated document does indeed date from August 2020. This would make sense as the file name includes the word 'draft' and it refers to the Disability in the Workplace Policy, which came into force on 1 December 2020. It appears to be a draft of managerial guidance in relation to the Disability in the Workplace Policy. We find that the three documents disclosed to the Claimant by the Respondents on day 9 of this hearing all post-date the Claimant's employment and are immaterial to the issues in the claim.

37. As to the emails with the file names *Job interview Jan 2020* and *emails were being sent to my GSK account* we do not admit these into the evidence. It would be wrong to do so. The Claimant had had a full and fair opportunity to put these document in evidence prior to the close of evidence and closing submissions. For instance, she could have included it in the Claimant's bundle which we permitted to be produced and adduced at the hearing in March 2023. As will be seen below we do not in any event think they take matters any further.

38. On 27 November 2023, the Claimant emailed the tribunal again, making further representations and attaching an email from Mr Wadey to her of 17 May 2017 that was already in the main bundle. It also attached an email exchange with Mr Ball on 18 October 2019 and made some lengthy further submissions in the body of the email. We decline to admit this email exchange for the same reasons as above. We also decline to take into account of the further representations the Claimant made in the body of the email. She had a full and fair opportunity to make closing submissions on day 9 (see below). There needs to be finality and it would not be fair to simply allow the Claimant to continue making further closing submissions by email. When this email was received, the tribunal was part way through deliberations in its second chambers day. If it were to take the submissions into account it would have needed to pause its deliberations and give the Respondents the opportunity to respond to the Claimant's further submissions. That would have caused yet further delay and in probability wasted the rest of that day set aside for deliberation.

39. On 30 November 2023, the Claimant emailed the tribunal yet again. This time she made some further representations about her case (which we do not take into account for the same reasons as above). The main purpose of the email was to ask for any remedy hearing to be deferred until after a number of matters taking place in December 2023.

*Witness evidence*

40. *Witnesses the tribunal heard from*:

    40.1. The Claimant;
    40.2. Mr James Ball, Director of Tech Security and Risk, responsible for Governance Risk and Compliance activities within Global Applications Development & Tech and Vaccines Tech. IT quality team;

40.3. Ms Donna Wilson, at the relevant times, Senior Director, Tech Governance Risk and Compliance;
40.4. Roz Austin, HR Manager, Employee Relations GBI (by videolink);
40.5. Jason Lord, Special Investigations Director.

41. During the Claimant's evidence she was given a significant amount of leeway. She gave very long answers that included a lot of advocacy rather than simply a response to the question. Judge Dyal explained to her the difference between witness evidence and advocacy and from time to time guided her to answer the question asked rather than slip into advocacy. Ms Bell from time to time asked the Claimant to answer 'yes or no' but she almost never did so. Instead she answered in narrative form and usually at significant length. The Claimant was a formidable witness. She made barely any concessions at all, knew her case inside out and stuck to it. She did not know the page numbers of the documents in the bundle, something she complained about often, but which is entirely normal. In almost all cases when she described what document she had in mind it was found in a matter of seconds. The Claimant objected a few times that she thought the cross-examination was trying to steer her evidence down particular paths. No doubt it was – but that was a perfectly proper purpose of cross-examination (which was conducted in a professional and appropriate manner).

42. The Claimant also proved to be a forensic and detailed cross-examiner. She cross-examined each of the Respondents' witnesses at length. Most of the cross-examination was on-point. The Claimant often make speeches rather than pose questions in a way that was absolutely typical of a litigant in person. When she did so Judge Dyal asked her to reformulate her speech into questions and often assisted her to do so by reframing the gist of a speech into questions for the witness.

*Reasons for decision at PH that Claimant was a disabled person*

43. In the course of the Claimant's evidence, it became clear that there remained a dispute between the parties as to the detail of what carrying out Change Controls involved. Change Control is an activity at the heart of the litigation (see below).

44. This was something that had been in dispute at the PH of December 2021 on disability status. It was unclear to the tribunal whether that dispute had been resolved in the course of the tribunal's reasons when finding that the Claimant was a disabled person by reason of nerve impingements in the right hand.

45. No written reasons were requested at the time (not a criticism) so none exist. The Employment Judge who decided the matter had not retained a note of her reasons (Judge Dyal checked with her). The Respondents' legal team (both solicitor and counsel) had taken notes but could not find them. The Claimant had been represented, by Mr Ohringer of counsel, so had not herself taken a note.

46. In the circumstances, after consultation with the parties, Judge Dyal wrote to Mr Ohringer ordering him to provide his minute of the reasons. The tribunal is very grateful to him for doing so and doing so very swiftly.

47. Mr Ohringer's minute of the reasons (also shared with the parties) shows that the dispute about what Change Control involves was not resolved by the tribunal at the PH. It had been sufficient for it to find that Change Control was a 'normal day to day activity'. It had not needed to resolve the conflicting accounts it was given by the parties of exactly what it involved. The matter therefore remained at large for this tribunal to resolve.

*Closing submissions*

48. At the end of day 7 we had a discussion of closing submissions. The conclusion of which was that closing submissions would take place on the morning of day 9. The Claimant asked for closing submissions to be deferred beyond that. However, the tribunal was already being left with far less time than it needed to determine the case and there simply was not further time to give the Claimant. In order to assist her as much as possible, it was agreed that Ms Bell would email the Claimant her written closing submissions at 8am on day 9. The Claimant wanted this so she could read the submissions on her lengthy commute to the tribunal. It was also agreed we would start at 11am.

49. In the event, Ms Bell's closing submissions were indeed sent to the Claimant as planned. The Claimant was however late on day 9 (for which she apologised), and the hearing started at 11.15. Ms Bell made her submissions first. In the course of them she made a number of helpful and pragmatic concessions:

    49.1. The Respondents conceded knowledge of disability at all material times;
    49.2. The Respondents conceded that, and knowledge that, the PCP relied upon in the reasonable adjustments claim put the Claimant at a substantial disadvantage compared to other employees who are not disabled.

50. At the end of Ms Bell's oral closing submissions the Claimant said she had only been able to read a few pages of the written closing submissions. Judge Dyal asked the Claimant how long she would need to read the remainder and she said 30 mins. The tribunal granted the Claimant this time. The parties returned after 35 minutes and the Claimant said she had not yet completed the reading. She said she had read about 20 pages (of 24). Judge Dyal offered the Claimant a further hour to complete her reading and be ready to make her submissions. She gratefully accepted this offer. The hearing therefore adjourned until 1.45pm.

51. The Claimant then made her closing submissions. She spoke for about an hour and 10 mins essentially addressing the facts as she invited us to find them. She asked us to take into account her Further and Better Particulars which had been prepared with some legal assistance. We have done so.

## Findings of fact

52. The tribunal made the following findings of fact on the balance of probabilities.[1]

*The parties*

53. The Respondent is an international pharmaceutical business. It is a very large employer with an employed workforce at the relevant times of around 110,000 people.

54. The Claimant's employment began in July 1999 as a Business Analyst. She then held a variety of roles - Service Manager, Global Disaster Recovery Senior Analyst, Global IT Risk and Compliance Manager – before transferring in May 2017 to what proved to be her final role. She became Global Governance Risk and Compliance Manager in the IT Quality Team, which was part of the Technology Strategy and Risk Department. Along the way she had some significant successes and many positive performance ratings.

55. Mr Ian Wadey was the head of the Technology Strategy and Risk Department. Miss Wilson was one the Senior Directors, the next tier of management down from Mr Wadey. The IT Quality team which was one of several teams that were in Ms Wilson's reporting line.

*Transfer to IT Quality Team*

56. The Claimant was transferred to this team because she had issues with the line managers in all of the other local teams. There was no existing role in the team, so Mr Wadey asked Ms Wilson to create a role for the Claimant. The Claimant's line manager, initially, was Mr Hayter.

57. Prior to commencing in the role Mr Wadey assured the Claimant by email that it would "absolutely" include the three key elements of a job description he had provided her, namely, IBM (35%), SOX (25%) and Change Control (40%). The percentages he gave were said to be how they (management) envisaged the split over the course of the year. Miss Wilson and Mr Hayter were copied into the email.

58. The context to this email is that prior to it being sent the Claimant had been told that the role would involve the three activities noted above. However, when she then spoke to Mr Hayter he said otherwise and that the role was only Change Control. This prompted the Claimant to go back to Mr Wadey who then sent the Claimant the above reassuring email.

59. This an early indication of two things. Firstly, that the Claimant was not, and would not be, happy with a role that involved only Change Control. Secondly, that there was a local desire for her to do only Change Control work. The

[1] Where the term 'the Respondent' is used, this is a shorthand reference to the First Respondent GSK. The Second Respondent is generally referred to by his name.

commencement of this state of affairs predates the disability-related difficulties Claimant encountered carrying out Change Controls as described below although it also persisted for the remainder of the chronology.

60. Initially, on starting work in May 2017, the Claimant was doing principally Change Control but also some IBM work. However, by July 2017 she was doing almost entirely Change Control.

61. There was, then, a wide discrepancy between what the Claimant was told her role would be by Mr Wadey, and what it in fact was. The Claimant was expecting a more varied and interesting role than the one that she actually got and we find that this upset and disappointed her both then and subsequently throughout the chronology. That is unsurprising: it matters to most people what their job consists of, particular where they have received assurances about the role content from a very senior manager.

62. Mr Hayter became unwell and was frequently absent on that account. Mr James Ball thus became the Claimant's line manager. Initially this was a temporary arrangement (from August 2017) but it became a permanent one (in May 2018). Mr Ball also reported to Miss Wilson.

63. We find that, by the time the Claimant moved to Mr Ball's team in August 2017:

    63.1. The bulk of the IBM work (process monitoring) had been transferred to a different team in Poznan, Poland. This happened in June 2017. However, the cross-examination of Mr Ball established, and we find, that there was some IBM work ongoing thereafter locally. The Claimant herself did some in July 2017, and the cross-examination showed that a couple of others did so after June 2017 also.
    63.2. The SOX work had been outsourced and largely automated. The work was overseen by Ms Wilson not Mr Ball.

*Change Control*

64. The Respondent operated in a highly regulated environment in which pharmaceutical compliance was of first importance. An important aspect of that was Change Control – a process that sat mainly with the IT Quality team. Putting the matter in a nutshell, whenever there was a change to any of the Respondent's Standard Operating Procedures (SOPs) there was a procedure for managing this, namely, Change Control. The change to the SOP had to be analysed, processed and recorded on a Change Control form and ultimately given approval on the system.

65. There is conflicting evidence before the tribunal as to what, physically speaking, the task of completing a Change Control actually involved for the person completing it. We prefer the Claimant's account of it to Mr Ball's. They both gave an account of the task in witness statements prepared for the PH on disability and they both commented on those accounts and more widely on the task in their evidence at this hearing.

66. We accept the Claimant's account of what completing Change Controls mechanically/physically involved as set out in her statement of 14 December 2021 particularly at paragraphs 12 – 13. It is more detailed and thorough than Mr Ball's. Further, Mr Ball accepted in his oral evidence that the account in his witness statement produced for the preliminary hearing had only described one of three stages of the overall task. Mr Ball also accepted that in broad terms the Claimant's account was accurate albeit that there may be a couple of areas of duplication and areas where it could have been done a bit more efficiently. This in our view reflects the fact that there was more than one way of completing the task and that completing the task may not be identical each time it was performed. The important point is that the Claimant, we find, has given a reasonable and broadly accurate account of it.

67. In our view, mechanically speaking, completing Change Controls is a fairly unremarkable task. It involves using a computer and mouse. It involves using email, working on a Word document and gathering information from a range of other mainly electronic sources (internal systems, spreed sheets and the like). Sometimes it is necessary to speak to people to bottom out queries and an element of judgment is needed to complete the task. It does involve quite a lot of mouse usage, including regular clicking of the mouse buttons; but so do very many ordinary computer based tasks that office workers undertake.

68. Change Control tasks arose in two main ways:

    68.1. Business as Usual (BAU) work: processing Change Controls that arose routinely and were emailed to a particular inbox.
    68.2. Project support: this was a more advanced work – rather than processing changes received in an inbox, a project manager would work with the project team, attend meetings during its life, and review proposed changes as and when they arose.

69. Change Controls varied in their level of complexity. Accordingly the amount of time, judgment and input from others that was needed to complete them also varied. A programme of training was required in order to complete Change Controls. As the worker became more competent they could carry out both more Change Controls volume-wise and also more difficult Change Controls.

70. We accept the Mr Ball's evidence that the Claimant took a lot longer than normally expected to complete the programme of Change Control training. We also accept the Claimant's evidence that there were some problems with the training beyond her control. This was essentially an IT glitch that meant when training had been completed this was not registered so it delayed moving to the next task.

71. We further accept Mr Ball's evidence that the feedback from his wider team about the Claimant's Change Control ability was partly negative in that he was told that the Claimant was reluctant to exercise her judgment. This continued despite him reassuring her that she should do so.

*Hand problems & complaints about workload*

72. When Claimant joined the team, there were principally three FTE carrying out the Change Controls during the week in addition to her. Mr Hayter, Mr Alex Choong and one experienced contractor at a time (from a pool of experienced contractors). There was also a weekend service staffed by contingent workers to carry out urgent Change Controls if they arose over the weekend.

73. The position during the week changed in July 2017 when it was announced that the work would be carried out by the Claimant, Ms Moore (an inexperienced member of staff) and Mr Choong. Mr Choong in practice carried out few Change Controls since he was deployed to GDPR related work.

74. We accept that the Claimant felt pressurised by the volume of work and that she worked long hours including weekend work. We also accept that the Claimant's actual output in terms of completed Change Controls was low based both upon Mr Ball's evidence and the documentary records. We also accept that the Claimant was never asked to work at the weekend, not least as there were contingent workers who picked up weekend Change Controls.

75. In around August 2017 the Claimant began to experience numbness in her right index finger and thumb which then spread to the rest of her hand. She was diagnosed with '*nerve root impingement'.* Her symptoms were aggravated by intensive use of a mouse and thus by completing Change Controls. She also had a pre-existing back condition.

76. On 11 September 2017, the Claimant wrote to Miss Wilson complaining about her workload and stating that "*this has impacted my work / life balance and physical health as I have had to continue working long hours and weekends in order to manage the ERP change Control Inbox*". She also wrote to Lucy Pope, OH Advisor. The message is mainly about work/life balance but also makes reference to physical health. The Claimant essentially was asking for an OH assessment.

77. The Claimant was on sick leave from 18 September 2017 to 2 October 2017. A Fitnote dated 18 September 2017, indicated that she was not fit for work with "*right wrist pain and c6/7 nerve root impingement*".

78. On 24 September 2017, the Claimant wrote to Miss Wilson. In her email she complained about her workload and thus working hours and said, in effect that, solely carrying out Change Controls was having an impact on her physical health. She referenced the "physical repetitive nature of the work".

79. On 29 September 2017, a further Fitnote stated that the Claimant had "*right wrist pain and lower back pain*" and that she may be fit for work taking account of a phased return, amended duties, altered hours and workplace adaptations. The GP advised, "*needs to be working less hours to prevent symptoms returning. And also requires amended duties to avoid repetitive hand movements*". The Fitnote applied for 6 weeks, thus to 10 November 2017.

80. On 4 October 2017, the Claimant commenced her return to work, working 3 days per week on a phased return. She met with Mr Ball and they scheduled a further meeting to discuss how to assist the Claimant's return to work.

81. On 10 October 2017, the Claimant and Mr Ball met to discuss her condition, the impact on her work, adjustments and a referral to Occupational Health (OH). It was agreed that as an interim measure the Claimant was to stop carrying out Change Controls but instead to focus on completing her still outstanding training.

82. They worked on a draft OH referral form. The version they completed was short, and simply requested advice on attendance/likelihood of further absence and adaptations/modifications. The draft Mr Ball sent to OH was materially different:

    82.1. It additionally sought advice on 'fitness for work/role', 'performance related health issues' and long-term disability/ill-health retirement;
    82.2. Stated that Change Control was the Claimant's primary role and gave a description of it;
    82.3. Described her phased return to work pattern;
    82.4. Discussed adaptations;
    82.5. Discussed amended duties.

83. The Claimant did not have sight of the amended occupational health referral. In his witness statement Mr Ball suggests that the amendments simply reflected a conversation he had with the Claimant after the first referral form had been drafted. That cannot be a complete explanation since the record of the conversation that he relies upon (an email he sent the Claimant detailing the conversation) makes no reference to LTIH/ill-health retirement. We find that the Claimant did not see and did not otherwise approve the content of the second OH referral form. It simply included additional matters Mr Ball wanted advice on.

*First OH report*

84. On 2 November 2017, the Claimant had a face-to-face assessment with OH. On 9 November 2017, OH carried out a workstation assessment observing the Claimant completing the Change Control task .

85. On 9 November 2017, Ms Pope (OH advisor) reported:

    85.1. The Claimant had been suffering with pain and numbness in her right hand since July, that she had seen a specialist and was receiving treatment. It was most likely that her condition had been exacerbated and aggravated by work. The Claimant's account was that repetitive tasks involving heavy mouse usage she had been undertaking since July 2017 caused her the most significant problems.
    85.2. The Claimant should continue with her phased return to work until 1 February 2018, rising to 4 days per week from 20 November 2017;
    85.3. The Claimant should avoid the repetitive tasks that "*caused her problems*";
    85.4. The Claimant had arranged for a vertical mouse and ergonomic keyboard to go with her sit-stand desk;

85.5. The Claimant should take regular movement breaks away from her computer every 40 minutes;
85.6. It would be helpful to find an alternative less repetitive task;
85.7. The Claimant had contacted the Adjustments Centre to ask for Dragon software;
85.8. The Claimant would benefit from a smaller keyboard, a chair with vertical tilt and a larger screen.
85.9. With the recommendations the Claimant was likely to be pain free;
85.10. Further absence was hard to predict;
85.11. Long term disability or ill health retirement were not options as the Claimant was in good health
85.12. OH would follow up with the Claimant when she returned to her full contracted hours.

86. Mr Ball shared the report with Miss Wilson. He did so because she was his manager and he was faced with a challenging situation. The Claimant is aggrieved because she had (in our view unhelpfully) only consented to the report being sent to Mr Ball.

*Miss Wilson's email of 15 November 2017*

87. On 15 November 2017, Miss Wilson emailed Ms Pope (Mr Ball and Melanie Backhouse, HR, in copy) as follows:

> *Alina's job is in GSK Tech. By default, her role involves using her computer and email and other repetitive tasks are the largest part of that.*
>
> *We do not have any jobs that don't require extensive computer use in this department.*
>
> *Therefore this proposal does not meet business needs and leaves us with an employee who will have little to do. I cannot work with this in my team.*
>
> *If Alina cannot do her role right now, then she should surely be signed off until she can do some of the role she is employed for.*
>
> *Please advise how we can proceed, from next week Alina will likely be sitting with little to do on the basis of this outcome.*

88. On 15 November 2017, the Claimant and Mr Ball met. The Claimant suggested picking up GDPR work as an alternative to Change Control. Mr Ball could not give an immediate answer as Miss Wilson controlled this work not him. They discussed the possibility of the Claimant reviewing hard copy Change Control forms. The Claimant was not enthusiastic and they agreed that it would be better for the Claimant to focus on completing her training for the time being. It was also agreed that there would be further discussion to talk about alternative suitable work.

89. Mr Ball wrote to the Claimant after the meeting stating:

*I spoke with Donna regarding your proposal to pick up GDPR work as an alternative to supporting the Rev Trac process. Donna reminded me that this task was identified a specific opportunity for Alex and it would not be appropriate to switch resources at this stage.*

90. On 16 November 2017, Ms Pope responded to Miss Wilson explaining that it was one particular task that the Claimant was experiencing problems with (she did not say so but it was Change Control):

*As advised in the recommendations there is one particular task that is causing concern for Alina, not her whole role. Obviously the expectation is that she can carry out her role with modifications, if you feel this task cannot be varied with other computer activities during the day, I would suggest as also recommended that Alina purchases Dragon Software which will allow her to carry out her tasks without using the computer at all.*

91. Miss Wilson wrote to Ms Pope as follows:

*But, I cannot create a role which only uses the computer in a particular way and she is not currently doing her role at all. That particular task you talk of is 80% of her role, so without this, she is not doing her job. She is doing ad hoc training, which will finish by next week. We discussed a way we could print out all the materials for that task and she could do manually and then give to someone else to do the computer work with Alina yesterday and she did not like this approach.*

*Thanks for your reply, I will now work with HR to see how we proceed*.

92. On 22 November the Claimant and Mr Ball had a further meeting, it did not progress matters significantly beyond the 15 November 2017 meeting.

93. Mr Ball followed up with an email in which he asked whether it was worth returning to the idea of the Claimant reviewing-printed Change Control forms.

94. On 7 December 2017, the Claimant had a PDP meeting with Mr Ball. He said it had not been possible to fully assess her capabilities since transferring to the team, and to focus on completing her outstanding training rather than 2017 objectives. Mr Ball also asked the Claimant to send him her CV to assist him find her suitable work.

95. On 12 December 2017, the Claimant sent Mr Ball an email with her CV and summary of her skills with a view to picking up alternative work.

96. On 19 December 2017, Mr Ball wrote to the Claimant. Among other things he stated:

96.1. The Claimant's phased return would continue as scheduled;
96.2. She had been permitted to take regular movement breaks from her computer;
96.3. As an interim measure Change Control tasks had been removed;

96.4. No excessive hours at home or at the weekend were required;
96.5. The Claimant had been given a vertical mouse, ergonomic keyboard and sit/stand desk;
96.6. The recommendation for a smaller keyboard and larger screen were supported;
96.7. He had asked the Claimant to assess the suitability of Dragon and purchase it if necessary;
96.8. That he struggled to understand why the Claimant considered Change Control in particular was problematic as it seemed to him little different to other computer based tasks;
96.9. The Claimant would be given hard copies of the Change Control materials reducing the need for mouse use.

97. On 17 January 2018, the Claimant met with Mr Ball. Drawing on the available evidence and making the best sense of it we can, we find as follows:

97.1. At the meeting Mr Ball put emphasis on Change Control and the centrality of it to the Claimant's role. This surprised and disappointed the Claimant as she had understood and hoped that the discussion was moving towards finding her alternative work. Her position was that Change Control had caused her pain, the pain had abated when not doing Change Control and so she should be given other work.
97.2. Mr Ball, approved purchasing Dragon Software (it later transpired that his approval was not needed but at this time he thought it was). It was hoped that it would enable the Claimant to carry out Change Control without using the mouse.
97.3. Mr Ball told the Claimant to process some Change Controls using the mouse to see if she could be pain free and to stop if she experienced discomfort.

98. On 25 January 2018, the Claimant wrote to Mr Ball in response to his email of 19 December and in response to a further email of 18 January 2018 giving his account of the meeting of 17 January. Among other things she said that upon returning to work and conducting duties other than Change Control her symptoms had been alleviated. She expressed surprise that he had not been receptive to her carrying out alternative work, ended by saying he had her CV and asked if he would continue discussion regarding alternative opportunities, roles and activities.

*Second OH report*

99. The Claimant was seen in OH again on 29 January 2018. Ms Pope sent her draft recommendations. The Claimant responded with amendments and consented only to Mr Ball being sent the report. A final draft was sent to Mr Ball on 31 January 2018.

100. The report indicated that the Claimant was currently well, that if she returned to her normal contracted role which required intensive mouse use without modification her pain may be exacerbated again. It suggested the following:

100.1. An alternative role, which was more varied and less computer intensive;
100.2. Continuing in the current role but using voice recognition software to avoid repetitive mouse use. It stated she would need time and training for this;
100.3. Carrying on in her existing role but varying it with other tasks during the day or shared out with other team members.

101. The report stated that the outlook was good.

*End of phased return and printing trial*

102. On 5 February 2018 the Claimant's phased return to work came to an end. She had a meeting with Mr Ball. Again making the best sense of all of the available evidence, we find that Mr Ball told the Claimant to resume Change Control activities for a day. The Claimant reminded him of the OH advice. Mr Ball said it was just for a day and he wanted her to do it. This was on the basis of an adjustment to the procedure so it involved less mouse use:

102.1. The Claimant would be emailed a copy of the Change Controls and supporting documents she was required to work on so that she would not need to sift through a general inbox to find her work.
102.2. The Change Control forms would be printed for her so that she would not need to navigate the systems to get and print them.
102.3. The Claimant would then work on the Change Control forms in hard copy. She would then tell colleagues what needed to be done and they would do it.
102.4. It was only the Change Control forms themselves that would be printed. The documents that the Claimant need to cross refer to, which included SOPs, spreadsheets and more, would not. There would simply have been too much to print.
102.5. She would be limited to 5 Change Controls per day.

103. In the event, the Claimant was given Change Controls to do on each of the subsequent five days, it was not simply for one day. The Change Controls were emailed to her by colleagues but they were not always printed for her, so sometimes she had to print the Change Control forms.

104. The Respondents' position is that with this amended mode of working in place, the amount of mouse use involved in completing Change Controls was minimal. The Claimant did not address this issue in her witness statements, but in cross-examination her evidence was that a) the documents were not always printed for her and were sometimes just emailed to her and b) either way the amount of mouse use was not significantly reduced because in order to complete the Change Control forms it remained necessary to use the computer to cross refer to other documentation and information in various ways.

105. In our view having analysed the Claimant's account of what Change Control involved in her witness statement of 14 December 2021, if the Change Control forms were sent to her directly by email (thus avoiding the need for her to sift

through the general inbox to find them) or better still printed for her (to avoid the need for the additional few clicks necessary for her to print the documents herself), and worked on in hard copy, this would have reduced the amount of mouse use by about half. That is because at least half of the mouse clicks the Claimant describes as being involved in completing Change Control are avoided if the Change Control forms are sent directly to her and then worked upon in hard copy. We accept her evidence that mouse usage is not eliminated because we accept it remained necessary to cross refer to electronic documents/information in other internal systems to complete the work.

106. As adjusted in this way, Change Control became an even more ordinary task from the perspective of PC/mouse usage.

107. On 9 February 2018, the Claimant and Mr Ball had a 1:1. Mr Ball apologised for being unclear previously that C would be conducting Change Controls daily not just on one day. The Claimant reported her symptoms were returning and that she had a work station assessment later that month. Mr Ball agreed to contact OH again.

108. The Claimant alleges that at this meeting Mr Ball said: "for the foreseeable future her role was going to be 100% Change Control, that he was testing to see if her symptoms came back, and that "Change Control is going to be your job from the time you start work till the time you leave work, five days a week every week". She says he smiled and said "How are you going to manage?"

109. If Mr Ball spoke to the Claimant in quite this way, that would have been cruel. We do not think that the allegation is fabricated but we also do not think it is entirely accurate. We find that Mr Ball did say something to the effect that her role only involved Change Control and that it was unclear how or whether she could manage it. Having heard the evidence, we do not accept that Mr Ball said this in a cruel way although we accept the Claimant experienced so.

110. Mr Ball's evidence is that at this meeting the Claimant told him that she could not carry out any further Change Control tasks in her employment. However, on the day of the meeting Mr Ball sent the Claimant an email with his summary of it. His summary does not record any such statement and characterises the Claimant's position much more moderately: "*You indicated that during this week your symptoms had returned although not to the same extent and you attributed this to the repetitive work involved in the RT [Rev Track – an aspect of Change Control] process".* We reject his evidence that the Claimant said she could not carry out any further Change Control tasks in her employment. If she had said that, it would have been recorded in his email.

111. On 13 February 2018, the Claimant emailed Mr Ball, she complained that her symptoms had returned after returning to Change Control activities. She said, *"…I would appreciate it if you could please support me by finding an alternative activity/ role as our team and department is going through restructuring as well as internal moves taking place. In the meantime, I will appreciate it if you could please let me know what alternative work you would like me to do. I will continue to progress with relevant parties regarding voice recognition S/W".*

112. On 13 February 2018, Mr Ball wrote to Ms Pope and reported that the Claimant had suffered a recurrence of symptoms doing a small amount of change Control work. Ms Pope responded that the Claimant was due to have a workstation assessment [this was to be carried out by the workplace adjustments service] with a view to providing her the tools needed to conduct her role without a mouse. She advised that once the assessment was complete they would write a report and she would advise discussing it with the Claimant. She said the Claimant's case in OH was closed so she would advise discussing any further concerns with HR based on her recommendations. In our view it was unhelpful for OH to decline to offer any further assistance at this stage.

113. On 14 February 2018, Mr Ball told the Claimant to cease carrying out Change Control activities. She was given some alternative work to do supporting a migration from CDMS which she was reasonably content with. It was beneath her grade but it occupied her.

*Dragon Software*

114. As a stage later in February 2018, the Claimant had an assessment with the workplace adjustments team. This culminated in a report in which Dragon Speak software was recommended, together with a particular vertical mouse, a particular noise cancelling headset and 3 x 3 hours of training on the software. The report was 12 pages long but the Claimant (in our view unhelpfully) disclosed only pages 1 and 12. This was another manifestation of her approach to data protection.

115. On 6 March 2018, the Claimant and Mr Ball met. Mr Ball stated all adjustments other than Dragon had been implemented and as such if it did not help, matters would move to a formal capability review.

116. At the meeting the Claimant said that her role was more varied than just Change Control. The Claimant also asked whether the team re-organisation could lead to different opportunities for her and Mr Ball said that he was not party to this but that Miss Wilson was. The action points from the meeting were essentially to press forward with getting Dragon and the headphones and trialling it.

117. A tension developed between the Claimant and Mr Ball in relation to how long it was taking to get Dragon and to work out whether it provided a solution (i.e., whether it enabled Change Controls to be completed without intensive mouse use).

118. On 13 March 2018, Mr Ball chased this up noting that the Dragon training company said they had left voicemails with the Claimant. We accept the Claimant's evidence that she had also left messages for the training company.

119. On 29 March 2018, following a number of chasers from Mr Ball, the Claimant confirmed she had downloaded Dragon but that it was crashing Excel, Word and Outlook. She had a meeting with an internal contact to discuss this on 3 April.

120. On 3 April 2018, Mr Ball wrote to the Claimant seeking an update but also effectively criticising her for not treating the matter with sufficient urgency. He said that it seemed unlikely to him based on the feedback he had received that Dragon would enable the Claimant to undertake Change Control and that if he did not hear the contrary by the end of 5th March (a typo where he meant 5th April) he would implement a formal capability review.

121. On 4 April 2018, the Claimant emailed Mr Ball and reported that she spoken with the internal software specialist and that the software supplier had not tested Dragon with SAP (the internal IT platform); that it was mainly used with Microsoft products; the issues the Claimant had encountered were also reported by others, the specialist would install it in on their lapop and test it with SAP. She had a further meeting scheduled with the specialist at the end of the week.

122. The Claimant further updated Mr Ball in the following weeks. She explained that she had been working with three internal and three external people to try and trial Dragon and that she had arranged training for the w/c 23 April.

123. On 12 April 2018, Mr Ball emailed Ms Backhouse asking to discuss moving to a 'formal competency review' stating that he was concerned the Claimant was not addressing her actions (related Dragon) with the sense of urgency he would expect from someone of her grade. In our view this email offers some insight into Mr Ball's thinking. He was frustrated with the lack of progress on Dragon and frustrated with the Claimant whom he thought was dragging her feet.

124. On 1 May 2018, the Claimant told Mr Ball that she had a swapped her laptop for a different one to see if that resolved the installation issue and that there were 5 agencies, 4 internal and 1 external, looking at the issues.

125. On 4 May 2018, Mr Ball authorised a new laptop for the claimant. On 17 May 2018, the Claimant wrote to Mr Ball and summarised in a 7 pages email and attachments, the problems she had had and were ongoing regarding Dragon. One of the proposed solutions was a more up to date version of Dragon.

126. On 18 May 2018, Mr Ball, Miss Wilson and the Claimant met to trial Dragon. It did not work and the correspondence continued and lengthy back and forth on 30 May 2018.

127. On 6 June 2018, the Claimant had a meeting with Dixie Solano, an IT Product Support Specialist and a further meeting on 1 June 2018. By 19 June 2018, the Claimant's update was that there were ongoing technical problems in getting Dragon to work.

128. Mr Ball then decided to trial Dragon himself. His assessment was that it did not work:

128.1. The error rate in transcription was high;

128.2. It did not allow accurate navigation through the file share structure for Change Control or to navigate around the screen – it would e.g. open the wrong email;
128.3. It was not a suitable substitute for a mouse – documentation would be moved inadvertently to the wrong location.
128.4. It made Microsoft products unstable. That could be resolved temporarily but he thought it likely to recur with updates.

129. On 3 July 2018, Mr Ball had a meeting with the Claimant in which they trialled Dragon together. The trial failed in much the same way as above.

130. Although we accept that when Mr Ball tested Dragon (alone and with the Claimant) it did not work as solution to the problem at hand (removing the intensive mouse use elements of Change Control), we also accept the Claimant's evidence that she had by that time established that some prerequisites needed to be in place before Dragon could definitively trialled:

130.1. It was necessary to have a particular version of Dragon and in accordance with internal protocol it needed to scripted in-house. This did not happen until June 2018. That was beyond the Claimant's control.
130.2. Windows 10 was needed and it took time to upgrade to it.
130.3. There were particular hardware requirements that were not in place:
130.3.1. Memory needed to be increased from 8 – 16 gb of RAM;
130.3.2. A particular noise cancelling headset was needed;
130.4. In addition to following the software's standard tutorial, face to face training on software was required in the form of 3x3 three hour sessions. This had to await the necessary hardware and software being put in place.

*Initiation of Long Term Ill-Health (LTIH) procedure*

131. The Respondent had an LTIH policy. It is in fairly typical terms. It contained a flow chart at the end. At the top of the chart, what might be called the entry point, is '*OH confirm whether the employee can fulfil all the duties of the role'*.

132. On 11 July 2018, Mr Ball met with the claimant and gave her a letter inviting her to a meeting under the LTIH policy. The letter was 7 pages long. There are inaccuracies in it. These include:

132.1. Misstating the period of sickness absence (said to be c.2 months not 2 weeks);
132.2. Stating that in February 2018 the Change Control controls had been printed for the Claimant and that this had eliminated the need to use a mouse. This was not accurate (see above);
132.3. Stating that all of the adjustments suggested had been in place for some time. The key discrepancy here was that although the Claimant had had Dragon Software for some time, not all of the prerequisites to definitively test it were yet in place even at the date of the letter. For example, the Claimant had not yet had all of the training.

133. The letter invited her to a meeting and said that one possibility was that she would be moved into a redeployment process:

> *It is therefore only appropriate for me to warn you that a potential outcome of the meeting could be a decision that keeping you in your current role is not sustainable and it is appropriate to move into a redeployment process.*
> *It is also appropriate for me to make clear that, should the decision be that redeployment is necessary, I, in consultation with Occupational Health and Mel Backhouse, will work with you to see if a suitable alternative role can be found within the business. The redeployment policy allows a period of time, based on an employee's notice period, to look for an alternative role. In your case this would be 12 weeks. GSK would pay you for that full 12-week period, notwithstanding that it appears that you are not and will not be able to return to carry out your full duties in the foreseeable future. We would at the outset of this period work with you and Occupational Health to draw up what an ideal role would look like for you and then support your search for opportunities within the business - including short term assignments. However, the redeployment process does not create a role for an individual if one is not available and if the work does not need to be done.*

134. The meeting was initially postponed because the Claimant could not find a companion. She had difficulty in doing that. She ultimately found Jason Lord, a colleague whom she did not previously know but who had a very senior role in internal investigation.

*Speak ups*

135. In August 2018, C raised two 'speak ups'.

135.1. On 14 August 2018: confidential information about her was shared beyond the person she had consented to it being shared with (reference to OH report being shared by Mr Ball). This complaint was made long after the event.
135.2. 17 August 2018: the LTIH procedure was being entered at the wrong stage, without having engaged OH appropriately or allowing time for the adjustment to be implemented and tried.

136. The LTIH process was paused during these speak-ups.

*Dragon continued*

137. The Claimant was permitted to continue her work on investigating Dragon as a solution, concurrently with the LTIH process. She sent Mr Ball and Miss Wilson periodic updates about this. For example on 19 July 2018 she told them:

137.1. Her computer was upgraded from 8gb RAM to 16GB;
137.2. She moved to windows 10;
137.3. A new headset was arranged and additional training was arranged.

138. Mr Ball and Miss Wilson did not think Dragon was likely to be a solution. However, Mr Ball made clear that on completion of her final training session the Claimant could demonstrate if/that it worked.

139. There were delays beyond the Claimant's control in the final training session being arranged. It finally took place on 14 August 2018. The Claimant updated Mr Ball by email on 17 August 2018. In essence she said that the technical problems (instability, crashing etc) had been resolved (in that they were not experienced during the final training sessions when using an appropriate laptop and headset). She said she had been given some commands by the trainer, that she had found some herself and that she was going to be given some more. She would then be looking to test and master using Dragon. This email therefore meant that the technical issues had been resolved but that it remained unclear whether Dragon actually worked as a solution.

140. The Claimant's case is that on 31 August 2018, she made clear to Mr Ball that Dragon was a solution and that she asked him for some Change Control work. The Claimant sent Mr Ball an email on that day, but in our view it stops well short of saying that Dragon was a solution. It does make clear that the technical problems had been resolved but it does not make clear that Dragon works as a solution. At best it is ambiguous. It includes this:

> *Training - after having all of these technical issues resolved I was able to have the 3rd rescheduled training. I was then able to test Dragon on loan Windows 10, 16 GB, version 15.3, new headset using existing and new commands for navigation in relation to Change Control process.*

141. Quite understandably then, Mr Ball followed up to try and get to the bottom of that matter. On 31 August 2018 he emailed the Claimant:

> *"1. Can you send me the list of commands please [i.e., the commands needed to get drag to work as a solution to the Change Control Problem].*
> *2. Where you able to execute the steps required to process a change document, including accessing Revtrac?"*

142. On 31 August 2019, Mr Ball chased for answers. He did so again on 3, 4 and 6 September 2018. Miss Wilson also chased on 3 September 2018.

143. Despite Mr Ball's and Miss Wilson's requests being important, simple and persistent, the Claimant did not answer them. In her oral evidence, she said that she did answer Mr Ball and did orally and by putting a list of the commands on his desk. We do not accept that. By this stage of the chronology both sides were routinely communicating in writing to leave an electronic trail, and if the Claimant had positive answers to the questions posed she would have simply emailed them in response to the many requests made.

144. In our view the Claimant, deliberately avoided answering the simple questions Mr Ball posed. We do not acept that she answered the points orally, or on hard copy paper, nor that she failed to receive the emails chasing an answer. We also draw the inference and find, that the reason she did not answer the questions

was that because she had not been able get Dragon to execute Change Controls without intensive mouse use.

*11 September 2018*

145. On 10 September 2018, Mr Wadey emailed the Claimant. This was in response to an email she had sent to him on 22 August 2018, complaining that despite what he had assured her, her role was 100% Change Control. He stated:

> *The job descriptions of the Strategy and Risk team members are generic, so individuals may get involved in a number of areas of work if they have time and the skillset, I would not have been in a position at any point to accurately indicate what percentage of time you would spend in the area you have been deployed. Additionally work task assignment is up to local line management as they manage demand in their teams.*
> *As I understand, to date, you have been involved in learning the Change Control process and subsequent to this, you have been out of the office or unable to execute work that involved emails or extensive mouse use due to injuries. I understand a large amount of time has been spent working to deploy the Dragon tool in order to allow you to return to Change Control tasks and allow you to finish your training in this process.*
> *With regards other areas of work you have mentioned, in the 16 months since you joined the Corporate risk team, there have been changes in demand and approach for work for the Strategy and Risk team. IBM is now largely undertaken by the service in Poznan (a transition which was planned prior to your joining the team and which was in progress at the time you joined) and GSK's Sox testing has significantly changed since Deloitte became our auditors and requires expert testers (this task alone would not, in any event, be appropriate to be performed by someone of your grade). Opportunities to work on these types of activities have moved and they would likely no longer be available to you.*

146. On 11 September 2018, the Claimant emailed Mr Ball and Miss Wilson effectively asking for alternative work. She suggested in particular RPA/Robotics and Smart Controls.

147. Mr Ball responded that he was not aware of any permanent vacancies.

148. Ms Wilson responded:

148.1. In relation to RPA/Robotics: we are using our project aligned resources for this work. As key part of this work involves the Change Control process of which you are currently not able to execute.

148.2. In relation to Smart Controls: this work is being led by Vx and the ITMS team . There is no involvement from my wider team and no roles are available.

149. The Claimant and Miss Wilson also had a face to face conversation. The Claimant's case is that Miss Wilson said to her that she had been "*out of office for*

*a long time, you cannot send emails or do any Change Control work because of extensive mouse use".* We think this is likely as it is consistent Mr Wadey's email above.

150. The Claimant says that she "*told Miss Wilson that she could do Change Control if it was not 100% of her role. And told Miss Wilson that the software did work to perform Change Controls.*" We do not accept she did either of those things. They are not apparent in the Claimant's account of the meeting which she gave in an email on 29 October 2018 and they are points that are of such significance that we think the Claimant would have put them in writing (whether in her email of 29 October 2018 or otherwise).

*LTIH resumed*

151. On 30 October 2018, the speak up of 17 August 2018 outcome was given. The speak up was not upheld. Essentially, the Claimant had failed to provide the information and documentation required to progress matters despite having multiple opportunities to do so. When she eventually provided some documentation it was incomplete. The Claimant also did not give the investigator, Ms Denman, permission to speak with Mr Ball by the deadline for doing so.

152. On 16 November 2018, Mr Ball wrote to the Claimant and invited her to a rescheduled LTIH meeting on 21 November 2018. The meeting was postponed to 30 November 2018.

153. On 30 November 2018, the meeting went ahead. Ms Backhouse and Mr Lord joined remotely. The Claimant's focus at the meeting was on whether or not the letter of 16 November 2018 was accurate and essentially this is all she would discuss.

154. The Claimant says that at some point Mr Ball suddenly leaped out of his chair and leaned over with his right arm and hand stretched out over the table and that he pointed his finger at her. On the Claimant's account this was an aggressive act on Mr Ball's part. We accept that this is how the Claimant's perceived matters but we do not accept that Mr Ball was in fact physically aggressive towards her. On balance, we think it is implausible he would have done this particularly with HR and Mr Lord in earshot (i.e. attendance at the meeting by telephone). It is likely that in the heightened state of anxiety the Claimant was in that she perceived benign movements on Mr Ball's parts to be aggressive.

155. In December 2018, Mr Ball conducted the Claimant's PDP review. Suffice to say there was broad disagreement between them.

156. It is the Claimant's case that in December and January 2019 she asked Mr Ball to let her do some Change Control tasks but that this was refused. We do not accept that is quite what she said. However, we do accept that she ask Mr Ball to do alternative roles and to see how much Change Control work was required. In particular she was interested in supporting projects and she was keen to shadow somebody for experience. Mr Ball refused this. He said that those supporting projects needed strong Change Control skills. He said that he had given the

Claimant ample opportunity to show that Dragon was a solution but she had not. And he reminded her that in February 2018 when she had conducted just a few Change Controls her symptoms had returned.

157. On 2 January 2019, the speak up of 13 August 2019 was closed essentially as a result of a lack of engagement from the Claimant.

158. A further LTIH meeting took place on 8 January 2019. The meeting continue on 18 January 2019. Again on both occasions the Claimant dominated the meetings and did so with an unrelenting focus on what she believed were inaccuracies in the invitation to the meeting.

159. After the meeting on 18 January 2019, Mr Ball asked the Claimant to organise her criticism of the invitation letter in tabular form. The left column to identify the line number of the letter (he provided a further draft of the letter with line numbers), the middle column to identify her point and the right column to identify supporting evidence. The Claimant did not do this and has offered a number explanations:

159.1. In cross-examination her first explanation was that to do so would have involved too much cutting and pasting from the letter into the proposed table. This did not really make sense since, if that had been uncomfortable, she could simply have typed rather than cut and paste, or cut and paste using the keyboard rather than the mouse. In any event, she had been given a version of the letter with line number so she could simply have input line number rather than copying or typing out extensive passages from the letter.

159.2. Later in cross-examination her explanation was that she had already marked up the letter and wanted to make her points her way rather than spending time doing it Mr Ball's way.

159.3. On 4 February 2019, by email the Claimant declined Mr Ball's method and said she wanted to continue going through the letter at the meetings, with Mr Ball stating what points she made he now agreed with and which he did not, and then discussing further the latter.

160. It is plain that the Claimant's approach was very unhelpful in progressing matters and that she was refusing to follow a reasonable approach that her manager was asking her too. This followed no fewer than three meetings at which the principal topic had been her complaints about the accuracy of the letter of 16 November 2018.

161. On 30 January 2019, the Claimant raised a grievance. It had numerous limbs. Limb 3 was essentially the same issue as raised in the 13 August 2018 speak-up and accordingly that speak-up was reopened. The investigation was split in two with limb 3 dealt with in-house (by Trevor Dickey) and the remainder dealt with by an external investigator.

162. On 5 February 2019, Mr Ball emailed C and among other things said:

*It is important to keep in mind the purpose of our meeting which is set out fully at the end of my letter. The following key points are central to the decision I need to make on whether it is appropriate for GSK to initiate its redeployment process:*

*i. Whether it is feasible for you to continue in your role given that you say you are unable to perform Change Control Tasks;*
*ii. The adjustments which have been made and their effectiveness (or not) in allowing you to perform the full remit of your role and in particular Change Control Tasks;*
*iii. Any further adjustments that could reasonably be made which might enable you to carry out Change Control Tasks;*
*iv. The business need for you to carry out Change Control Tasks;*
*v. The current availability of any other roles that you might have the skills to perform;*
*vi. The duties that you would perform during any period of redeployment.*

163. Mr Lord emailed the Claimant asking her to focus on these points.

164. The LTIH meeting resumed again on 11 February 2019. It continued for a fifth time on 18 February 2019. At this meeting there was the following exchange:

> *JB does dragon speak work yes or no?*
> *AH will answer that at the next meeting need to look at whole thing was not just the software what is required and have already been discussed will share ref the specifics is just to take time out and come back with OH piece.*

165. In our view this exchange again serves to show that Dragon was not a solution and that the Claimant was avoiding giving a straight answer.

166. On 26 February 2019, the Claimant was invited to a grievance meeting with an external investigator on 5 March 2019.

167. On 27 February 2019, the sixth LTIH meeting took place.

168. On 5 March 2019, there was a grievance meeting.

169. On 2 April 2019, the Claimant sent in further information about her grievance.

170. The LTIH meeting went ahead on 4 April 2019 and proved to be the final one.

171. The Claimant had three meetings with Mr Mundy (the external grievance investigator). Along the way she lost confidence in him because she thought he was not handling her data correctly (e.g. he put the password for a password protected document in the same email that the document was attached to).

172. Mr Munday produced an investigation report on 13 June 2018.

173. A grievance hearing took place with Mr Ian Culliford on 1 and 8 August 2019. The outcome was given by letter of 24 September 2019 rejecting the grievance (save for limb 3 which Mr Dickey was dealing with).

174. On 5 August 2019, the Claimant was emailed Trevor Dickey's findings in respect of limb 3 of the grievance and the speak-up of 13 August 2018. He rejected the complaint.

175. On 14 October 2019, Ms Backhouse invited the Claimant, Mr Ball and Mr Lord to a further LTIH meeting. The Claimant indicated she would not attend essentially because she wanted to work on her grievance appeal all day. The Claimant appealed the grievance outcome on 15 October 2019.

176. On 15 October 2019, Mr Ball gave the Claimant a letter setting out his "preliminary decision". He found that the Claimant was not fit for her existing role and that there were no further adjustments that could be made. He then said this:

> *I previously indicated that, if I reached this conclusion then, for a period of 12 weeks you could look for a suitable alternative role within the business (this period would not have created a role for you if one was not available and if the work did not need to be done). I also previously indicated that if, after the 12 week period, no alternative role could be found then it may be necessary to issue you with notice of the termination of your employment and you would be paid for your 12 week notice period. I have reflected on this and concluded that it would not be worthwhile to spend a further 12 weeks considering whether there is an alternative role for you. No suitable alternative roles have arisen during that period and, having given it careful thought, it is clear to me that it is highly unlikely that any roles would arise in a further 12 week period. I have also given consideration to whether it is appropriate for us to meet again given that we have not met since February. However, I have concluded that the positon has not changed over that period, your ability to comment in writing on this letter is sufficient and a further meeting is not warranted.*

177. The Claimant provided comments on the letter of 15 October 2019, disputing its accuracy in various respects. There was a strong focus on being considered for other roles generally and in particular roles that did not involve so much Change Control.

178. The Claimant was given notice of dismissal by letter of 4 December 2019. The letter was given to her in a meeting that day. At the meeting Mr Ball told her that her access to the Respondent's IT systems would be cut of immediately and that she would be escorted out of the building.

179. Clearly this was heavy handed for an employee who was being dismissed at least ostensibly for long-term ill-health. Mr Ball evidence was that he was concerned that the Claimant may be a risk to the business as she had access to a lot of business data. He did not think she was a high-risk but a risk nonetheless. We accept this was his view at the time.

180. In the course of the meeting, the Claimant raised concerns about being cut-off from IT access since she needed the access among other things to appeal, to gather her personal data and for redeployment purposes. Eventually, Ms Backhouse intervened and said that her access would not be immediately cut off.

181. However, two days later (a Friday), Mr Ball saw the Claimant on Skype messenger and asked her what she was doing. She went offline. This triggered him and he arranged for her access to be immediately cut off.

182. Returning to the letter of dismissal, it stated that notice would be served while on garden leave, ending on 4 March 2020. The letter made clear that no further time would be spent considering whether there was any alternative role. It also stated that the Claimant should not contact anyone at GSK.

183. Ms Backhouse later told the Claimant that she was permitted to make contact for the purpose of finding alternative employment.

184. However, as a result of having her systems access cut off, the Claimant did not have access to the internal job vacancies database. She was instead sent a link to the careers section of the Respondent's general website. The Claimant's evidence was that "in dismissing me and putting me on garden leave with immediate effect, JB denied me the opportunity to apply for roles that came up within the company which would not be externally advertised." Ms Austen said that there was a way of accessing internal vacancies with additional login details but did not know whether C had been sent them. We find that the Claimant was not sent these additional login details and we find that on the basis of the passage of the Claimant's statement just quoted.

185. On the Monday 9 December 2019, the Claimant attended the workplace having arranged to do so to gather data, only to find that her access had been cut off. Mr Ball then took steps to reinstate her access but this was delayed by a mix up on his part. The access was restored at 2pm and then cut-off again at 4pm. The Claimant returned the following day to be told at reception that she was not allowed in. This was at Mr Ball's instruction. Mr Ball explained this by saying he thought the Claimant's access to the site should be limited because he was concerned there may be a risk to GSK's systems.

186. The Claimant appealed against her dismissal. The grounds of appeal included this comment:

> *With regard to Dragon Speak software, I have not been in a position to properly test the efficiency of the software. I note James states that there are issues with the software, these have been resolved and we have not tested or trialled this properly after a period of training in order to help us to make an assessment whether there are any new issues which may impact my efficiency or accuracy.*

187. This again, in our view, shows that the Claimant's evidence to the tribunal that Dragon was working and that she told Mr Ball this, was not correct.

188. On 27 February 2020, the Respondent invited the Claimant to an appeal hearing to take place on 2 March 2020. It was a hearing to deal both with the appeal against the grievance outcome and the appeal against dismissal. The meeting did not go ahead partly because of personal reasons in C's life and partly because Mr Lord was not available.

189. There was a significant back and forth trying to arrange mutually convenient dates and a dispute also emerged over whether the appeal against the grievance outcome should be heard on the same occasion as the appeal against dismissal.

190. In late March, Ms Austen, attempted to schedule the appeal hearing several times, with no response. It transpired that there had been a bereavement in the Claimant's family. In May 2020, Ms Austen tried again to schedule the appeals. The Claimant did not further respond. No appeals therefore took place.

*Alternative work*

191. A good deal of evidence has been heard about alternative roles and employment, so much so that it is convenient to deal with it in its own section here so as not to disturb the broadly chronological telling of the story above.

192. To begin with, we fully accept the Claimant's evidence that the business culture at the Respondent was such that not all roles and opportunities were filled through formal open recruitment. On the contrary, very many roles, projects, secondments and opportunities that were routinely assigned informally.

193. At the highest level of generality we also accept the Claimant's evidence that a very wide range of the colleagues in her team and the teams around her were given roles and opportunities of various kinds during the part of the chronology in which she was trying to secure an alternative roles (c. late 2017 to dismissal).

194. The list of issues identifies a number of specific roles. It does this in a slightly confusing way in that they are identified at 11.4 by reference to the annex to Claimant's further and better particulars. They are then identified again under reasonable adjustments but there is not a complete overlap in the roles identified. Yet further, the Claimant applied for two alternative roles after being told a 'preliminary' decision had been made to dismiss her/in her notice period and these are not explicitly referenced in the list of issues but are undoubtedly features of the claim.

*A role in GDPR*

195. In 2017, the Respondent was preparing for the coming into force of GDPR. In essence the Respondent was analysing the applications it used that contained personal information to ensure that it would be compliance with GDPR when it came into effect.

196. On the tech side, the project was being let by an employee in Kuala Lumpur, Mr Pochet. In November 2017, the Claimant asked Mr Ball if she could become involved in this GDPR work. At the time, the QRC aligned person was a

colleague, Alex Choong. He was also based in Kuala Lumpur. This work was outside of Mr Ball's remit so he raised the matter with Ms Wilson.

197. Ms Wilson decided that there was no opportunity for the Claimant in respect of this work. By the time the Clamant had made this request, Mr Choong was well established in the role. He had had external training on GDPR and was regarded as a subject matter expert. The project was also a development opportunity for him and she was keen to ensure that a remote colleague was not overlooked for the same. And there was no business need to assign the work to the Claimant rather than Mr Choong. It was also convenient for him to be co-located with the tech leader. Another colleague, Maureen Mora who was based in Costa Rica was also at this time supporting the project. She was also regarded as a subject matter expert.

198. The project was time limited and came to end, according to the Claimant's evidence which we accept, at the end of 2018.

*DCMS: February to December 201[8]*

199. There appears to be a typographical error in the further and better particulars, and we understand the relevant year to be 2018 rather than 2019 as drafted. The information in the Annex to the Further Particulars, does not identify any opportunity in DMCS that the Claimant says she was not given. Rather, it identifies that she was given this alternative work and says in effect she did a good job.

200. We accept the Claimant performed this work well and diligently. However, it was work that was two grades below her on the grade-scale and Mr Ball was only prepared for her to do it on a time limited basis. The roles in the CDMS team, were all, save for the manager's role which was occupied, at two grades below the Claimant.

*Smart Control opportunities: April 2018; September 2018; April 2019 and May 2019*

201. Smart Control was a new tool that was developed and introduced to assist with compliance determination assessments. It was not a job or a role as such, it was simply a new application that replaced two previous applications.

202. We accept Mr Ball's evidence that smart controls are essentially a list of questions that allow an application owner to determine what requirements (aka Controls) need to be considered in order to provide assurance that the application is fit for purpose.

203. Smart Control was developed in-house and thus one aspect of work related to Smart Control was coding, i.e., the actual creation of the application. This required coding skills. The Claimant did not have coding skills. However, that was not the only aspect of work related to Smart Control. The application also needed to be tested and developed and then used. Coding skills were not required for that. A wide range of the Claimant's colleagues were involved.

204. We find that in physical/mechanical terms using the Smart Control application was, at least without adjustments, a fairly mouse intensive activity. For instance, it was necessary to make selections from a large number of drop down boxes, and then to review the controls created (of which there could 60 – 120), review spreadsheets and verify results appending evidence.

205. On 17 April 2018, the Claimant emailed Ms Wilson inquiring about Smart Control expressing an interest in it having been to a presentation and asking if she could support the activity. Ms Wilson responded that there was unlikely to be any work for the Claimant. She said "*the LT has already designed the controls and the tool and the ITMS team will deliver any relevant changes. in the future controls will not reside in the SOPs".*

206. In September 2018, the Claimant again raised the issue of supporting Smart Control work. She did this orally with Mr Ball and then by email of 10 September to Mr Ball and Ms Wilson.

207. In essence she was told that there were not opportunities for her. In her email the Claimant said: "Smart Controls - due to Smart Controls being implemented we need to review our IBMs and SOPs. Hence, proposing to support this activity." Ms Wilson responded "This work is being led by Vx and the ITMS team. There is no involvement from my wider team and no roles are available."

208. In cross-examination both Mr Ball and Ms Wilson accepted that members of their teams were involved in Smart Controls. However, Ms Wilson stood by what she said in her email on the basis that it while it true that individuals in Mr Ball's and her team used the tool as part of their job, the work the Claimant had described in her email (review IBMs and SOPs) sat with the Vaccine team (Vx) and the IT management system team (based in Poland) neither or which were part of her team. So the information she gave was technically correct albeit that it did not describe the totality of smart control related activity.

209. A number of emails in the bundle show that colleagues, Hannah, Van and Sonia, were working on smart controls. Ms Wilson acknowledged that this is what the emails suggested but she did not know what they were doing. Mr Ball's evidence was essentially that there were development opportunities for Hannah (an apprentice – so given a wide range of experience) and Van (wanted to move beyond document control). He could not recall the reason why Sonia had been given some opportunity in Smart Control or what the opportunity it was, but if there was evidence in the bundle that she had been, then he accepted that. There are indeed emails in the bundle that suggest Sonia was involved in Smart Control work.

210. Drawing the evidential strands together and trying to make some sense of it, we find that:

210.1. There was some smart control work which required specialist coding skills that the Claimant did not have;
210.2. There was some smart control work that went to other teams that were not in Mr Ball's and Ms Wilson's control;

210.3. There was a lot of other work related to smart control carried out by members of Mr Balls' and Ms Wilson's teams by employees who were not coders and had a range of seniorities and skills. This included Alex, Maureen, Hannah, Van and Sonia who had been given Smart Control related duties after the Claimant had been told there were no opportunities for her;

210.4. The Claimant had too painstakingly eke out details in cross-examination. It showed that the Respondents had not given fully candid accounts.

*RPA/robotics: September 2018*

211. In her email of 11 September 2018, the Claimant asked for work in this field. Ms Wilson responded that "*we are using our project aligned resources for this work. As a key part of this work involves the Change Control process of which you are currently not able to execute.".* At this time, Mr Ball said simply that there were no permanent vacancies. He later also said in an email on 10 December 2018, that he had brought two contingent workers into the RPA space because they had niche skills.

212. The Claimant does not accept that this work required specialist skills in robotics. This is based on a conversation she had with one of the people doing the role. We can accept that is what she was told. However, we accept the Respondents' evidence that this was a specialist area in which experience and skills in robotics was needed and that is why the contingent workers Mr Ball recruited were selected because they had those niche skills. We also accept that carrying out Change Controls was a key part of this role in any event.

*IT/Quality Project Manager: December 2018/January 2019*

213. The Claimant did make requests to shadow a colleague carrying out such a role as set out in our findings above. Mr Ball refused this request, in essence because a core part of the IT/Quality Project Manager role involving doing Change Control. We accept his evidence that at times it would be 20 – 30 % of the role but at other times a greater percentage.

*Permanent role as service manager in wider team given to CW (issue 22.1.3)*

214. Despite the reference to a 'CW' in the characterisation of the issues, the evidence and argument in the case focussed on a role that came up in Colin Jones' team that was ultimately filled by Mr Ali.

215. The Respondents' case is that this role was essentially the same as the Claimant's in that the key component was doing Change Controls. The Claimant did not accept this on the basis that from her past experience service managers did not simply do Change Controls. Ms Wilson was asked about this role in her evidence. Her evidence was the role was in fact IT Quality manager role not a service manager role but in any event, whatever the title, it involved a lot of Change Control activity. It could be 20 – 30% at times but at others 50 – 60%.

We prefer Ms Wilson's evidence. She was in our view in the better position to speak with authority about what this role was and what it comprised.

216. We also accept Ms Wilson's evidence that the type of Change Control that this job required, supporting on a projects, was more advanced than the ones the Claimant had experience of and that the Claimant needed to continue building Change Control competence before moving on.

*Roles outside of team*

217. In around November 2019 (after the "preliminary" decision to dismiss), the Claimant applied for a role as a Project Manager in another section of the business. Mr Westwood, was the recruiting manager. He emailed Mr Ball on 29 November 2019 asking for some 'initial feedback'. Mr Ball then spoke to Mr Westwood.

218. The Claimant's application was not progressed and she did not get an interview. She believes that Mr Ball spoke negatively about her and put the recruiting manager off. Mr Ball denied this and said he had told the recruiting manager that he could not comment on the role because the role in his team was quality management whereas this was a project management role; but that he noted the claimant and service and project management on her CV.

219. We found Mr Ball's account of the call rather implausible. The request was for initial feedback and we think it overwhelmingly likely that the conversation would have included a discussion of the merits of the Claimant as an employee. By this stage in the chronology, Mr Ball had made a "preliminary" decision to dismiss the Claimant and in our view did have a negative opinion of her. Her period of employment in his team had not gone well and he had found her very difficult to manage. We think it is likely that he did give Mr Westwood a negative feedback about the Claimant.

220. The Claimant also applied for a role in the data privacy team. Mr Xavier Jean was the recruiting manager. This application appears to have been during her notice period. The Claimant was shortlisted and interviewed.

221. The Claimant says she had positive feedback from the interviewers and was told that she would hear back in respect of the role before the end of week. We accept her evidence. She did not hear back until she followed up and was told she had not been selected.

222. The Claimant believes that Mr Ball spoke to the recruiting manager and gave negative feedback about her. Mr Ball denies this. He accepted in cross-examination that he knew Mr Jean, and indeed, Mr Jean had once been his manager. However, his evidence was that he was not even aware that the Claimant had applied for this role and that he had not given any feedback in respect of the Claimant in relation to it.

223. We have found this a difficult matter to resolve. However, we ultimately think it is more likely than not that Mr Ball was asked for feedback in respect of the Claimant and her application for this job and that he provided negative feedback to like effect as above. We find this because it is plain that this was a business in which there was an accepted culture of reaching out to the existing manager of an employee for a view when an employee sought an alternative role internally. It therefore seems likely that this happened. We have little doubt that when privately asked Mr Ball would have given his candid view, namely that the Claimant's employment with him had been unsuccessful and that he had found her difficult to manage.

224. The Respondent has no disclosure documents in respect of this job application. As a matter of course, recruitment documents are kept for only 12 months and then destroyed. Of course where documents are relevant to litigation they need to be preserved. The Respondent says that they were not in this case because the Claimant made the application from her personal email account and thus that the relevant people tasked with preserving documents for litigation were unaware of it.

225. Considering the matter in the round, it seems to us that the Respondent could and should have done a better job of preserving the documents in respect of the Claimant's application for this role. However, we do not accept that the documents were either deliberately suppressed or destroyed with a view to improving the Respondents' position in litigation. In our view the more likely explanation is simply that there was an oversight: an innocent failure to appreciate that the documents should be preserved.

226. We would have taken the same view even if we had admitted the email sent by the Claimant to the tribunal on 24 November 2023, appearing to show that the Respondent sent an email to her GSK account in January 2020 regarding what appears to be this role.

**Law**

*Unfair Dismissal*

227. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed. That includes a right not be unfairly constructively dismissed (s. 95(1)(c) ERA).

228. There is a limited range of potentially fair reasons for dismissal (s.98 Employment Rights Act 1996).

229. The 'reason' for dismissal is the factor operating on the decision-maker's mind which causes him/her to take the dismissal decision (**Croydon Health Services *NHS Trust v Beatt*** [2017] ICR 1420). In some circumstances, the net could be cast wider such as where the facts known to, or beliefs held by, the decision-maker have been manipulated by another person (***Royal Mail Ltd v Jhuti*** [2019] UKSC 5).

230. Capability for performing work of the kind which he was employed by the employer to do is a potentially fair reason (s.98(2)).

231. Where there is a potentially fair reason for a dismissal, the fairness of the dismissal is assessed by applying the test at s.98 (4) ERA. The burden of proof is neutral. Section 98 (4) says:

> *(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.*

232. The range of reasonable responses test applies to all aspects of dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

233. In ***Spencer v Paragon Wallpapers Ltd*** *[1976] IRLR 373*, *[1977] ICR 301* the EAT said this:

> *"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?"*

234. In ***East Lindsey District Council v Daubney*** *[1977] IRLR 181*, *[1977] ICR 566*, a different division of the EAT said this:

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

235. Sometimes a tribunal may feel that the medical position has been adequately established following consultation with the employee himself; in others the employer ought to consult doctors about the state of the employee's health, as (***Patterson v Messrs Bracketts*** *[1977] IRLR 137.)*

236. In ***Merseyside and North Wales Electricity Board v Taylor*** [1975] IRLR 60, [1975] ICR 185 the EAT said this:

> *"… when one comes to consider the circumstances of the case, as to whether they make it reasonable or unreasonable to act upon his incapacity and to dismiss him, it cannot be right that, in such circumstances, an employer can be called upon by the law to create a special job for an employee however long-serving he may have been. On the other hand, each case must depend upon its own facts. The circumstances may well be such that the employer may have available light work of the kind which it is within the capacity of the employee to do, and the circumstances may make it fair to at least encourage him or to offer him the chance of doing that work, even if it be at a reduced rate of pay."*

<u>*Direct discrimination*</u>

237. Section 13 EqA provides: *"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."*

238. Section 23 EqA provides:

> *(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.*
> *(2) The circumstances relating to a case include each person's abilities if – on a comparison for the purposes of section 13, the protected characteristic is disability…*

239. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

240. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

> *'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an*

*examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*

*The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'*

241. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

*'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'*

242. The EHRC Employment Code says this on comparators in direct disability discrimination cases:

*3.29*
*The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).*

*3.30*

*It is important to focus on those circumstances which are, in fact, relevant to the less favourable treatment. Although in some cases, certain abilities may be the result of the disability itself, these may not be relevant circumstances for comparison purposes.*

*Example:*
*A disabled man with arthritis who can type at 30 words per minute applies for an administrative job which includes typing, but is rejected on the grounds that his typing is too slow. The correct comparator in a claim for direct discrimination would be a person without arthritis who has the same typing speed with the same accuracy rate. In this case, the disabled man is unable to lift heavy weights, but this is not a requirement of the job he applied for. As it is not relevant to the circumstances, there is no need for him to identify a comparator who cannot lift heavy weights.*

243. In ***Aylott v Stockton on Tees*** [2010] IRLR 994, Mummery LJ said this:

*39. The employment tribunal selected a hypothetical comparator. As the identity of the comparator for direct discrimination must focus upon a person who does not have the particular disability, that disability must, as directed in section 3A(5) , be omitted from the circumstances of the comparator. In other respects the circumstances of the claimant and of the comparator must be the same "or not materially different". The claimant's abilities, as directed in section 3A(5) , must be attributed to the comparator. Although the comparator is not required to be a clone of the claimant, failure by the employment tribunal to attribute other relevant circumstances to the comparator may be an error of law on the part of the tribunal: see, for example, the judgment (Judge McMullen QC) in High Quality Lifestyles Ltd v Watts [2006] IRLR 850 . However, as explained below, there is no obligation on the employment tribunal to construct a hypothetical comparator in every case and failure to do so does not necessarily lead to an error of law in the employment tribunal's findings.*

244. Where an employer makes inaccurate assumptions about mental illness that are not based on up to date medical evidence, but for instance upon stereotypes about mental illness, that is a matter that may infer directly discriminatory treatment: ***Aylott v Stockton on Tees*** **[2010] IRLR 994.** The same principles apply in the case of physical disabilities.

245. In ***Owen v Amec Foster Wheeler Energy Ltd*** **[2019] ICR 1593** the Court of Appeal gave important guidance on direct discrimination in the particular context of disability. Mr Owen had multiple health issues and was denied an overseas posting because medical concerns were raised in an occupational health assessment. Mr Owen argued that the reason the employer did not allow him to be posted overseas was the outcome of his medical assessment and that this was indissociable from his disabilities. He argued that, regardless of any benign motive that Amec may have had, there was a necessary and inherent link between the reason Amec made the decision and his disabilities. The Court of Appeal rejected this argument – the hypothetical comparator was a person who was not disabled but who was also deemed to be a high medical risk. That person would have been treated in exactly the same way.

246. The appeal considered the concept of indissociably and the case-law jurisprudence around that in the context of direct discrimination. That culminated with the following conclusion:

*78. I would also accept the submission made by Ms Sen Gupta that, unlike racial or sex discrimination, the concept of disability is not a simple binary one. It is also not the case that a person's health is always entirely irrelevant to their ability to do a job. For those reasons the concept of indissociability, which forms the foundation of much of Ms Genn's submissions, cannot readily be translated to the context of disability discrimination.*

*Reasonable adjustments*

247. Section 20(3) EQA 2010 provides:

*"…where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, [there is a requirement] to take such steps as it is reasonable to have to take to avoid the disadvantage."*

248. "*Substantial*" is defined at section 212(1) EQA 2010 to mean "*more than minor or trivial*".

249. General guidance as to the overall approach to reasonable adjustments was given in ***Environment Agency v Rowan*** [2008] ICR 218:

249.1. The PCP must be identified;
249.2. The identity of the non-disabled comparators must be identified (where appropriate);
249.3. The nature and extent of the substantial disadvantage suffered by C must be identified;
249.4. The reasonableness of the adjustment claimed must be analysed.

250. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal (***Morse v Wiltshire County Council*** [1998] IRLR 352).

251. There is no requirement for there to be a good or a real prospect of an adjustment removing or mitigating the substantial disadvantage before it can be held to be one that the Respondent ought reasonably to have made. An adjustment *may* be a reasonable one to make even if there is merely *a prospect* of it removing or mitigating the substantial disadvantage (***Leeds Teaching Hospital NHS Trust v Foster***, unreported EAT UKEAT/0552/10/JOJ).

252. In **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160 Elias LJ said this at 170:

*"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness".*

253. In ***Lincolnshire Police v Weaver*** [2008] All ER (D) 291 (Mar), the EAT held that it is proper to examine the question not only from the perspective of a claimant, but that a tribunal must also take into account 'wider implications' including 'operational objectives' of the employer.

*Discrimination arising from disability*

254. Section 15 EQA 2010 provides as follows:

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

255. In ***Pnaiser v NHS England*** [2016] IRLR 170 the EAT gave the following guidance:

> *(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
> *(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
> *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).*
> *(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

*(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

*(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*

*(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, "discriminatory motivation" and the alleged discriminator must know that the "something" that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.*

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

256. In ***MacCulloch v ICI*** [2008] IRLR 846, Elias J (as he then was) set out four legal principles with regard to justification, which have since been approved by the Court of Appeal in ***Lockwood v DWP*** [2014] ICR 1257:

*(1) The burden of proof is on the respondent to establish justification….*

*(2) The classic test was set out in **Bilka-Kaufhaus GmbH v Weber Von Hartz** (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.*

*(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].*

*(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."*

257. Concrete evidence is not always required to prove justification (***Lumsdon v Legal Services Board*** [2015] UKSC 41).

258. When assessing proportionality, the tribunal must reach its own judgment, but it must be based on a fair and detailed analysis of the working practices and business considerations involved, having regard to the business needs of the employer (***Hensman v Ministry of Defence*** *UKEAT/0067/14/DM*, *[2014] EqLR 670;* ***City of York Council v Grosset*** (*[2018] EWCA Civ 1105*, *[2018] IRLR 746*).

*The burden of proof and inferences*

259. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

260. In ***Igen Ltd & Others v Wong*** [2005] IRLR 258 the Court of Appeal gave the enduring guidance on the burden of proof. Although that was a case brought under the Sex Discrimination Act 1975, it has equal application to all strands of discrimination under the EqA:

> *(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.*
> *(2) If the claimant does not prove such facts he or she will fail.*
> *(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.*
> *(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*

*(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*
*(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*
*(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.*
*(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*
*(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.*
*(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.*
*(11) 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 on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.*
*(12) That requires a 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 sex was not a ground for the treatment in question.*
*(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.*

261. In ***Madarassy v Nomura Bank*** 2007 ICR 867, a case brought under the then Sex Discrimination Act 1975, Mummery LJ said:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts 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."*

262. The position was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

*'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:*

*(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):*

*"56. … 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.*
*57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"*

*(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues: "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim." He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'*

263. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

264. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

265. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and

documentary evidence available and what inferences may be drawn from all the primary facts.

266. It is not permissible to infer discrimination simply from unreasonable treatment. However, it can be permissible to infer discrimination from the failure to explain unreasonable treatment (***Bahl v The Law Society*** [2004] IRLR 799).

267. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

268. In a complaint of failure to make reasonable adjustments the Claimant has the burden of proving that the PCP, physical feature or failure to provide auxiliary aid, would put him at a substantial disadvantage compared to others who are not disabled. The burden does not shift unless there is evidence of some apparently reasonable adjustment which could have been made. This does not necessarily mean providing the detailed adjustment but at the least requires the broad nature of the adjustment to be clear enough for the Respondent to understand and engage with it. See ***Project Management Institute v Latif*** [2007] IRLR 579.

*Time limits*

269. S.123(1)(a) EqA provides that:

*(1) [Subject to [sections 140A and 140B],] Proceedings on a complaint within section 120 may not be brought after the end of—*
*(a) the period of 3 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.*

270. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS, and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

271. In ***Matuszowicz*** the CA held that s.3 of Sch.3 of the DDA 1995 provided that a deliberate omission was deemed to occur when it was decided upon and that a person can be taken to have decided upon that omission either (a) when he does an act inconsistent with the doing of the omitted act or (b) after that period of time within which a reasonable person would have acted. Lord Justice Lloyd held that the effect of para 3(4) was to treat an inadvertent omission by the employer as an act that was done deliberately either when the employer had performed an act inconsistent with the omitted act or after that period of time within which a reasonable person would have acted. His Lordship also stated that since the allegation in Matuszowicz, concerned a continuing omission, the time limit was governed by paragraph 3 of Schedule 3. Lord Justice Sedley agreed with the judgment of Lord Justice Lloyd and stated that it was worth stressing that the effect of paragraph 3 of Schedule 3 "is to eliminate continuing omissions from the computation of time by deeming them to be acts committed at a notional moment." Their Lordships therefore agreed that even where an act is a continuing omission the time limits were governed by paragraph 3."

272. In ***Abertawe*** the Court of Appeal essentially built upon the jurisprudence of ***Matuszowicz.*** It held as follows (this is extracted from the headnote, which in our view accurately captures the principles):

*section 123(4) of the Equality Act 2010 dealt only with the question of when time began to run for the purpose of calculating the time limit for bringing proceedings in relation to acts or omissions which extended over a period; that, in the case of omissions, the approach taken in section 123(4) was to establish a default rule that time began to run at the end of the period in which the employer might reasonably have been expected to comply with the relevant duty; that ascertaining when the employer might reasonably have been expected to comply with its duty was not the same as ascertaining when the duty to comply began; that pursuant to section 20(3) of the Act, the duty to comply with the relevant 2010 requirement began as soon as the employer was able to take steps which it was reasonable for it to have to take to avoid the relevant disadvantage; that, in contrast, the period in which the employer might reasonably have been expected to comply with its duty ought in principle to be assessed from the Claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the Claimant at the relevant time; and that, accordingly, there was no inconsistency between the tribunal's finding that time did not begin to run for bringing the reasonable adjustments claim until August and its conclusion that the claim 1 2011 was well founded.*

273. S.123(1)(b) EqA provides that the Tribunal may extend the three-month limitation period, where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which may include factors such as: the reason for the delay; whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (***Abertawe***).

## Discussion and conclusions

*Unfair dismissal*

274. Identifying the reason or principal reason for dismissal in this case is not a simple matter. The Respondent's case is that the reason is capability. Ultimately we take the view that it is, but not without considerable analysis and pause for thought.

275. The Respondents' primary position is that they took the Claimant at face value with respect to her having an inability to carry out Change Controls without adaptations. We do not think this is the whole truth - it omits an important nuance. We are sure that Mr Ball and indeed Ms Wilson were sceptical of the Claimant's position that she was unable to do Change Control without experiencing pain. In our view they had a suspicion that she may be using a medical issue to get something she wanted, namely, a different and more interesting job that did not involve any or at least as much Change Control (something more along the lines of what she had been promised by Mr Wadey).

276. It is important to be clear what the suspicions arose out of. There was, in our view, a rational basis for them, and they were nothing to do with any sort of prejudice or stereotyping of people with disability/the Claimant's particular disability. The main factors were these:

276.1. On coming to the role in the first place, the Claimant had gone out of her way to get assurances that her role would not be limited to Change Control;
276.2. There was nothing very special about the mechanics of doing Change Controls. It did involve using the mouse quite a lot, but in that respect it was a fairly ordinary computer based task and it was not obvious why the Claimant could do other tasks, or prospectively other roles (all of which were computer use heavy) without like problems;
276.3. The Claimant was slow to complete her training on Change Controls (albeit there was a partial excuse for this, essentially, IT problems);
276.4. The Claimant completed few Change Controls even before the pain issues arose;
276.5. The feedback on the Claimant even before the pain arose was that she was reluctant to make judgment calls in respect of Change Controls;
276.6. The Claimant gave pretty short shrift to adapting the Change Control task by having the Change Control form printed. She did not seem to like the idea when Mr Ball first suggested it. Further, while this way of working did not eliminate all mouse use, it did reduce it a lot in our view (though we appreciate the Claimant herself does not accept this). That made it even harder to understand how it was that the Claimant could not do Change Controls without pain but could do other computer based tasks. The Claimant reported that the pain had returned after doing just a few days of Change Controls in February 2018 and then only a few on each of those days.

276.7. It did take a surprisingly long time to bottom out whether or not Dragon would work. By no means was this entirely the Claimant's fault at all. However, it frustrated her managers. Moreover, by the latter stages of that process (from around September 2018 onwards) she did simply fail to answer simple inquiries as to whether it worked as a solution or not.
276.8. The Claimant was seeking alternative work at an early stage.
276.9. Ms Wilson also knew that the Claimant came to the department having had "issues" with all of the other line managers in the area such that a role needed to be created for her.

277. Mr Ball and Ms Wilson then, in our view, had a suspicion that the Claimant simply did not want to do Change Control and that that was at least a significant part of the Claimant's motivations and had a reasonable evidential basis for this. That is essentially the case that the Respondents have run in this litigation - that the Claimant simply did not want to do Change Controls. They have done that while concurrently with not really going seeking to go behind the Claimant's case that doing Change Controls caused her the symptoms she said.

278. The fact was that in addition to her own account the Claimant had medical evidence (e.g. OH evidence) in support of her position. Because of that Mr Ball and Ms Wilson, managed the Claimant on the basis that she was unable to complete Change Controls to the extent required, at least without an adaptation that removed the repetitive computer work element. Thus the management route they decided to go down, assumed (despite their personal suspicions and scepticism) that the Claimant was incapable of completing Change Controls without unacceptable levels of pain. But, and it is an important 'but', we infer from the evidence, what they were not prepared to do was to allow the Claimant to use the difficulty with doing Change Controls to manoeuvre into a different role. This is well evidenced by the approach to redeployment as discussed in detail below.

279. The reason for the Claimant's dismissal, was that Mr Ball took the view, proceeding on the premise that the Claimant was unable to do Change Controls to the extent required, that she was unable to carry out the most fundamental part of her job. This state of affairs persisted for a very long period of time and there was no indication it would change. He was of the view that he had made all reasonable adjustments that might enable the Claimant to complete Change Controls but that they had not enabled her to return to completing them. Accordingly, and in light of the view he took about redeployment to other roles he dismissed the Claimant.

280. The principal reason for dismissal was capability. Mr Ball dismissed the Claimant because he was operating on the assumption that she was unfit for her existing job because of ill-health, thus was unable to fulfil her role. He did have reservations about whether this was really true or not, but it was the basis on which he managed her. However, he was not prepared to let her 'have her cake and to eat it' as we think he saw it, in the sense that he did not think doing Change Control was very significantly different in a physical/mechanical sense to other roles/jobs so he was not prepared to redeploy or help her to be redeployed. That scepticism played a role in the dismissal in that it explains at least in part

why the Claimant was not redeployed. However, the principal reason for the dismissal was as stated.

281. To be clear, this was not a conduct dismissal. Mr Ball did not dismiss the Claimant *because* he disbelieved her about her ability to do Change Control. That would be an analytically distinct reason.

*Inferences*

282. We note that before making any finding as to the reason for the dismissal (and indeed the reason for any of the impugned treatment) we stood back from the evidence and asked ourselves what inferences we should draw.

283. It was as part of that process that we drew the inferences set out above that Mr Ball and Ms Wilson had a suspicion that the Claimant was strategically trying to manoeuvre herself into a more interesting role.

284. We gave particular thought to whether or not we should infer that the Claimant's disability itself (or some other ulterior matter) was the reason or part of the reason for the treatment complained of, such as the dismissal. Ultimately, we decided that there was no basis for drawing that inference but the following factors gave us the greatest pause for thought.

285. There are occasional references in the evidence in which managers said or suggested that the Claimant could not send emails. However, we do not think these should be taken literally and are ultimately not a basis for drawing adverse inferences.

285.1. It is clear that Mr Ball, Ms Wilson and Mr Wadey were all aware that the Claimant could send emails since she was in fact sending them emails and this was one of her primary means of communication with them. It cannot have been, and in our judgment was not, any of their view that she was unable to send any emails. That would have been totally irrational. Nor do we think they were strategically purporting that the Claimant was unable to send emails as some sort of pretext for dismissal (or anything else). That would have been so demonstrably baseless (by simply gathering emails the Claimant had sent - including to them) it would have been utterly pointless.

285.2. Ultimately, we take the view that it was a matter of poor and imprecise expression. The Claimant's ability to use Outlook was a question of degree. Using Outlook does (ordinarily) involve use of mouse and depending on the particular task to hand can involve using a mouse a lot. Part of the Claimant's complaint about Change Control was that it involved using the mouse a lot to search the Change Control shared inbox and get documents from it. This aspect accounts for a significant portion of the mouse clicks she describes in executing Change Control work. This was one of the reasons why in February 2018 the Change Controls were printed for her and sent to her personal inbox (rather than the shared inbox that need to be searched).

There thus was an issue about using email though it was not that the Claimant was entirely unable to send emails.

285.3. In any event, the key point is that we do not think that any decision making proceeded on the (inaccurate) basis that the Claimant was unable to send any emails nor that anyone actually thought that the Claimant was unable to send any emails.

286. Not getting up to date medical advice before moving to dismissal. As further explained below, we think this was unreasonable. However, we do not think it infers that the Claimant's disability was the reason for dismissal or other impugned treatment:

286.1. The reason updated medical evidence did not happen was firstly because Mr Ball genuinely did not think it was necessary when the LTIH meetings were commenced. The possible need for it was identified as a discussion point for the LTIH meetings in both the July and November 2018 invitation letters in which Mr Ball expressed a provisional view that there was no merit in getting further OH evidence and asking for the Claimant's comment. At that stage the OH evidence was relatively recent. And his effort to obtain further OH input in February 2018 had been rebuffed (he was told the case was closed).

286.2. There followed many meetings over many hours. The Claimant's focus was immovably elsewhere – on the accuracy of the invitation letter - as described in more detail above and below. By the end of this process there did not appear to have been a change in the medical position i.e., the extent of the Claimant's ability to carry out Change Control. In our view, that combined with the fact that Mr Ball had lost patience with the Claimant because of the approach she took to the meetings meant he did not see value in obtaining updated OH advice. He thought it better to bring matters to a conclusion.

287. A certain level of hostility was shown to the Claimant: putting her on garden leave, cutting her system access, walking her out of the building, not assisting her with redeployment and indeed hindering it by speaking negatively to recruiting managers. None of that is very typical in ill-health capability cases. In our view the explanation for it is as follows:

287.1. For the reasons set out above Mr Ball suspected that the Claimant may be mis-using a medical issue to try and manoeuvre herself into a different role. He did not want her to achieve that.

287.2. Mr Bell grew frustrated with the Claimant because her time in his team had not been a success, it had taken so long to investigate Dragon and because the LTIH meetings had been such an investment of time and effort but without really scratching the surface of the agenda for the meetings because of the Claimant's approach to them.

287.3. Mr Bell was indeed concerned, as he said, that there was a possibility of the Claimant being a threat to the business. Matters had become quite adversarial by the point of dismissal and he became more suspicious

when he asked the Claimant what she was doing on Skype and she went offline.

*Fairness*

*Consultation with the Claimant*

288. In our view there was adequate consultation with the Claimant. There were a large number of LTIH meetings. It is unfortunate that the meetings achieved very little but there was a clear reason for that. The Claimant had an obsessive focus on the accuracy of the letter inviting her to the meeting, including in respect of very peripheral issues. Some challenge to the terms of the letter would have been perfectly fair but the Claimant took it to an extreme to the point that the meetings were basically derailed and a discussion of the key issues was largely precluded.

289. The Claimant was also uncooperative with Mr Ball's efforts to move things on by consolidating her complaints about the invitation into an easy to use table. That would have enabled a good deal of the work in respect of the complaints about the invitation letter to take place outside of the meetings and the meetings could have been used more productively. That was unhelpful to say the least.

290. Further, the Claimant has a fair opportunity to raise concerns in the form of her speak-ups and grievances. The Respondents did a reasonable job of dealing with those matters. At various times they stalled and protracted significantly. Again that was essentially because of the Claimant's approach to them. There were many delays in her providing information, particulars and documentation. When she provided documentation it was often so heavily redacted it was meaningless.

*Medical information*

291. By the time of the decision to dismiss the Claimant in September/December 2019, the most recent OH advice was the better part of two years old. The most recent advice was from January 2018. That is a very long time.

292. In our view, any reasonable employer, would have obtained up to date medical advice, whether from OH or otherwise, before taking the decision to dismiss. There was nothing in the original two OH reports that suggested the Claimant's condition would never change over time or that there would be no utility in updating the advice in the future. It is notable that in February 2018, Mr Ball himself sought further OH advice but was told the Claimant's case had been closed. That was distinctly unhelpful, but also did not come with any statement to the effect that there would be no point in making a further referral in the future, in the event of a significant passage of time and/or in the event of considering dismissal.

293. While we note the Respondents' position that the Claimant continued to represent that she was unable to carry out Change Controls, the Claimant was a

lay person and it remained relevant and important to have up to date medical input.

*Efforts to find alternative employment*

294. It was incumbent on the Respondent to make reasonable efforts to find the Claimant alternative employment, at the least, once the decision had been reached that it could not sustain her in her existing role if unable to do Change Controls. However, what the evidence shows, is that at the moment that stage came, the Respondent, far from being prepared to make reasonable efforts to find the Claimant alternative work, did quite the reverse.

295. Mr Ball told the Claimant that it would do this in the letter initiating thing LTIH procedure (in both July and November 2018):

> *The redeployment policy allows a period of time, based on an employee's notice period, to look for an alternative role. In your case this would be 12 weeks. GSK would pay you for that full 12 week period, notwithstanding that it appears that you are not and will not be able to return to carry out your full duties in the foreseeable future. We would at the outset of this period work with you and Occupational Health to draw up what an ideal role would look like for you and then search for opportunities within the business - including short term assignments. However, the redeployment process does not create a role for an individual if one is not available and if the work does not need to be done.*

296. In the event, Mr Ball said this in his letter of dismissal on notice of 4 December 2019:

> *I have reflected again on this and have concluded that it would not be worthwhile to spend any further time considering whether there is an alternative role for you. No suitable alternative roles have arisen during the extensive period that we have been discussing this issue with you and it is clear to me that it is highly unlikely that any roles would arise in a further reasonable period.*

297. In short, Mr Ball was absolutely not assisting the Claimant to find alternative work, on the contrary he was telling her it was not even worth trying.

298. Further, despite the reason for the dismissal being capability and not gross misconduct or a matter of that sort, the Claimant was placed on garden leave and her system access was rapidly disabled. This meant that she could only attend the workplace if accompanied and more significantly that she could only apply for externally advertised vacancies and not internally only advertised ones.

299. According to Ms Austen's evidence there was a way of accessing internal vacancies via special login details. However, these were not provided to the Claimant. Thus she was compromised in her job search at the very most critical time, i.e., having been given notice of dismissal and the decision made that she could not remain in her existing job.

300. The error of Mr Ball's position, as stated in the letter of dismissal quoted above, is illustrated by the fact the Claimant must have come quite close to actually obtaining alternative employment in the notice period because she was shortlisted for a role and interviewed.

301. In closing submissions, Ms Bell submitted that although it may appear that the level of assistance to the Claimant in respect of redeployment was reduced compared to what was stated in the letters initiating the LTIH procedure, in fact the Respondent had been more generous. That is because redeployment had been open to the Claimant throughout the long running LTIH procedure. We reject that submission.

301.1. Even if it were true that redeployment had been open to the Claimant prior to being given notice of dismissal and that the procedure to that point was protracted, any reasonable employer would nonetheless have taken reasonable steps to try and redeploy the employee in the notice period. Indeed the notice period was the most important period – it was the period in which the Claimant's employment was at imminent risk.

301.2. We do not think the Respondent was in reality taking reasonable steps to redeploy the Claimant up to the point of being dismissed on notice in any event.

302. Overall, the Respondent's approach to alternative employment was outside the band of reasonable responses.

*Had the employer waited long enough?*

303. We are of the view that in principle the Respondent had waited long enough to see whether or not the Claimant could continue in her existing role. She had been unfit for it in an unadjusted form since around September 2017. A great deal of effort was put into seeing whether she could continue in that role with some form of adjustments. She could not. There was a strong appearance that she therefore needed a different role if her employment were to continue. However there were two shortcomings.

304. The dismissal was outside the range of reasonable responses for the two reasons identified:

304.1. Up to date medical advice was needed to cross-check and potentially shed further light on the appearance that the Claimant remained unfit for her role in an unadjusted form then and for the foreseeable future. It may also have shed further light on adjustments and her fitness for alternative roles;

304.2. Reasonable efforts were not made in respect of redeployment.

*Direct discrimination*

305. As noted above, before determining the claims including the direct discrimination claims we stood back from the facts, looked at them as a whole and asked ourselves what inferences should be drawn. Having done that we reached our conclusions as now stated.

*Issue 11.1. The emails of 15 November 2017 communicating to management, HR and Occupational Health that C was incapable of using computer and emails.*

306. This complaint relates to Ms Wilson's email of 15 November 2017 (despite the wording of the complaint being in the plural no other email of 15 November 2017 has been impugned.) Ms Wilson's email, reads as follows:

> *Hi Lucy*
> *I have read through this and have a number of concerns.*
> *Alina's job is in GSK Tech. By default, her role involves using her computer and email and other repetitive tasks are the largest part of that.*
> *We do not have any jobs that don't require extensive computer use in this department.*
> *Therefore this proposal does not meet business needs and leaves us with an employee who will have little to do. I cannot work with this in my team.*
> *If Alina cannot do her role right now, then she should surely be signed off until she can do some of the role she is employed for.*
> *Please advise how we can proceed, from next week Alina will likely be sitting with little to do on the basis of this outcome.*

307. The context of the email is of some importance in understanding its meaning. It is from Ms Wilson to the OH adviser (with Mr Ball and Ms Backhouse in Change Control) and follows Ms Wilson's reading of the first OH report.

308. In our view the sentence that reads "*Alina's job is in GSK Tech. By default, her role involves using her computer and email and other repetitive tasks are the largest part of that"* is Ms Wilson explaining to Ms Pope what the Claimant's role involves. She is describing the use of the computer and sending emails as repetitive tasks and saying that this, together with other repetitive tasks is what the Claimant's role involves. It is also what other roles in the department involve. The reason she is referring to repetitive tasks is because the OH report identifies repetitive tasks as the issue ("*Alina feels that the main issue for her pain is having to carry out the repetitive computer tasks which involve heavy mouse usage*.")

309. Ms Wilson's paragraph that reads "*If Alina cannot do her role right now, then she should surely be signed off until she can do some of the role she is employed for"* also needs to be construed. It is not a declaration by her of what the Claimant's abilities were or were not. She was simply saying that *if* the Claimant was unfit for her role she should be signed off. The email was therefore not doing what it is alleged to have been doing at issues 11.1.

310. What this email really shows is Ms Wilson struggling to make sense of the OH advice. She did not understand how the Claimant could be fit for work if she could not undertake repetitive computer based tasks and this is what she was taking up with Ms Pope. She did not do this *because of* disability. She did it because:

310.1. The OH report suggested the Claimant was made unwell by carrying out repetitive computer tasks;
310.2. Ms Wilson knew that the Claimant's and all other roles in the department required intensive usage of a computer;
310.3. She could not see any significant difference between Change Control and other repetitive computer based tasks.

311. It is also important to be clear that we do not think any form of stereotyping of disability was going on here. Ms Wilson's understanding of what the Claimant's limitations were, were based on the OH health report as well as general logic and reason. Change Control is a repetitive task but it is a fairly unremarkable task that is not dissimilar to a wide range of other computer based tasks. It involves using a mouse quite a bit and a keyboard to interact with some pretty ordinary software like Outlook among others.

312. Further, we think that Ms Wilson would have taken the same approach in the case of a hypothetical comparator whose circumstances were the same but who was not disabled or had a different disability. That comparator would be an employee in a comparable role to the Claimant's, about whom Ms Wilson received an OH or other report describing a capacity to work limited in comparable way to the limitations described in the Claimant's OH report.

*Issue 11.2. C was told by R2 in January 2018 that her role involved only Change Control Tasks.*

313. Mr Ball did say this but it was on 5 February 2018 not in January 2018. In closing submissions, Ms Bell pragmatically indicated that the Respondents took no point about the discrepancy with the date.

314. However, we do not accept that Mr Ball said this *because of* the Claimant's disability. The reasons he said this were:

314.1. As a matter of fact, in practice, Change Control was essentially the Claimant's role by this stage of the chronology. This in turn reflected the fact that Change Control was the thing that the business really needed the Claimant to do.
314.2. For the reasons described under the heading of unfair dismissal, Mr Ball did not want the Claimant to manoeuvre herself into a different role.
314.3. It also reflected the fact that at this point in the chronology he thought there may be a solution which was for the Change Control forms to be emailed and printed.

315. We are sure that Mr Ball would have treated a hypothetical comparator with no disability or a different disability in the same way. The comparator is someone who like the Claimant he was managing on the basis that they were unable to complete Change Controls, but whom he suspected may be trying to get out of doing them as a matter of choice in favour of doing a different more interesting job, and in circumstances where he believed that printing the Change Control

forms may resolve the issue the comparator raised with carrying out Change Controls.

*Issue 11.3: R2 communicated to management and HR that C was incapable of performing her role or doing any work that involved Change Control tasks.*

316. The essential facts of this allegation are true. It was Mr Ball's position, and this was something that he communicated to management and HR, that the Claimant was incapable of performing her role or of doing any work that involved Change Control tasks. A good example of him taking this position and communicating it to the business are his letters initiating the LTIH process (11 July 2018 and 16 November 2018).

317. In order to discern the reason for Mr Ball taking this position some analysis is required. It is necessary to identify the premises on which Mr Ball said that the Claimant could not perform her role:

317.1. His position was that Change Control was absolutely central to it. It was at the core of the Claimant's role and was the duty which the business really needed the Claimant to carry out. We accept that this was genuinely his view and that it was essentially supported by the facts on the ground. When the role had been described to the Claimant at the outset, it had two other major elements: IBM work and SOX work. The IBM work had moved to a team in Poznan (although it is true that there were a few bits of IBM work that continued to be done locally). The SOX work had been outsourced and the way it was done had changed. This meant that the role as originally promised to the Claimant had changed. What was left of that role was essentially Change Control. There were other roles and opportunities in and beyond Mr Ball's team but they are another matter that go beyond the Claimant's actual role. Of course thought needs to be given to that aspect of the case – and it is – above and below.

317.2. Mr Ball's position was that the Claimant was unable to do Change Control. He was, as we have found, sceptical that this was true because he found it hard to understand how there could be a problem with doing Change Control but not with doing other similar computer based tasks. Despite that scepticism his position was that the Claimant was unable to do Change Control and the key reasons for taking that position were that:

317.2.1. The Claimant had reported suffering from pain and numbness caused by doing that task;
317.2.2. There was occupational health evidence in support of the Claimant's position;
317.2.3. In February 2019, after a good break from doing Change Control the Claimant reported that her symptoms had returned after doing a few Change Controls per day for about 5 days. That was even with a potential solution of the Change Controls being printed and emailed to the Claimant in place (albeit that the solution was not executed perfectly because the Change Controls were not always printed for the Claimant during this period though they were emailed to her).

317.2.4. A potential solution of using Dragon was identified but there was never a time (we have found) at which that potential solution actually worked and Mr Ball concluded it was not in fact a solution.

317.3. A particular issue that needs thought is why Mr Ball suggested that the Claimant was unable to perform *any* Change Controls as distinct from being unable to perform Change Controls all day every day. We find that Mr Ball suggested this because it is what he believed to be the case. The basis of his believe was:

317.3.1. The matters stated in the previous paragraph which are repeated;

317.3.2. Beyond that, we reject the Claimant's evidence that she actually told Mr Ball she could do some Change Control activities without Dragon provided it was not all day every day. She did ask to shadow someone carrying out project related work to find out how much Change Control tasks were required compared to doing Change Controls all day every day (her email of 10 December 2018 and 24 January 2019). However, that is not the same thing. It did not include an express representation that she would be able to carry out Change Controls if it formed a more limited part of her role. It is true that it could be inferred from these emails that the Claimant was saying it might be the case that she could carry out Change Controls if it formed a small part of her role. However, Mr Ball did not draw this inference. On the contrary he simply viewed this as another attempt by the Claimant to try and secure a different more interesting role by using her inability to carry out Change Controls. This why his response was, essentially, that the project related work also required Change Controls to be carried out.

318. The above are the reasons that Mr Ball took the position, and made representations, he did. Mr Ball's reasoning may not have been perfect but managers (and everyone else) often reason imperfectly. Disability was not the reason nor part of the reason for the treatment.

319. We find that Mr Ball would have treated a hypothetical comparator who did not have a disability or had a different disability, but was otherwise in materially the same circumstances as the Claimant, in exactly the same way. The hypothetical comparator's circumstances are someone who:

319.1. Was in a similar job to the Claimant;
319.2. Reported the same problems doing Change Control;
319.3. About whom there was comparable medical or non-medical evidence from an authoritative source (like OH) identifying comparable limitations on capacity for work;
319.4. Mr Ball suspected that the comparator was exploiting a professed inability to carry out Change Controls as a strategy to manoeuvre into a better and more interesting job;
319.5. In circumstances in which there was a rational basis for this suspicion including that it was hard to understand how the comparator could

struggle with Change Control but not generally with computer based tasks/roles.

*11.4 C made requests to be transferred to alternative roles, as per the OH reasonable adjustments recommendations, from November 2017 (See Annexure 1 of the C's Further and Better Particulars) and those requests were denied.*

320. We accept the Claimant's evidence that this was a business in which there was wide scope for employees to get involved in projects, secondments and other opportunities of many kinds. Many of these were arranged informally and not through any kind of formal recruitment process, although there were also roles and opportunities that did go through a formal recruitment process.

321. The Claimant was looking for alternative roles and opportunities for a long time. From around late 2017 onwards. She had held many roles with the Respondent in the past and had very wide range of experience. We find it totally unrealistic that, *if there had been a will* to find the Claimant additional opportunities or roles, there was any major impediment to prevent that over that period of time. If there had been a will to do so, it is plain to us that in an organisation of this size, resource and calibre this could have happened. It is plain that all around the Claimant her colleagues were being given opportunities of various kinds.

322. There was not a will to transfer the Claimant to an alternative role and the key questions are, why not? And was it, wholly in part, because of the Claimant's disability?

323. We find it was essentially because the Respondents thought that the Claimant did not deserve/merit an alternative role for the following reasons:

323.1. The Claimant came to the department with some history. It is not in evidence quite what, beyond that she had "issues" with all the other line managers but it is plain that there was some 'baggage';
323.2. It is plain that Mr Hayter wanted the Claimant's role to be simply Change Control but that the Claimant managed to secure assurances that it would not be;
323.3. On arriving in the department the Claimant was slow to complete her training (albeit that there was a partial explanation for this in that there were some IT problems progressing through the training). She was also slow in completing Change Controls and got through few of them (despite we accept working hard).
323.4. The centrality of Change Control to the Claimant's role evolved and increased with some business changes that happened independently of anything to do with the Claimant (IBM work largely moving to Poznan, SOX work being outsourced and changing);
323.5. The Claimant then reported that her work/life balance was wrong and harming her. The Respondent found this hard to understand in light of the few Change Controls she was getting through. It also did not understand why she was working at the weekend as there was no such requirement.

323.6. The Claimant then reported that carrying out Change Control was harming her physically. The Respondents found this hard to understand because the mechanics of the task are unremarkable and not dissimilar to a great deal of computer based activity which it was the Claimant's position she could do. As explained under unfair dismissal above they were therefore sceptical that what the Claimant was saying was true and suspected that she may be using a medical issue to manoeuvre herself into what she had wanted in the first place: a different role that was not dominated by Change Control.

323.7. It then took a very long time to explore whether or not Dragon provided a solution and in the course of that the Respondents further lost patience with the Claimant though the timescales were not in fact entirely down to her by any means.

323.8. It would not have been convenient or ideal for the business to transfer the Claimant to an alternative role. It did have a business need for her to carry out Change Controls.

324. For those reasons the Respondents did not think that the Claimant deserved or merited an alternative role and did not have a will to transfer her to one. The Respondents did not want to give in to the Claimant and give her what she wanted: a different or at least more varied role. There were additionally some business reasons that added further obstacles to the Claimant being given any particular role one of the identified roles. None of these were even in part disability. They are explored in more depth in the context of reasonable adjustments.

325. We find that the Respondents would have treated a hypothetical comparator who did not have a disability or had a different disability, but was otherwise in materially the same circumstances as the Claimant, in exactly the same way. The hypothetical comparator's circumstances are someone who:

325.1. Was in a similar job as the Claimant;

325.2. Who reported the same problems doing Change Control;

325.3. About whom there was comparable medical or non-medical evidence from an authoritative source (like OH) identifying comparable limitations on capacity for work;

325.4. Whom the Respondents suspected was exploiting a professed inability to carry out Change Controls as a strategy to manoeuvre into a better and more interesting job;

325.5. In circumstances in which there was a rational basis for this suspicion including that it was hard to understand how the comparator could struggle with Change Control but not generally with computer based tasks/roles.

*11.5 C was dismissed on 4 December 2019, effective 4 March 2020.*

326. The reasons for dismissal are as explained under the heading of unfair dismissal above, which should be read together with the analysis of the other direct discrimination complaints also above.

327. The reasons for the Claimant's dismissal did not include her disability.

328. We find that the Respondents would have treated a hypothetical comparator who did not have a disability or had a different disability, but was otherwise in materially the same circumstances as the Claimant, in exactly the same way. The hypothetical comparator's circumstances are someone who:

328.1. Was in a similar job to the Claimant;
328.2. Reported the same problems doing Change Control;
328.3. About whom there was comparable medical or non-medical evidence from an authoritative source (like OH) identifying comparable limitations on capacity for work;
328.4. Whom the Respondents suspected was exploiting a professed inability to carry out Change Controls as a strategy to manoeuvre into a better and more interesting job;
328.5. In circumstances in which there was a rational basis for this suspicion including that it was hard to understand how the comparator could struggle with Change Control but not generally with computer based tasks/roles;
328.6. There had been the same passage of time without apparent change in ability to carry out Change Controls;
328.7. There had been comparable effort to explore adjustments to the existing role;
328.8. There had been a comparable number of comparably unfruitful LTIH meetings.

*Reasonable adjustments*

329. The Respondents accept that:

329.1. the PCP of requiring the Claimant to perform Change control tasks was applied;
329.2. it accepts that it put the Claimant at a substantial disadvantage compared to other employees who are not disabled;
329.3. it accepts that it had knowledge of both that and that the Claimant was a disabled person at the relevant times.

330. These concessions were helpfully and correctly made in closing submissions.

*Issues 22.1 and 22.3*

331. All of the adjustments identified at paragraph 21.1 of the list of issues relate to permitting the Claimant to carry out a different role or opportunity. It is convenient to deal with those complaints together with 22.3 which relates also to redeployment but is stated in a more general way.

*Pre-July 2018 period*

332. Chronology is one of the important elements in the analysis here.

333. In our view, until the LTIH procedure was initiated in July 2018, it was reasonable for the Respondents not to deploy the Claimant to any other role or opportunity beyond what it did. That is because until then matters were at a preliminary and formative stage and the Claimant's time was meaningfully and usefully occupied:

333.1. In the late/summer and autumn of 2017 the medical issues were just beginning and then being investigated;
333.2. Once OH evidence was obtained, it was perfectly reasonable and sensible to focus on finding out whether or not with adjustments the Claimant could carry out her existing role. This is a role the Respondent had a heavy business need to be done so it was reasonable to put time and effort into seeing whether the Claimant could do it.
333.3. The Claimant was temporarily excused from actually completing Change Controls from her return to work from sick-leave onwards barring a short period in February 2018. She was given meaningful work to do. Initially this was completing her long delayed training on Change Control. That was an appropriate focus.
333.4. There was then an attempt in February 2018 to check whether the symptoms would return if she resumed doing Change Control in a modified way (printed and emailed to her);
333.5. That did not work so she was given alternative work in the CMDS migration project whilst she and the Respondent continued to investigate whether or not Dragon would work.

*Post-July 2018 period*

334. There was a step change however, when, on 11 July 2018, Mr Ball initiated the LTIH procedure. This was essentially on the basis that the Claimant was unable to fulfil the core duty of her role, that such adjustments as could be made had been, and that Dragon did not work. At this point, although it is also true that Mr Ball allowed the Claimant to continue investigating Dragon, there was a clear risk to the Claimant's employment if she was not deployed to other work.

335. At this point we think that the biggest impediment to finding the Claimant alternative work was that the Respondents did not have a will to do it for the reasons that we have set out above. Although we accept that there was a rational basis for the Respondent to suspect that the Claimant may be using a medical issue to surreptitiously manoeuvre herself into another role, it was not reasonable to refuse to redeploy the Claimant for that reason without first openly confronting her with it and following a fair process to decide one way or the other whether the suspicion was well founded. The Respondent evidently chose not to do that, and having decided to take matters down the LTIH route, the only reasonable course was to follow that through properly and make a reasonable effort at redeployment.

336. That, of course, is not to say that had the Claimant been redeployed to another role that involved no or much less Change Control, it would have actually worked out. It was possible that the reality was that the nerve impingement would have proved a significant problem in that new role too if, as was inevitable in this

business, it involved a lot of computer work with mouse use. However, given that the Claimant was reporting that she could do non Change Control tasks, and given that she was in fact doing them (e.g. in the CMDS migration work) there was at the least *a prospect* of her being able to work in another role.

337. The Respondent is an enormous employer. As set out above it was one in which there were very many opportunities, formal and informal, of different types and lengths. Many of these were not filled through open recruitment which is significant in that it shows that this was an organisation in which it was culturally possible to move people around and deploy them without, in all cases, formality.

338. The Claimant had a very wide range of skills and a huge amount of experience in different roles in the organisation. She was thus potentially suited to a very wide range of roles/opportunities.

339. The Claimant has done more than enough to shift the burden of proof to the Respondent in respect of her case that she should have been found an alternative role she was capable of. This means a role that involved little or no Change Control, whether because the role simply did not involve it or because it could be adjusted down or out of it. As *Latif* makes clear, it is not necessary to identify all of the details of the adjustment and thus not necessary to identify the exact role/opportunity for the burden to shift.

340. The burden having shift to the Respondent we do not accept that it has discharged it. We do accept and appreciate the Respondent's evidence that organisational changes were afoot and that at times it was trying to make savings on headcount. However, it is evident that it remained an organisation filled with opportunities.

341. A particular shortcoming with the Respondents' evidence is that it has barely engaged with job opportunities beyond Mr Ball's and Ms Wilson's teams. There is no good explanation for that. It is obvious that were very many jobs and opportunities outside their team in an 110,000 employee strong organisation, and there was no good reason why redeployment of some kind had to be limited to their teams. Indeed, in her notice period the Claimant almost did secure alternative employment in another team.

342. A further difficulty is that in her notice period the Claimant was not assisted in her job search but the contrary happened. Yet further the assistance she was told that she would be given – management and OH assisting her to design an ideal role as part of the process of actively helping redeploy her – simply did not happen.

343. Altogether the Respondent has fallen well short of discharging the burden of proof that has passed to it in respect of issue 22.3.

344. Turning to the specific roles that are raised at the sub-paragraphs of paragraph 22.1 we find as follows.

345. *GDPR opportunity:*

345.1. The burden shifts to the Respondent in respect of this opportunity. In addition to the general points made above, it is work that did not involve Change Control, which the Claimant was interested in and which in principle there was at least a prospect that she could have done.

345.2. However, the Respondent has discharged the burden and we are satisfied it would not have been reasonable to deploy the Claimant to this work. The Claimant's case is that there was an opportunity here until the end of 2018. The analysis above deals with the period prior to July 2018. As at July 2018 the Claimant continued to have meaningful work to do on the CDMS migration work. In September and October 2018 she had additional meaningful work to do (the audit) assigned to her by Mr Ball. It was reasonable not to deploy the Claimant to this GDPR work which was always going to be time limited especially while she had other meaningful work to do. Once the audit work had been completed the GDPR project was almost at an end. By this stage it was not worth deploying the Claimant to it and it was reasonable not to. It would have taken time to build the skills and it was not worth that investment with the work coming to an end.

346. Permanent role as a Service manager in the wider team:

346.1. The burden shifts to the Respondent in respect of this opportunity. In addition to the general points made above, it is work that did not involve as much Change Control, which the Claimant was interested in and which in principle there was at least a prospect that she could have done.

346.2. However, the Respondent has discharged the burden and we are satisfied it would not have been reasonable to deploy the Claimant to this work. We have accepted Ms Wilson's evidence this was in fact an IT Quality manager role, that it involved 20 – 60% Change Control activities. This means that while there was a prospect the Claimant might have been able to complete it since it did not involve Change Control all day every day, the prospect must have been low (which is a relevant but not determining factor). Moreover, we also accept Ms Wilson's evidence that the type of Change Controls involved in this role were more complex than the Claimant had been doing and that the Claimant had not yet demonstrated the Change Control competence needed to move onto it. In short, this role was not a good candidate for an alternative to the Claimant's role.

347. Smart Controls (Claimant says there were opportunities from 2018 – to December 2019):

347.1. The burden shifts to the Respondent in respect of this opportunity.

347.1.1. In addition to the general points made above, it is clear from the evidence that a lot of work was going on related to smart controls. Only a fraction of it required coding skills (which the Claimant did not have). Through cross-examination the Claimant established that there was more smart control opportunities around than the Respondents' evidence

suggested and that there were more people involved in those opportunities than the Respondents' evidence suggested.

347.1.2. We are satisfied that there is a prima facie case that there was significant work relating to smart controls that there was a prospect that the Claimant could have done.

347.2. The Respondent has not discharged the burden of proof:

347.2.1. We accept that Smart Control as such was not a role. However, it was a new tool that generated a lot of work. The work was of various kinds. It included the development of the tool, testing the tool as well as the actual use of it.

347.2.2. We accept that coding skills were required for some of the work, however that was essentially only for the initial development of the tool. Many of the Claimant's colleagues who were doing smart control related work did not have coding skills.

347.2.3. It is true that using the Smart Control tool was a computer based activity that in the ordinary course one would expect to be quite mouse intensive. There was a basis for concern then that the impact on the Claimant may be the same as when doing Change Control. This may or may not have proved to be the case. However, there was at the least a prospect that it would not have. For example it might have been possible to use the keyboard more, or perhaps Dragon would have worked with this task though it did not with Change Control. There was a way of finding out: trying it.

347.2.4. We found the Respondents' evidence on this opportunity unsatisfactory. Its starting position was undermined through cross-examination which showed that more employees (without coding skills) were working on smart controls than the Respondents volunteered, such as Hannah, Van and Sonia albeit that it was not entirely clear what they were all doing.

348. Roles/opportunities as IT/Quality project Manager which required less Change Control:

348.1. The analysis here is as per issue 22.1.2. The burden shifts but it was reasonable not to deploy the Claimant to such a role. A core component of the role was Change Control. It accounted for less of the role than the Claimant's existing role but it was still a core component. Further, the type of Change Control work involved was more difficult and advanced and the Claimant had not yet progressed enough in her Change Control competence to do it.

*Issue 22.2 Permitted Dragon Speak Software*

349. The short point is that the Claimant was *permitted* to use Dragon software. It was purchased and a great deal of effort was put into trying to get it to work (in this context 'work' means enable the Claimant to carry out Change Controls

without intensive mouse usage). It never did and that is why it was not used; it was not a permission issue.

350. In any event we are satisfied that all that could reasonably have been done to try and get it to work was done and that in the final analysis, that being so, there was no prospect of it working.

351. A great deal of time and effort, including the Claimant's, was put into establishing whether or not Dragon worked. It was tested a number of times along the way and it did not work. After those tests the Claimant was permitted to continue trying to get it to work. Our finding is that despite her efforts she did not manage to get it to work.

352. Again, ultimately, all that could reasonably have been done to explore Dragon as a solution was done. A reasonable amount of time, effort and resources were put into that endeavour. Additional equipment was purchased and the Claimant was given 9 hours of in person training (albeit that there were delays). The inquiry could not go on forever, and, although it was hasty for Mr Ball to decide as at July 2018 that it was not a solution, in fact he allowed the Claimant to continue working on Dragon for much longer and the correspondence shows that he remained open to it working. It did not and even by the time of the Claimant's dismissal it was not working.

*Issue 22.4: Removed some or all of the Change Control Tasks from her role and allocated that work to others.*

353. For significant periods of the chronology this is in fact what happened. There was a hiatus in the Claimant's Change Control activities after her return from sick leave in October 2017 to February 2018. Then in February 2018 for about a week she was required to do Change Controls (in a modified way). Thereafter she stopped carrying out Change Controls albeit that this is not a complete answer because carrying out Change Controls remained her duty in the most meaningful sense in that she was at risk of dismissal as a result of not being able to do it.

354. However, it would not have been reasonable as a *standalone* adjustment to simply remove some or all of the Claimant Change Control duties from the scope of her role. By the time that a significant problem with carrying out Change Controls arose, carrying out Change Controls was more or less what her job comprised of. If all of the Change Control duties had been removed then there would have been basically nothing of the role left. If some of them had been removed it is hard to see how this would in any way of resolved the problem since basically all that would have been left was Change Controls.

355. Thus this adjustment in reality makes sense only in the context of the Claimant being given alternative roles and opportunities and we have made our points about that. If the Claimant had been given an alternative role(s)/opportunity then naturally that envisages that her existing role would be assigned to others, whether existing employees or contingent workers (which the Respondent made a lot of use of including for Change Control work).

356. In short, this adjustments would not have been reasonable in and of itself; but it is inherent or at least implicit that it would have been made had the Claimant been deployed to alternative opportunities/roles (as dealt with separately above).

*Discrimination arising from disability*

357. The Respondents correctly conceded in closing submissions that the Claimant's inability to perform Change Control tasks to the extent required arose in consequence of disability. It also accepted that the Claimant's dismissal was because that inability.

358. The s.15 complaint then, turns on justification.

359. The aim relied upon is that the Respondent: *"Needed to ensure that it had a full headcount of staff who were able to perform the key Change Control tasks associated with C's role."*

360. We accept that this was a legitimate aim. Change Control was a critical business task, there was a lot of it to do and it was central to the Claimant's work and the work of others in the surrounding teams. We also accept that the need to have someone in the Claimant's role who could carry out this task was the central reason for the Claimant's dismissal. She could not do it.

361. The key issue in our view is whether it was reasonably necessary to dismiss the Claimant in order to meet this business need. Or put differently whether the legitimate aim could have been achieved but with a lesser discriminatory impact on the Claimant.

362. The Respondent's case that it was reasonably necessary to dismiss the Claimant to meet this business need is premised upon it having made reasonable adjustments to attempt to retain her in employment. The difficulty for the Respondent of course is that we have found against it on that front.

363. Our finding is that the Respondent failed to take reasonable steps to deploy the Claimant to other work. Since there were reasonable further steps it should have taken to retain the Claimant in employment her dismissal has not been shown to be reasonably necessary. If the Claimant had been redeployed to other work there would have been no need to dismiss her to achieve the legitimate aim. Someone else could have been recruited or transferred to her old role or perhaps it could have been covered by contingent workers.

364. Of course none of that is to say that if the Claimant had been redeployed her employment would have been a success or that it would have endured for any particular length of time. It is possible for instance, that it might have come to a swift end perhaps because proved to be incapable of it (medically or otherwise) or because of redundancy. But those are other matters that go beyond the dismissal we are considering and go into the assessment of remedy.

*Time limits*

365. The only successful claims that might be out of time are the reasonable adjustments claims. Time limits operate in a complex way in reasonable adjustments claims.

366. In this case our view is that the earliest point in time that time ran from in respect of the reasonable adjustments claims that succeeded (which all relate to deploying the Claimant to alternative roles/opportunities) is July 2018. We repeat, albeit now in a different context, the points we made above about why it was reasonable not to seek any redeployment / opportunities for the Claimant beyond that which actually happened, prior to July 2018.

367. The Respondents do not concede that if the complaints are out of time it is just and equitable to extend time. However, Judge Dyal noted in closing submissions that no submissions had been made about that and Ms Bell candidly said the Respondents did not have any submissions to make.

368. Let us assume that time ran from July 2018. Even on that basis we find that it is just and equitable to extend time. We think there are two key factors: the explanation for the delay and the balance of prejudice.

368.1. In essence, the reason the Claimant did not present her claim more swiftly than she did was because she treated litigation as a last resort. Prior to litigating she wanted to try and resolve the matters internally. She did not want to litigate if she had a job. Thus she did not litigate until she was dismissed and she used the dismissal – which was undoubtedly the most important and significant of her complaints – as the reference point for limitation. We find this an understandable explanation though it is also the case that it is not a wholly compelling one.

368.2. We do not accept that the Respondents are prejudiced in any material way by the delay between July 2018 and the presentation of the claim. Given the fact the employer was following an LTIH procedure, it was always going to be necessary to consider alternative employment and be ready to explain in the event of litigation about dismissal the history of that and why it had not happened.

368.3. Essentially the same issues are before the tribunal anyway: there is a s.15 claim which is in time and the adjudication of the justification aspect of which necessarily requires an assessment of the history leading to dismissal especially redeployment issues.

368.4. The Claimant may well be materially prejudiced if we did not extend time. Although she would nonetheless be able to pursue her complaints about dismissal (since they are in time) she would be deprived of seeking a remedy in respect of what we have found to be meritorious reasonable adjustments complaints. It may well be that her main remedy lies in respect of the dismissal claims but the reasonable adjustments complaints seems likely based on what we currently know to add something - for instance in injury to feelings. We stress that we remain open minded about remedy and the point made here is just a very general and preliminary one.

369. If the reasonable adjustments claims are out of time it is just and equitable to extend time.

**Next steps**

370. The parties should liaise with each other and endeavour to resolve remedy between them. If they are not able to, the tribunal is here to determine remedy and case management orders in respect of that will be given under separate cover. A case management hearing will be listed to take place in the new year.

371. The First Respondent is liable in respect of all of the complaints that succeeded. We have not determined which if any of those complaints the Second Respondent is also liable for. That is because the matter of the Second Respondent's liability was not addressed by either party in closing submissions. We consider it preferable to defer that matter and deal with it concurrently with the remedy stage of the case. However, we can say now that the Second Respondent cannot be liable for the unfair dismissal claim since he was not the employer and liability for that rests only with the employer.

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Employment Judge Dyal

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Date 06.12.2023

SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS