EMPLOYMENT TRIBUNALS

Claimant: Mrs Abimbola Adeturinmo
Respondent: Whittington Health NHS Trust

Heard at: Watford **On:** 27 November to 1 December 2023

Before: Employment Judge Dick
Mr M Bhatti OBE
Mr N Boustred

Representation
Claimant: Mr W Brown (solicitor)
Respondent: Mr P Sangha (counsel)

WRITTEN REASONS

Key to references:

[x] = page of agreed bundle.

INTRODUCTION

1. At the end of a five-day hearing, on 1 December 2023 the Tribunal gave a judgment with oral reasons. The judgment has been issued as a separate document. A formal request for written reasons was received by the Tribunal later that day, Mr Brown for the claimant having indicated an intention to make the request at the hearing. The request reached Employment Judge ("EJ") Dick on 5 December. EJ Dick apologises for the delay in providing these written reasons for the Tribunal's unanimous decisions.

2. The claimant was employed by the respondent from January 2002 as a pharmacist at the Whittington Hospital in London. The claimant has sickle cell anaemia and there was no dispute that at all material times she was a disabled person within the meaning of the Equality Act 2010 ("EqA"). Broadly, the case was about the respondent's decision to terminate the claimant's employment on the grounds that she was incapable of carrying out the main functions of her contracted role. We make clear at the outset that the respondent considered that the claimant was incapable solely because of the sickle cell anaemia. There was never any suggestion that

she was otherwise incapable of competently carrying out her role, nor was there ever any suggestion that she was unwilling to work; any incapability was entirely genuine and the result only of the sickle cell anaemia.

CLAIMS AND ISSUES

3. It was not in dispute, taking into account the dates of the ACAS conciliation process, that the claim for unfair dismissal was in time and that any discrimination/reasonable adjustment complaints relating to events on or after 16 March 2022 were in time. Complaints relating to events before that date could be considered by the Tribunal either (i) if they were part of "conduct extending over a period" within the meaning of s 123(3)(a) of the Equality Act 2010 ("EqA" or "the Act") or (ii) if the Tribunal considered it "just and equitable" to extend time under s 123(2)(b) EqA.

4. The factual and legal issues for us to decide were, as the parties agreed, unchanged from the list of issues set out in the Case Management Summary prepared EJ Curtis following a preliminary hearing on 16 February 2023, with two exceptions. An edited version of the list is appended to this document. The two exceptions were:

    a. On the first day, the claimant withdrew all claims based upon race discrimination and so we dismissed these at the outset.

    b. The original list of issues read: "The respondent says the reason [for the dismissal] was capability (long term/repeated absence)." During the course of the evidence it became clear to us that the parties agreed that the respondent had not based its decision on long term or repeated absence. Rather, as reflected in the grounds of response, the respondent's case was that: "The claimant's employment was terminated on the grounds of her incapability to carry out the main functions of her contracted role.", i.e. it was the symptoms of the sickle cell anaemia, not the absences caused or likely in future to be caused by it, that the respondent considered made the claimant incapable of carrying out her role. The parties agreed that there was no suggestion that this was a change in the nature of the response and so no amendment to the respondent's case was necessary.

5. We therefore also make clear at the outset that, although the claimant had to spend a lot of time off work due to sickle cell crises, there was never any suggestion by either party that those absences were a factor in the dismissal. In other words, the unfair dismissal aspect of this case was about inability arising from ill health, not a case about long term or repeated absence – the issue was about what the claimant could do when she was well enough to work, not about her being unable to work at all.

6. For the reasons which follow, the following claims were in our judgment well-founded and succeeded to the limited extent set out below:
    a. Unfair dismissal.
    b. Indirect disability discrimination.

c. Failure to make reasonable adjustments.

7. The following claims were not well founded:

    a. Wrongful dismissal.
    b. Direct disability discrimination.

PROCEDURE, EVIDENCE etc.

8. Before the evidence began, EJ Dick explained to the parties the nature of a personal connection he had to the Whittington Hospital. The Tribunal considered that, taking into account the nature of the connection, it was appropriate for EJ Dick to continue to hear the case. No submissions to the contrary were made by the parties.

9. Before the evidence was called we explained to the parties that we would read the witness statements but they should be sure to refer us to any documents of relevance in the agreed bundle during the course of the evidence or submissions. Both advocates helpfully suggested a number of pages which we might read in advance as they would be dealt with during the course of the evidence. We also discussed the issues with the parties (see paragraph 4 above). We indicated that we would not need to hear evidence about remedy at this stage, with the exception of any point about whether, if the claimant was unfairly dismissed, she might otherwise have been dismissed had a fair process been followed.

10. After taking time to read the statements, we heard evidence from the witnesses. In each case the usual procedure was adopted, i.e. their written statements stood as their evidence-in-chief and they were then cross-examined. The respondent called Mr Ian Man, the claimant's line manager, who was the relevant decision-maker in this case. The claimant also gave evidence.

11. Over the course of the case we agreed, with the consent of the parties, that a further three documents could be added to the agreed bundle, taking the total to 477 pages.

12. At the conclusion of the evidence we heard oral submissions from both advocates, supplemented by written submissions from Mr Sangha on behalf of the respondent. Having then delivered a judgment and reasons on liability (i.e. points 1, 3 and 5 to 9 in the written judgment) we indicated that it would assist us to hear further submissions relating to "*Polkey*" points (see paragraph 97 below). Having heard those submissions, we delivered an oral decision with reasons on point 2 in the written judgment, also taking the opportunity, at Mr Sangha's invitation, to clarify (not reconsider) a particular point covered in the earlier reasons. (That particular point is dealt with at paragraphs 33, 34 and 54 below.)

FACT FINDINGS

13. We find the following facts on the balance of probabilities. In this case many of the primary facts were not in dispute; generally the issue was about what actions of the respondent were or would have been reasonable in light of those facts. Where we have needed to resolve disputed facts we make that clear. We have not made findings on every fact presented to us, but merely on those which assist us to come to a decision bearing in mind the list of issues.

14. The sickle cell anaemia caused the claimant to suffer shortness of breath, chronic pains, difficulty walking and/or performing day-to-day activities and also stress.

Start of employment

15. The claimant worked as a band 6 pharmacist, band 6 being the most junior grade. She started working for the respondent in 2002 on a part time contract (20 hours per week). Copies of the job description for that role and the particulars of employment were in the bundle. The Whittington NHS Trust was named as the claimant's normal place of work. Also in the bundle was a more recent written job description. As we understand it, that had come into effect following the implementation of an administrative or reform process within the NHS called Agenda for Change. Although the later job description on its face appeared to apply to a full time employee, the claimant accepted in her evidence that it otherwise reflected her role. Her job title was clinical pharmacist (rotational). As Mr Man explained, a rotational pharmacist would spend three months at a time on particular rotations within the hospital run by the respondent.

Pre-COVID

16. In the years before the COVID-19 pandemic a number of adjustments were made to the claimant’s role on account of her disability as she began to experience more severe symptoms. The adjustments were to what she did and what equipment – a special chair, for example – she was provided with. No formal change was made to the claimant's written job description and we accept Mr Sangha’s submission that the changes amounted to reasonable adjustments rather than formal changes to the claimant’s employment contract – in the (as is now clear unlikely) event that the claimant’s condition improved, she would it appears have returned to working as she had been initially. The result of the adjustments was that shortly before the pandemic struck the claimant was no longer subject to rotations. In fact she worked only in the inpatient dispensary, with a number of adjustments to her working environment. Broadly, the purpose of the adjustments was to minimise the amount of time that the claimant spent standing and moving around. It was not disputed that, by now, the claimant would not have been able to do any other rotation (such as ward work)

because of her disability. By now, the claimant was working two days per week.

The start of the COVID-19 pandemic – early 2020

17. When the COVID-19 pandemic struck, unlike in many other areas of work the nature of the respondent's undertaking of course meant that the bulk of its employees had still to come into work. Mr Man told us that the hospital's pharmacy department employed around 30 pharmacists as well as a number of technicians at a lower grade than the claimant. His recollection was that the claimant was the only one of those pharmacists who was permitted to work from home during the pandemic. That was a reasonable adjustment which the respondent made on account of the claimant's particular vulnerability to a COVID-19 infection.

2021 – Working from home

18. Mr Man became the claimant's line manager in 2021. The claimant was still working from home at this point (and indeed she continued to do that until the end of her employment). One significant task she worked upon was reviewing and developing the department's clinical screening guideline document; this undoubtedly required the claimant's expertise as an experienced pharmacist and was useful work for the respondent. The review of that document was an occasional task which was to be complete by September 2021. So far as the other work being done by the claimant during this time is concerned, although the claimant would dispute this, we accept Mr Man's assertion that the claimant was not carrying out her usual contractual role, though she was doing useful work for the respondent, such as providing input about equality standards from the pharmacy department's perspective and attending steering groups etc. The claimant regularly sent emails to Mr Man setting out what work she was doing. One such example is to be found at [274] dated 4 of January 2022. The claimant lists such tasks as reading and responding to emails, looking at redeployment information (see below on redeployment), writing a work plan and attending meetings. We also accept Mr Man's evidence, although this was, in part at least, disputed by the claimant, that the respondent was by now starting to have difficulty finding enough work for the claimant to do. What had been a workable temporary arrangement during the start of the pandemic was no longer much benefiting the respondent.

19. In 2021, despite some occupational health and similar assessments suggesting it, no further special equipment was in fact provided to the claimant to assist with her working on site or at home. Mr Man explained to us that this was essentially because his bosses were not prepared to authorise any further expenditure until they were sure what the claimant would be doing, in other words whether or not she would return to work on site. In any case, so far as on-site work is concerned, there is no issue as to the failure to provide that equipment given that the claimant did not in fact return to work on site. So far as equipment for working at home is

concerned, the claimant did not make a complaint to the Tribunal about that (see agreed list of issues).

2021/2022 reports etc

20. In February 2021, because of a sickle cell crisis the claimant spent six weeks in hospital.

21. Though there had been many earlier ones, the first occupational health report in evidence was dated 9 June 2021, i.e. 18 months into the pandemic. A return to work plan was considered. The report found no medical reason why the claimant could not return to work at the beginning of July to undertake her role in some capacity. The claimant, it said, should benefit from working from home initially with the aim of returning to on-site responsibilities in September 2021. At this point, then, it was expected that the claimant would return to work in the dispensary, with further adjustments made. Mr Man did not demur from Mr Brown's characterisation that the role contemplated for the claimant in the dispensary would be "largely sedentary".

22. The respondent also had a report from a clinical psychologist dated 27 August 2021, which was used by the claimant in support of a request to continue working from home. In that request the claimant set out proposals for work that she could do. There was not (nor was there ever) any suggestion on her part that she work "in" the dispensary remotely. Although the claimant did in fact continue to work from home, Mr Man formally refused her request, having had advice from "HR" and his own line manager, on the basis that the claimant's role in the dispensary could not be done from home. Mr Man set out several changes that the respondent would implement if the claimant did return to work. Following further communication with the claimant Mr Man did agree that for the time being at the claimant could remain working from home.

23. On 28 September 2021 the claimant met with Annabelle Adrah, the respondent's "Moving and Handling Lead". Ms Adrah's assessment was that the claimant was not fit to perform some physical aspects of her role without putting her own safety at risk as well as the safety of patients. The assessment also highlighted that the claimant was likely to experience some difficulties with the mental challenges that the role involved, particularly around concentration. The claimant had attended the hospital in person for that assessment but it could not be completed because of how unwell she was. The plan was that the assessment would be completed on another date but again it could not be completed on that date because of the claimant being unwell. Ms Adra ultimately assessed that the claimant could not return to work at the pharmacy to carry out her role as a pharmacist since it required on site work.

24. Around the same time, 29 September 2021, another occupational health report concluded that the claimant was still medically fit to work, to fulfil her normal contractual hours and to undertake the role of a pharmacist. It did

however also conclude that the claimant would continue to benefit from working from home and suggested that be considered as a long-term adjustment, and if that were not possible then an alternative role should be considered via the redeployment process.

25. We note then that the respondent was given two strands of opinion by different professionals – one suggesting that the claimant was fit to return to work and another suggesting that she was not. Ultimately however for the purposes of this case not much turns on that point because the claimant does not dispute the respondent's assessment, which was that she was not fit to return to work on site.

The meetings and the dismissal process

26. A first "sickness absence review meeting" took place on 13 October 2021. (Although the claimant was absent in the sense that she was not on site, she was of course working from home.) That meeting was followed by another six meetings up to 4 March 2022. We were not provided with minutes of these meetings, but it was not disputed that letters – which we did see – written to the claimant by Mr Man after each meeting fairly summarised the contents of those meetings. The claimant's trade union representative was present for each meeting, and so was the claimant. The reports we have referred to above were discussed at the meetings.

27. At the first meeting the respondent concluded that the claimant had recently been doing meaningful and useful work in the shorter term but that that situation could not continue indefinitely and that the work the claimant was doing was mostly outside her band six role. It was explained to the claimant that there were three possible options under consideration. Option one was to be redeployed to a different role in the pharmacy department, including adaptations to allow her to work from home. Option two was redeployment within the wider trust, i.e. outside pharmacy. Option three was ill-health retirement ("IHR"). Ms Adrah's Report was in fact received after this first meeting.

28. The second meeting was on 21 October 2021. The claimant had emailed some suggestions to the respondent for some of the work she could do from home. We accept that Mr Man's assessment, as set out in the letter relating to the meeting, was reasonable: many of the suggested tasks were already done by other people in other roles and some of them would require support for the claimant from more senior staff. In short, any role in which the claimant was performing (only) those tasks would not meet the respondent's needs. As we have already noted, the claimant did not suggest that she could work remotely in the dispensary. Vacancies within the pharmacy department were discussed with the claimant at this meeting. The claimant indicated that, as Mr Man recorded it, she was "agreeable" to exploring IHR and redeployment outside the pharmacy department. A further occupational health assessment would be required, it was agreed, to see whether IHR was a practical option.

29. Following the second meeting the claimant made a formal flexible working request to be allowed to work from home.

30. The third meeting took place on 16 November 2021. The claimant said that she did not feel able to return to work on-site and said that the two roles that have been drawn to her attention – at bands 7 and 4 – were unsuitable as they also required on-site working. The claimant said that she didn't want to proceed with what was option 2 (redeployment) at that point as she wanted to review the forthcoming occupational health assessment first. (She had initially been incorrectly told that IHR could not take place until the redeployment process happened, so in this meeting she was told that the two processes could in fact happen in parallel.)

31. On 17 November 2021 the respondent's HR department emailed the claimant to say that they did not believe there was work they could offer in which she could work from home on a permanent basis. They were still looking at wider redeployment – in other words within the hospital but outside the pharmacy department – and at IHR.

32. Mr Man's response to the claimant's flexible working request the previous month came on 19 November 2021. Mr Man agreed that the claimant could continue to work from home, though making clear that the arrangement was "ad-hoc and outside the scope of [the claimant's] pharmacy role".

33. The fourth meeting took place on 30 November 2021. The claimant was told that she could not be seen by an occupational health doctor until January and so discussion of IHR was deferred until then. It was confirmed that the claimant had been placed on the respondent's redeployment list for "any suitable roles". Mr Man's letter records:

> Regarding redeployment, you have completed the redeployment skills forms and submitted these. You received an email on 23rd November confirming receipt and are now on the redeployment list for any suitable roles.
>
> You have noticed in the email confirmation that there is an end date – 23rd February 2022 and sought reassurance about what this date represents. Sally [from HR] assured you that this was an arbitrary 12-week statutory notice period and could be extended indefinitely.

34. It is important to note that the second part of that passage is written in the context of Mr Man just having said that the respondent had placed the claimant on the redeployment list. So, although there is an explicit mention of a notice period, this is not the respondent offering to extend the claimant's notice period – she had not yet been "put on notice". Rather, such significance as there is comes in the respondent indicating that the redeployment period would not (or need not) end on that date.

35. The occupational health doctor was in fact able to "see" the claimant a little earlier than expected, on 14 December 2021 in a telephone consultation. The doctor's report says:

> The nature of [the claimant's] chronic medical condition is such that she would continue to benefit from working from home in preference to being on site. This should be considered a long term adjustment in the context of the Equality Act 2010, which is likely to apply in this case. To return to onsite working is likely to be a potential risk factor for the relapse of her symptoms which she can manage optimally when based at home.
> …
>
> **Redeployment**
> I note from your email dated 17 November 2021 that the adjustments outlined above cannot be accommodated and hence, alternative roles are being considered for her via the deployment process. A suitable alternative role would be one that would accommodate her to work from home for the foreseeable future.
>
> **Ill health retirement (IHR)**
> If no alternative roles are available for this lady, then she explained she will apply for ill health retirement. She is aware that whether she applies or not is her prerogative and not a decision for Occupational Health or [the respondent]…

36. The fifth meeting happened on 21 December 2021. The above occupational health report was discussed. The claimant was told that the redeployment process would continue, with a note of caution that the respondent was not aware of any roles in the Trust which could be done solely working from home on a permanent basis. The prospect of the claimant being dismissed on the grounds of ill health was raised by the respondent. The claimant was told that (despite what she had been told by the occupational health doctor) the IHR process application could run in tandem with her 12 week notice, and that at the end of that 12 weeks if her application for IHR had been unsuccessful and she had not been redeployed she would be dismissed on the grounds of ill health.

Dismissal

37. The results of the sixth meeting, on 25 January 2022, are recorded in two letters ("the dismissal letters"). The first, dated that day, was the now-usual summary of the meeting. The second, dated 1 February 2022, was a more detailed summary of the reasons for the respondent's decision, which the claimant agreed in evidence was communicated at the meeting, that she would be dismissed on the grounds of ill health, with the notice period to end on 18 April 2022, i.e. twelve weeks from 25 January. (And 18 April was when the claimant's employment did in fact end.) There was no dispute that it was Mr Man who made the decision to dismiss the claimant. Of particular significance, in the second letter Mr Man noted that:

> Your notice period will run [over the above dates and] will be paid at full pay. During this time [i.e. the notice period] we will continue to work with you through the redeployment process and will support you if you decide that you wish to make an application for ill health retirement.

38. It was also noted (in the first letter) that notice could be withdrawn should occupational health decide that the claimant was well enough to return to working on-site.

39. At the seventh meeting, on 4 March 2022, the claimant confirmed that she was still on the redeployment register, but that there had been no further updates regarding redeployment opportunities. Amongst other things, IHR was also discussed.

40. It is important to note that although each meeting was styled a "sickness absence review meeting", clearly more than that was discussed – in particular, the dismissal process, redeployment and IHR.

41. For the sake of clarity, where we now refer to the dismissal process, we mean all of the process up until the point that the claimant's employment came to an end. We say that because although the decision to dismiss the claimant was made as early as 25 January 2022, the respondent had made clear to the claimant that the decision to dismiss could be revisited were the claimant to be found another job by way of redeployment, and the redeployment process, the respondent had also made clear, would run all through the claimant's notice period (see paragraph 37 above).

42. We now go on to consider in detail the sort of work the claimant was doing and the decisions made by the respondent.

The nature of work in the dispensary

43. The claimant and Mr Man told us about the work within the dispensary. Although Mr Man did not work in that area himself, he was a lead clinical pharmacist and his recollection about the work was not disputed. He told us that one or two pharmacists would work in the dispensary along with one or two technicians. Pharmacists would be assisted in some of their tasks by the technicians but it was the pharmacist who was clinically responsible. The pharmacist would take in prescriptions from various hospital staff; labels would be prepared by technicians but they would have to be checked by the pharmacist. Some of the prescriptions were electronic, others on paper (30%, he estimated). The pharmacist would have to check the prescription against the patient's drug chart, to check things such as the frequency of dose and potential interactions (i.e. to avoid allergic reactions). The drug charts – a record of a patient's demographics and allergy status, what drugs the patient had had in hospital and so on – were also sometimes in paper form and sometimes in electronic form. If content, the pharmacist would check and physically endorse the prescription label – always, as we understood it, a physical rather than electronic document – with any

important remarks that needed to be added in light of the comparison with the drug chart. Mr Man accepted that there may come a time when the process of signing off a prescription could be done entirely electronically, though as he put it "we have been trying to move towards that for at least a decade"; clearly then that is no easy task. Once the technician had dispensed the drugs they would be put in a tray for the pharmacist to check (e.g. that the dosage was correct) and to package the drugs. The pharmacist would also have to answer the phone to deal with queries about the whereabouts of medications and address clinical queries about medications available for prescribing.

44. Having considered what the claimant was doing before the pandemic, we accept the respondent's contention that the claimant's role – which was now in reality as a pharmacist in the dispensary – could not be performed remotely. It is certainly possible to say that some of the dispensary pharmacist's duties could have been performed remotely (perhaps with the assistance of an on-site technician) but in reality that involves a process of picking out a few tasks whilst still leaving others undone, and particularly in the context of the relatively small number of people working in the pharmacy, it seems to us that for the claimant to have been working remotely in the dispensary would all but have required the respondent to have two people in effect doing one person's job. Nor do we accept, and indeed nor was it really suggested to us, that it would have been reasonable for the respondent to make their entire prescription process entirely electronic given the sheer size of the respondent's undertaking and Mr Man's evidence about how long they had already been trying to do just that. And that approach would overlook what Mr Man told us was a legal requirement, for a "responsible pharmacist" to be present at all times – this requirement could be accommodated for brief periods like breaks and lunch by the respondent's system of arranging cover but we do not see that that would be a practicable arrangement, where the claimant was concerned, had she been permanently off-site – again, the respondent would be in the territory of employing two people to do one person's job. We also accept that the respondent came to a reasonable view in deciding that certain safety-critical aspects of the work of a dispensary pharmacist, for example checking the quantities of drugs, could only be completed if the pharmacist was physically present. Even with all the adjustments that the respondent was able to put in place shortly before the pandemic took effect, the role in the dispensary would still have required some manual handling and some standing and moving around. It seems clear to us from all of the evidence that we have seen, and indeed the claimant herself accepts, that by virtue of her disability, by the time Mr Man came to make his decision about termination, the claimant was simply not able to do the role of dispensary pharmacist.

Changing the claimant's role

45. Mr Man was asked whether in light of the 29 September report he thought about refashioning the claimant's role so that she could work from home. In short, we accept that Mr Man's (and so the respondent's) response to that

was reasonable: “We were always of the view,” he said, “that you couldn't work from home on a long term basis. The claimant was working in the inpatient dispensary and we felt that she needed to be physically on site.” Mr Brown took Mr Man through most of the claimant's 17 “Main Duties” explicitly set out in her job description. It is fair to say, and Mr Man accepted, some of these duties taken in isolation could have been performed remotely, although a significant number in our judgment could not have been. Of those that could have been, some – like “practising pharmacy to local and national standards” – were so vague as to not really assist with the issues before us. Others – such as completing mandatory training – would only have been meaningful work if other duties were also being done. Mr Man, rightly in our view, put a lot of stock in the value of face-to-face interactions in the environment in which the claimant was working. Mr Man also pointed out that, were some of the elements of the job description left only to the claimant, that would in the long-term harm the career development of the other pharmacists who did not do that work.

46. We accept the respondent’s contention that it was not reasonable for them to create a role for the claimant to do from home by picking out the parts of her job description that could be done remotely – what Mr Sangha aptly described as a scoresheet approach – as this would have been a role that in fact the respondent had no requirement for. We also consider that, though the job description sets out those 17 Main Duties, the nature of the role is, as Mr Sangha pointed out, well set out under the heading “Post Summary”: “This post involves extensive participation in the Clinical Pharmacy Service, the dispensing and checking of all types of prescriptions, the supervision of pharmacy staff of all grades and the provision of information to patients and carers, medical staff, nursing staff and other members of the multidisciplinary team.” The bulk of those things could not, we find, have been done remotely.

47. It was also suggested on behalf of the claimant that it might have been possible to give her the training to do the work of a higher band pharmacist which could, somewhat speculatively we thought, have been performed remotely. We note that there was no evidence of the claimant ever having applied for work at a higher band. More significantly, this would essentially have required the respondent to not simply to make adjustments to the claimant’s role but to make another role entirely for her; we do not accept that in the circumstances of this case that would have been reasonable even if that work had been available (and there was no evidence that it was). We note that over the relevant time the claimant was informed about all vacancies (i.e. not just at the claimant’s band) in the pharmacy department and, as Mr Man confirmed, all of those vacancies required, like the claimant’s role, a pharmacist to work on site.

48. While the claimant had been able to identify other pharmacist roles that she had seen advertised (by other employers, not the respondent) as explicitly remote working, Mr Man explained to us, and we accept, that those roles were not as dispensing pharmacists and so there would be no legal requirement for a responsible pharmacist to be on site. In short, while it is

possible to be a pharmacist and work remotely, we accept having considered all the evidence in the round that it was not possible at to be a pharmacist *of the sort required by the respondent* whilst working remotely.

49. In the context of this case it is important to note that the claimant as much as the respondent agrees that she was physically unable to work on-site by the time Mr Man made his decision – see the occupational health report of 14 December 2021. Taking everything so far into account, then, we accept the respondent's contention that there was not work within the pharmacy department, as a pharmacist, for the claimant to do.

50. The claimant also fairly accepted – and we agree – that at the time Mr Man made his decision the respondent was in possession of all the necessary medical evidence and information and that the position was unlikely to change.

Redeployment outside pharmacy

51. We turn now to the issue whether the respondent might have provided the claimant with a job outside the pharmacy department. It is clear to us, given the claimant's evident passion for her work, that the claimant was not much interested in work that was not pharmacy work, although we do accept her evidence that she would have given all due consideration to any particular offer. The evidence from the respondent suggested that the claimant had been placed in some sort of scheme to alert her to other suitable jobs that might become available, although Mr Man was not able to assist us about that, beyond telling us that it had been handled by HR and that if the claimant had expressed an interest in a particular role it would have been ring-fenced for her (in other words not advertised). The respondent did not provide any clear evidence about what, if any, other jobs the claimant had in fact been alerted to and by what criteria it was decided that they were suitable; on that basis alone it might be thought surprising that there were no suitable alternatives to offer the claimant given the thousands of people that Mr Man told us the respondent employs. However, of course, given the nature or the respondent's business, very many roles would require someone on site, particularly those likely to be suitable for the claimant as opposed to being totally different sorts of job. Also, the claimant fairly told us that she had been emailed links with available jobs a number of times during the course of her dismissal process. In the normal run of things, and in particular given the number of meetings that took place, we accept that it would have been reasonable for the respondent to place the onus on the claimant to tell them about any of those jobs in which she was interested before considering whether they might be suitably adapted for the claimant if necessary. However, this is subject to one important qualification in our judgment. It is clear to us that the respondent made clear to the claimant that, all the way through the process and up to the point of the end of her notice period, the respondent would continue to help her find other work by way of redeployment. We consider that in the normal run of things, i.e. up to 23 March 2023, that is what the respondent did.

The claimant's admission to hospital 23 March 2023

52. That situation changed when the claimant was admitted to hospital and was in our judgment unable to meaningfully participate in the redeployment process for all of the time she was in hospital. On 23 March 2022 the claimant notified Mr Man that she had been admitted to hospital because of a sickle cell crisis. She was to remain there – at the respondent's own hospital, in fact – until the day after her notice period came to an end. During that time, although she was able to communicate with Mr Man, it is clear that she was in no fit state to meaningfully participate in a redeployment process. The respondent through Mr Man agreed to reschedule another formal sickness absence review meeting, which had been scheduled for 5th April. In fact that meeting never took place. It would appear that that was because the claimant only left hospital after the end of her notice period. In our judgement while it may have been reasonable for a mere sickness absence review meeting not to have taken place in those circumstances and (perhaps) not to have been rescheduled, the reality is that the meeting, despite its title was in fact also for the purpose of considering (amongst other things) redeployment – all the other meetings we have described were also described as sickness absence review meetings but similarly were also to discuss other things such as redeployment.

53. On 13 April the claimant sent Mr Man a message asking him to extend her notice period so that she could catch up with work-related matters and complete the ill health retirement paperwork. Her request was not granted.

54. The time during which the claimant was unable to participate in the redeployment process made up around a third of her notice period. In our judgment this was a significant proportion of the period when the respondent would usually have thought it appropriate to be making efforts to redeploy the claimant. It was a significant failing on the respondent's part that they did not agree to the claimant's request to extend the notice period, so as to allow her to meaningfully participate in the redeployment process for the whole of the period. Although the passage we have quoted above at paragraph 33 may have given the claimant the impression it was possible to extend *a* notice period (if not *her* notice period, since she had not been given notice at that point) the failure lies not in breaking a promise to extend the notice period (no such promise was made) or in giving the claimant the impression that a notice period might be extended, but simply in failing to extend the period. The only reason why the respondent did not extend the notice period was, as is made clear by an email from Sally Dibben (the HR person who was responsible for the claimant and was advising Mr Man) that the "leaver forms" had already been completed and that the claimant had been processed by the payroll department as a "leaver". We do not accept that this made it impossible for the respondent to have extended the notice period (and so the redeployment period). What Ms Dibben's response does show, in our judgment, is that any request from someone in a similar situation - in other words still within their notice period but after the time that they had been processed by payroll as a leaver – would have met the same response. This was not a one-off decision but the way the respondent did

or would have done things – in other words, it was a provision, criterion or practice (see below).

55. Mr Man, who was fair and reasonable throughout the course of his evidence, conceded that if the notice period had been extended the claimant might have been able to participate in meetings and discuss any vacancies that had arisen. Although we note that the claimant's written request to extend the notice period did not mention that one of the reasons was for her to continue participating in redeployment, nevertheless the onus was on the respondent – and not the claimant – to ensure that the process was fair. We also accept the claimant's evidence – given the state she was in in hospital – that although she did not explicitly say so in writing, part of her intention in asking for the extension was also to continue the efforts towards redeployment.

56. We also consider that the failure to reschedule the final meeting contributed somewhat to the procedural unfairness. Although the respondent had conducted a good number of other meetings, clearly the respondent had felt that this final meeting was necessary, and as we have said it was not simply for the purpose of reviewing sickness absence.

Appeal

57. Mr Man conceded that the dismissal letters should have, but did not, inform the claimant about her right to appeal, which should/would have applied under the respondent's usual procedures. Mr Man candidly conceded it was his error. It may well be that Mr Man did himself something of a disservice and that in reality the fault lies elsewhere – Mr Man is not a lawyer or an HR professional, and the letter was, he told us, checked by HR – but whoever personally was at fault, this was, we consider, a significant failing on the respondent's part. We do not consider that failure particularly mitigated by the fact that the claimant had the help of a union representative during the process, particularly given that, as we have found, the claimant was unable to meaningfully participate in the process for a significant part of it.

58. The claimant told us that she could not remember exactly when she realised that she had not been told about her right to appeal, only that it was some time after her discharge from hospital, when she was going through the ill-health retirement papers; although the claimant did not take it up with the respondent then, clearly that would have been well after her dismissal had taken effect. We regard the loss of the opportunity to appeal in this case as significant. We do take the respondent's point that the fact that another decision-maker on appeal might have made a different decision does not automatically make the first decision unfair. We also accept (see below) that on the facts it was not particularly likely that an appeal would have succeeded on the ultimate merits – i.e. on whether the claimant should have been dismissed rather than allowed to work from home in some capacity – but nor can we say that an appeal would have been pointless or futile. At the very least, an appeal might have identified the significant procedural failing that we have found to have happened, i.e. the failure to extend the notice period, meaning that the claimant's employment could well have

ended later than it did. There was also at least a chance that a properly conducted redeployment procedure, remedied on appeal, might have succeeded. (As to how much of a chance, see below.) We also consider that there was a non-zero chance that a different decision-maker might have come to a different decision on appeal.

59. We should record that the failure to tell the claimant about her right to appeal had not been explicitly pleaded as an element of the unfair dismissal, although it might reasonably be said to be caught by the "catch-all" question at 2.2.5 in the list of issues as to whether dismissal was in the range of reasonable responses. As the issue emerged during the course of the evidence, we raised the point with the parties and counsel for the respondent, pragmatically, did not submit that it would be unfair of us to include the point in our general consideration of fairness. Mr Sangha was able to address the point in his helpful submissions and we are grateful to him for drawing our attention to the relevant authorities discussed below at paragraph 68.

Bringing forward end of notice period

60. The claimant's contention – not, we may say, pursued with quite the same vigour by Mr Brown as he pursued the other aspects of the claimant's claim, once the evidence had been heard – had been that the respondent changed the claimant's agreed effective date of termination (i.e. the date of the end of her notice period), bringing it forward from a previously agreed date. This was the basis of the claim for wrongful dismissal/failure to pay the proper notice pay. The contention was based upon an e-mail from Mr Man to the claimant dated 13 April 2022, where Mr Man said that he completed the online termination forms on 29 March. From that, the claimant appears to have formed the belief that 29 March was now the termination date and that this amounted to the respondent seeking to bring forward the previously agreed end of her employment. If she did form that belief, it was erroneous and was not a natural reading of the email, which clearly stated in a different paragraph that the notice period formally ended on 18 April 2022. The claimant also accepted in evidence that she had been told at the January 2022 meeting that her notice period ended that day. The same date continued to appear in other correspondence. The respondent therefore did not bring forward the agreed notice period, and the claimant served out her proper notice period.

IHR

61. The claimant's application for IHR (Tier 2) was granted on 12 August 2022. We do consider it an important point bearing upon the overall fairness of the dismissal that the respondent made efforts to help the claimant apply for ill health retirement. Whatever the respondent's failings during the claimant's time in hospital, the application for ill health retirement did succeed. So it is clearly the case that the respondent did not leave the claimant with nothing. But it still left the claimant without a job and we accept the claimant's

evidence that although she came to regard ill health retirement as the best option – or perhaps the least worst option – that was really only because she had no better other options. She clearly, in our judgment, would have preferred to continue in work, albeit that she felt that the only sort of work she could do was from home (as indeed the respondent agreed).

LAW

Unfair dismissal

62. S 94 of the Employment Rights Act 1996 "ERA" confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. There is no issue with time limits in this case. The employee must show that they were dismissed by the employer (see s 95 ERA), but in this case the respondent admits that it dismissed the claimant.

63. S 98 ERA deals with the fairness of dismissals in two stages. First, the employer must show that it had a potentially fair reason for the dismissal within section 98 (1) and (2). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

64. So far as the first stage of fairness is concerned, S 98 ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do
>
> …
>
> (3) In subsection (2)(a)—
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality
>
> …

65. So in this case it is for the Respondent to prove that the principal reason for the Claimant's dismissal was capability (i.e. a reason falling within ss (2)).

66. The second stage of fairness is governed by s 98 (4) ERA:

> (4) … 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.

67. In deciding fairness, we therefore must have regard to the reason shown by the Respondent and to the resources etc. of the Respondent. In general, the assessment of fairness must be governed by the band of reasonable responses test set out by the EAT in *Iceland Frozen Foods Ltd* v *Jones* 1983 ICR 17. In applying s 98(4), it is not for us to substitute our judgment for that of the employer and to say what we would have done. Rather, we must determine whether in the particular circumstances of this case the decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer.

68. In the specific case of incapability through illness, the relevant part of the list of issues is based on a number of authorities, many of which we were referred to by counsel for the respondent in his helpful skeleton argument. As both advocates did, we concentrated on the principles to be applied, as set out in the list of issues, rather than embarking on a detailed analysis of those authorities. That said, we were referred by Mr Sangha to two cases which we do consider now – *Moore* v *Phoenix Product Development Ltd* UKEAT/0070/20/OO and *Jefferson (Commercial) LLP* v *Westgate* UKEAT/0123/12/SM. Between them they establish the principle that although an appeal would normally be part of a fair dismissal procedure, that will not invariably be so – the ultimate consideration is always the test under s 98(4) ERA. Where an appeal might be "futile" (as in *Moore* where there was a complete and irreconcilable loss of trust and confidence between the parties) or "pointless" (as in *Jefferson*, where that applied to a further meeting after Mr Jefferson had already indicated he would not return to work and had lost confidence in the respondent), then a dismissal without an appeal (or further meeting) may be fair – it will all depend on the facts and the application of s 98(4).

69. Finally, although again not specifically referred to in the list of issues, it was not disputed before us that, in the circumstances of this case an employer will have the obligation to consider redeployment, though there is no duty on employers to create a special job where none exists. (The authority for this is *Merseyside and North Wales Electricity Board* v *Taylor* 1975 ICR 185, QBD. Although such a duty did arise in a claim for reasonable adjustments under the EqA in *Southampton City College* v *Randall* 2006 IRLR 18, EAT, that was exceptional in that the respondent should have considered it as part of a wider restructuring process that was already taking place.)

70. In the event that the dismissal was unfair, we would go on to consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in *Polkey* v *AE Dayton Services Ltd* [1987] UKHL 8.

71. The authors of the IDS Employment Law Handbooks note (at 17.100):

> In *Williams* v *Amey Services Ltd* EAT 0287/14 the EAT helpfully summarised the various methods by which it is open to a tribunal to make a *Polkey* reduction. Her Honour Judge Eady observed that: 'In making such an assessment the [employment tribunal] is plainly given a very broad discretion. In some cases it might be just and equitable to restrict compensatory loss to a period of time, which the [tribunal] concludes would have been the period a fair process would have taken. In other cases, the [tribunal] might consider it appropriate to reduce compensation on a percentage basis, to reflect the chance that the outcome would have been the same had a fair process been followed. In yet other cases, the [tribunal] might consider it just and equitable to apply both approaches, finding that an award should be made for at least a particular period during which the fair process would have been followed and thereafter allowing for a percentage change that the outcome would have been the same. There is no one correct method of carrying out the task; it will always be case- and fact-specific. Equally, however, it is not a "range of reasonable responses of the reasonable employer" test that is to be applied: the assessment is specific to the particular employer and the particular facts.'

Wrongful dismissal

72. In the context of this case, the claimant would have been wrongfully dismissed – i.e. in breach of contract – if she had been dismissed before the twelve-week notice period which the parties agreed applied to her.

Discrimination Generally

73. The Equality Act 2010 ("EqA") prohibits discrimination on the grounds of various "protected characteristics", set out at sections 5 to 18. An employer must not discriminate against (or harass or victimise) an employee by (amongst other things) dismissing them or by subjecting them to any other detriment (sections 39 and 40). There was no dispute here that the claimant was the respondent's employee within the meaning the Act. Nor was there any dispute that the respondent would be liable under s 109 for any contraventions of the Act done by other employees (e.g. the claimant's managers).

74. The Equality and Human Rights Commission Employment Code ("the EHRC Code" provides a detailed explanation of the EqA. The Tribunal must take into account any part it that appears relevant to any questions arising in proceedings (s 15 Equality Act 2006).

Direct discrimination because of disability

75. Under s 13(1) EqA read with s 6, direct discrimination takes place where because of disability a person treats someone less favourably than that person treats or would treat others.

76. In this case it was not disputed that the claimant was at all material times disabled within the meaning of EqA.

77. By s 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: *Hewage* v *Grampian Health Board* [2012] UKSC 37. By s 23(1), in a direct disability discrimination case, the circumstances include a person's abilities. This means, as Mr Brown for the claimant agreed, that the 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 (see EHRC Employment Code para 3.29). Put more simply (by the authors of the *IDS Manual*, Volume 4 at 5.15) if a disabled person simply cannot do a particular job and the employer refuses to employ on that basis, this will not be direct discrimination. In this case, the claimant relied upon a notional comparator rather than any particular person.

78. In many direct discrimination cases, it is appropriate for a Tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of a protected characteristic. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the "reason why" the claimant was treated as they were (*Shamoon* v *Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285).

79. The protected characteristic need not be the only reason for the treatment, provided it had a significant influence on the outcome (*Nagarajan* v *London Regional Transport* [1999] IRLR 572, HL). The case law recognises that very little discrimination today is overt or even deliberate; people can be unconsciously prejudiced. A person's motive is irrelevant, as even a well-meaning employer may directly discriminate.

Indirect discrimination

80. By s 19 EqA:

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

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

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

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

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

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

81. The EHRC Code (para 4.5) says that the term "provision, criterion or practice" ("PCP") should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. In *Ishola* v *Transport for London* [2020] EWCA Civ 112, although the Court of Appeal accepted that the words 'provision, criterion or practice' were not to be narrowly construed or unjustifiably limited in their application, it considered it significant that Parliament had chosen these words instead of 'act' or 'decision'. The words 'provision', 'criterion' and 'practice' all carry the connotation of a state of affairs indicating how the employer generally treats similar cases or how it would deal with a similar case if it occurred again. The Court also pointed out that a PCP must be capable of being applied to others. Although a one-off act or decision may amount to a PCP it is not necessarily one.

82. The disadvantage referred to in ss (2)(b) is known as the group disadvantage. Not every person with the protected characteristic (disability in this case) need be affected by the disadvantage. In order to test whether there is a group disadvantage, it may be necessary to construct a pool of people for comparison who are all affected by the PCP, some with the protected characteristic and some not. If those with the protected characteristic are significantly more negatively affected, that will be good evidence of the disadvantage. When making the comparison, the claimant's group is restricted to those who have the same disability (by virtue of s 6(3) EqA).

83. It will be for the claimant to establish the discriminatory elements in ss (2)(a) to 2(c). In contrast, the burden is on the employer to show justification under ss (2)(d). In order to establish this "objective justification", the employer will need to show:
    a. The aims(s) of the PCP.
    b. That the aim(s) was/were legitimate.
    c. That the PCP was proportionate to achieving the aim(s).

84. The clearer the disadvantage, the more compelling the justification will need to be. The tribunal will consider whether or not the same aim could have been achieved by less discriminatory means. The balancing exercise will

involve careful consideration of the evidence, including the particular business needs of the respondent.

Reasonable adjustments

85. Ss 20, 21 and 39 EqA impose a duty upon an employer to make reasonable adjustments; failure to comply with the duty is discrimination. The duty applies where a PCP or a physical feature puts a disabled person (or where, but for the provision of an auxiliary aid, a person would be put) at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. The duty is to take such steps as it is reasonable to have to take to avoid the disadvantage (or to provide the auxiliary aid). "Substantial" means "more than minor or trivial" (s 212 EqA). The employer is not subject to the duty if it shows that it did not know, and could not reasonably be expected to know, that the person had a disability and was likely to be placed at the relevant disadvantage (Sch 8 Para 20 EqA). Paragraph 6.8 of the EHRC Code says that the duty to make reasonable adjustments applies at all stages of employment including dismissal.

Burden of proof in discrimination cases

86. S 136 of the EqA makes provisions about the burden of proof. If there are facts from which the Tribunal could decide, in the absence of any other explanation, that there was a contravention of the Act, the Tribunal must hold that there was a contravention, unless the respondent proves that that there was not a contravention. S 136 requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but has nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another (*Hewage* v *Grampian Health Board* [2012] UKSC 37). The burden of proof does not shift where there is no evidence to suggest the possibility of discrimination (*Field* v *Steve Pye and Co (KL) Ltd* [2022] EAT 68). Guidelines on the application of s 136 were set out by the Court of Appeal in *Igen Ltd* v *Wong* [2005] EWCA Civ 142 and the importance of these was recently restated by the Employment Appeal Tribunal in *Field* v *Steve Pye and Co (KL) Ltd* [2022] EAT 68. We do not reproduce the thirteen steps of the guidance here. One important point to note is that the question is whether there are facts from which a Tribunal *could* decide… It is not sufficient for the employee merely to prove a difference in protected characteristic and a difference in treatment. Something more is required (*Madarassy* v *Nomura International Plc* [2007] EWCA Civ 33). Unfair or unreasonable treatment on its own is not enough (*Glasgow City Council* v *Zafar* [1998] IRLR 36). If the burden of proof does shift, under the *Igen* guidance the employer must prove that the less favourable treatment was "in no sense whatsoever" because of the protected characteristic. Because the evidence in support of the explanation will usually be in the possession of the employer, tribunals should expect "cogent evidence" for the employer's burden to be discharged.

87. In this case given the clear factual findings we were able to make we did not need to apply s 136.

Time limits in discrimination claims

88. In discrimination claims, under s 123 EqA a complaint must be brought after the end of (a) the period of 3 months starting with the date of the act complained of or (b) such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. Failure to so something is to be treated as occurring when the person in question decided on it. In the absence of evidence to the contrary a person is to be taken to decide on failure to do something (a) when they do an act inconsistent with doing it or (b) if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it. In indirect discrimination, the time limit will usually run from the date the PCP was applied or, in the case of an ongoing policy or practice extending over a period, from the end of that period.

CONCLUSIONS

89. We now apply our findings above to the particular points from paragraph 2 onwards in the list of issues.

2. Unfair Dismissal.

90. The reason for dismissal was, as the respondent asserted, the claimant's incapability (as a result of the symptoms of sickle cell anaemia) to carry out the main functions of her contracted role. Up to the point that the claimant went into hospital (23 March 2023), we find that the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. All reasonable adjustments that could have been made had already been made. The respondent genuinely (and correctly) believed that the claimant was no longer capable of performing her duties and adequately consulted her in all of the meetings we have set out. Alternative work was properly considered and ruled out. The respondent carried out a reasonable investigation including finding out the up-to-date medical position. We also consider – given that it was the consensus in this case that the situation was unlikely to change – that the respondent waited as long as it could reasonably be expected to wait before dismissing the claimant. Up to 23 March 2023, then, dismissal was within the range of reasonable responses.

91. After 23 March 2023, however, we find that the dismissal was procedurally unfair. In the context of the claimant's hospitalisation, no reasonable employer, we find, would have declined the claimant's request to extend her notice period (and so to allow her to participate in the redeployment exercise), in the context that there was to have been a final meeting which did not in fact take place and given that, but for her illness, the claimant would have been able to participate in the redeployment process for almost another month, a significant proportion of her notice period. Nor would any reasonable employer have neglected to inform the claimant of her appeal rights, and therefore effectively deny her that opportunity. For the reasons

we set out above, an appeal would not have been futile or pointless. In accordance with equity and the substantial merits of the case, the dismissal was therefore unfair.

4. Wrongful dismissal

92. The respondent gave the claimant the applicable period of notice and paid the claimant throughout that period. That period was never changed by the respondent. There was therefore no breach of contract and no wrongful dismissal.

6. Direct disability discrimination

93. The respondent did not do the things set out at 6.3.1 of the list of issues (early termination). Regarding 6.3.2 to 6.3.4, for the period the claimant was in hospital the respondent did fail to assist the claimant in attempting to find an alternative suitable job, the respondent did terminate the claimant's employment whilst the claimant was in hospital, thereby excluding the claimant from the dismissal process and the respondent did (as all agreed) refuse to allow her to work remotely on an indefinite basis. Was this less favourable treatment? As Mr Brown agreed, the notional comparator here was a person who is not disabled but otherwise had the same inability as the claimant to do the work (or participate in the redeployment process). We are quite satisfied on all the evidence that that notional comparator would have been treated in exactly the same way as the claimant. The treatment was not because of the claimant's disability, but because she was unable to do the work (or participate in the process). The claim for direct disability discrimination therefore fails.

7. Indirect disability discrimination

94. The respondent did have the three PCPs set out at 7.1 of the list of issues. The PCPs at 7.1.1 and 7.1.2 were requirements of the claimant's role. For the reasons set out above, there was also a PCP (7.1.3) that the dismissal would have continued for anyone in the circumstances which the claimant was in (i.e. in hospital and unable to participate). At the time we are concerned with, the respondent did not apply 7.1.1 (requiring standing etc) to the claimant – the respondent had already made reasonable adjustments which applied towards the end of the claimant's time working in the dispensary and it was clear that if she was to return she would not have spent long periods standing or walking around (see paragraph 16 above). The requirement to work in person (7.1.2) and proceeding with the dismissal process etc. (7.1.3) were however applied to the claimant. Those two would also have been applied to non-disabled persons and did put persons with sickle cell aneamia at a particular disadvantage, those persons being more likely to have the difficulties which the claimant had working on-site and

being more likely to have more frequent hospital stays during which they would be unable to participate in internal employment processes. Should any evidence be required as to 7.4.2, it can be found at [368], where the claimant's multiple sickle cell crises over the years, resulting in hospitalisation, are set out. Those two PCPs did put the claimant at those disadvantages. Were they a proportionate means of achieving a legitimate aim? For all of the reasons we have already set out, we find that the respondent has shown that requiring pharmacists to work in person was. The aim was ensuring patient safety and otherwise complying with the respondent's legal obligations. In our view there was nothing less discriminatory that could reasonably have been done instead – the aim could not have been met by someone working off-site. However, the respondent has not shown that the refusal to countenance extending the notice period amounted to the proportionate means of achieving a legitimate aim. While we accept that there was a legitimate aim in ensuring regular and effective attendance and in ensuring that any such processes are not unnecessarily delayed, it would have caused the respondent little or no inconvenience or difficulty to have allowed the claimant a little more time to continue to participate in the process for the whole of the length of the notice period, especially given that the respondent was aware that the history was such that the claimant's sickle cell crises did come to an end within a matter of weeks. So we find that the refusal to extend the process was indirect discrimination.

8. Reasonable adjustments

95. The above reasoning on PCPs and disadvantage applies to 8.1 and 8.2 in the list of issues. There was no realistic dispute that the respondent knew that the claimant would be placed at the disadvantages. Regarding the steps which the claimant says could have been taken to avoid the disadvantages (8.4), all of those steps could have been taken by the respondent. For reasons we have already set out, step 8.4.2 (minimising standing etc.) was in fact taken and it would not have been reasonable for the respondent to have taken steps 8.4.1 (remote working) and 8.4.3 (creating a new role). It would however have been reasonable, again for the reasons we have already set out, for the respondent to have extended the dismissal process; the respondent failed to do so. In so failing, the respondent failed to make a reasonable adjustment.

Time Limits

96. In light of our findings above, we need only to consider time limits with regard to the failure to make the reasonable adjustment of extending the notice period and the indirect discrimination in refusing to extend it. Irrespective of when the claimant made her request to extend the notice period, we consider that the reasonable adjustment should have been made within a week of the respondent being informed the claimant was in hospital, by which time it would have been clear that her stay could amount to a significant proportion of the time allowed for redeployment. The applicable

date is therefore 30 March 2023, and the reasonable adjustment claim is not out of time. That is in our view the most favourable approach from the respondent's point of view; were one instead to take the view that the appropriate date was Mr Man's decision not to extend the period, that date was even later and so the claim would still be in time. Similar considerations lead us to the conclusion that the indirect discrimination claim is also in time.

"Polkey" etc

97. As we have said, after giving oral reasons for our decisions on liability, we heard further submissions from the parties about two points which will have a bearing on the amount of damages to be awarded for unfair dismissal. Both parties were content to deal with the points on the basis of submissions, i.e. nobody sought time in which to obtain further evidence. We then gave oral reasons for our findings. Our written reasons are as follows.

98. The first question was, given our finding that part of the reason for the dismissal procedure being unfair was the fact that the claimant was not told of her right to appeal, how long might a fair appeal process have taken? Mr Sangha for the respondent was not aware of any particular policies of the respondent which would have set a timetable, so the parties made submissions in general terms about how long such a process might take. We took into account the time that might reasonably have been allowed for the claimant to decide whether she was going to appeal and for her to prepare an appeal, the time for the respondent to appoint someone to consider the case and for that person to consider the case, draft a decision and send it to the claimant having conducted a hearing if necessary. That person would have to have been new to the case and so would have been unfamiliar with the evidence. On the other hand, it was not a case of the greatest complexity and given that the medical evidence was already there, with the situation unlikely to change, time to gather further evidence would not have been required. Taking all that into account we consider that a fair appeal process would have taken 8 weeks in this case.

99. The second question was the percentage chance that the claimant would have remained in post after a fair dismissal process (including any appeal). There are two aspects to this. The first is that an appeal process may well have found (as we found) that the notice period, and so the redeployment process, should have been extended. It follows from that that there was a chance, albeit a small one, that the claimant would have been redeployed – which would of course be the whole point of extending the process. It was not suggested that the redeployment process was a sham, though equally the respondent was honest with the claimant throughout that the chances of redeployment were slim, as indeed we find they were. The second aspect is that fresh eyes on a decision may have resulted in a different decision entirely. That said, we consider it unlikely that a decision would have been made on appeal to allow the claimant to continue working from home in her then-current role; although we described it earlier as a non-zero chance, it

was pretty close to zero in our judgment. We say close to zero because although we have found that doing this would not have been practicable, we cannot (quite) rule out someone taking a different view. There was, in summary, a small chance that the claimant could have been deployed working from home in another role and there was an almost, but not quite, zero chance that she would have been allowed to continue working in the pharmacy role from home. In the round we come to the conclusion that there was 10% chance of the claimant's employment continuing after a fair process, i.e. a 90% chance that she would have been dismissed after a fair process.

APPENDIX:

Edited Version of the List of Issues set out by EJ Curtis following the hearing of 16 February 2023

1. Time limits
[…]

2. Unfair dismissal

2.1 What was the reason or principal reason for dismissal? The respondent says the reason was [*see paragraph 4 above*].

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

2.2.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;
2.2.2 The respondent adequately consulted the claimant;
2.2.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
2.2.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
2.2.5 Dismissal was within the range of reasonable responses.

3. Remedy for unfair dismissal
[…]

4. Wrongful dismissal / Notice pay

4.1 What was the claimant's notice period?
4.2 Was the claimant paid for that notice period?
4.3 If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

5. Disability
5.1 The Respondent accepts that the Claimant was disabled [...]

6. Direct… disability discrimination (Equality Act 2010 section 13)

6.1 ...
6.2 The Claimant is disabled by reason of sickle cell anaemia.

6.3 Did the respondent do the following things:

6.3.1 Terminate the Claimant's employment on 18 April 2022, which was earlier than the date which had previously been set by the respondent or agreed between the respondent and claimant.
6.3.2 Fail to assist the Claimant in attempting to find an alternative

suitable job rather than dismissing her.
6.3.3 Terminate the Claimant's employment whilst the Claimant was in hospital, thereby excluding the Claimant from the capability process.
6.3.4 Refuse to allow the Claimant to work remotely on an indefinite Basis.

6.4 Was that less favourable treatment?
The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.
If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.
The claimant has not named anyone in particular who she says was treated better than she was.

6.5 If so, was it because of the Claimant's… disability?

7. Indirect discrimination (Equality Act 2010 section 19)

7.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:
7.1.1 Requiring pharmacists to spend long periods standing or walking around.
7.1.2 Requiring pharmacists to work in person rather than remotely.
7.1.3 Proceeding with capability dismissal process regardless of whether an employee is able to participate in the process, e.g. due to hospital admission.

7.2 Did the respondent apply the PCP to the claimant?

7.3 Did the respondent apply the PCP to non-disabled persons or would it have done so?

7.4 Did the PCP put persons with sickle cell anaemia at a particular disadvantage when compared with non-disabled persons, in that:
7.4.1 Persons with sickle cell anaemia are likely to be unable to stand for long periods of time.
7.4.2 Persons with sickle cell anaemia are likely to have more frequent hospital stays, during which time they will be unable to participate in internal employment processes.

7.5 Did the PCP put the claimant at that disadvantage?

7.6 Was the PCP a proportionate means of achieving a legitimate aim?
[…]

7.7 The Tribunal will decide in particular:
7.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;
7.7.2 could something less discriminatory have been done instead;
7.7.3 how should the needs of the claimant and the respondent be balanced?

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

8.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

8.1.1 Requiring pharmacists to undertake work which involved long periods of standing or walking around
8.1.2 Requiring pharmacists to work in person rather than remotely
8.1.3 Proceeding with capability dismissal process regardless of whether an employee is able to participate in the process, e.g. due to hospital admission

8.2 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

8.2.1 The Claimant is unable to stand for long periods of time, so was unable to carry out her role.
8.2.2 The Claimant was unable to effectively participate in the capability dismissal process and was ultimately dismissed.

8.3 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

8.4 What steps could have been taken to avoid the disadvantage? The claimant suggests:

8.4.1 Allowing the Claimant to work remotely
8.4.2 Reduce or minimise periods of standing and/or walking
8.4.3 Create a new role for the Claimant which did not have the requirement of long periods of standing and constantly walking around.
8.4.4 Delay the capability dismissal process until the Claimant was able to participate in it.

8.5 Was it reasonable for the respondent to have to take those steps and when? […]

8.6 Did the respondent fail to take those steps?

9. Remedy for discrimination
[…]

_____

Employment Judge **Dick**

_____

Date: 18 January 2024

REASONS SENT TO THE PARTIES ON
23 January 2024

FOR THE TRIBUNAL OFFICE