EMPLOYMENT TRIBUNALS

Claimant: Alexandra Ivey

Respondent: Norfolk County Council

Heard at: Bury St Edmunds

On: 30, 31 October, 1, 2, and 3 November 2023
19 December 2023 (in chambers)

Before: Employment Judge Graham

Members: Mrs L Gaywood
Mrs B Handley-Howarth

Representation
Claimant: Ms K Hampshire, Counsel
Respondent: Ms H Ifeka, Counsel

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that:

1. The complaint of unfair dismissal fails and is dismissed.

2. The complaint of direct discrimination fails and is dismissed.

3. The complaint of indirect discrimination fails and is dismissed.

4. The complaint of failure to implement reasonable adjustments fails and is dismissed.

5. The complaint of discrimination arising from disability fails and is dismissed.

REASONS

Claim

1. By way of ET1 claim form dated 17 February 2022, the Claimant complains of unfair dismissal, direct discrimination on grounds of disability and sex, indirect sex discrimination, discrimination arising from disability, and failure to

implement reasonable adjustments. By ET3 Response dated 6 April 2022, the Respondent resists the complaints.

Procedural History and Issues

2. The matter came before Employment Judge Palmer for a preliminary hearing on 6 September 2022 where the Issues below were discussed and agreed with the parties **[bundle pages 40-43]**.

3. At the start of the final hearing, it was confirmed that Issues 8a, 8b, 13a, 13b, 19-21 were no longer pursued by the Claimant, and Issue 25 was no longer pursued by the Respondent – these have been struck through but are included for completeness.

4. In addition, two of the words within the legal tests below appeared to be typographical errors, therefore I have struck through those words and included the correct words from the legislation. This relates to the reference to "substantial disadvantage" under the indirect discrimination heading which should instead read as "particular disadvantage" and also the word "dismissal" which should have read as "disability" under the section 15 EQA 2010 claim.

Unfair Dismissal

1. *Was the Claimant dismissed for a potentially fair reason pursuant to s.98(1) of the Employment Rights Act 1996 ("ERA")?*

2. *The Respondent relies on capability, ill health and / or in the alternative, some other substantial reason as the reason for the dismissal ("SOSR").*

3. *If it is accepted that the reason for the Claimant's dismissal was health, did the Respondent have a genuine belief based on reasonable grounds and having followed a reasonable investigation, that ill health was the reason for the dismissal?*

4. *If the answer to question 3 is yes, was the Claimant's dismissal substantively fair pursuant to s.98(4) ERA 1996? In other words, did the Respondent act reasonably or unreasonably in using the Claimant's capability as a sufficient reason for dismissing her:*

    a. *taking into account the size and administrative resources of the Respondent's undertaking; and*

    b. *taking into account equity and the substantial merits of the case.*

5. *Even if it is accepted that the Respondent acted reasonably in using the Claimant's ill health as a sufficient reason for dismissing her, satisfying the Tribunal as to the conditions outlined above, was the Claimant's dismissal within a band of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted?*

6. *If the answer to question 5 is yes, did the Respondent follow a fair process in dismissing the Claimant, to include but not limited to, ascertaining the up to date medical position, and consulting with the Claimant?*

Discrimination (EqA 2010)

7. *The Claimant is a disabled person by virtue of both her depression and her endometriosis. It is accepted by the Respondent that the Claimant was so disabled at all relevant times and that the Respondent had the requisite knowledge for the purposes of the EqA 2010.*

   Direct Discrimination (sex and disability) (s.13 EqA 2010)

8. *Was the Claimant subjected to less favourable treatment by the Respondent by any of the following:*

   a. *~~the failure to properly advise her about the sickness absences process and the risk that she would be dismissed;~~*

   b. *~~the Respondent's sickness absence process itself;~~*

   c. *her dismissal; and / or*

   d. *the failure to uphold her appeal against dismissal.*

9. *Was the less favourable treatment complained of, because of the Claimant's sex or disability?*

10. *The Claimant is comparing herself to a hypothetical comparator.*

    Indirect Discrimination (sex) (s.19 EqA 2010)

11. *Did the Respondent apply a provision, criterion or practice ("PCP") in relation to the Claimant's sex that put or would put the Claimant at a ~~substantial~~ particular disadvantage in comparison with persons who do not share that characteristic?*

    a. *The Claimant relies on a PCP where it alleges that the Respondent has a Policy of requiring any time off to be made up during the working week in which it was taken, in that it puts the Claimant at a substantial disadvantage as a woman (more likely to be part time and suffer from endometriosis) in comparison to a man (who is less likely to be part time and cannot suffer from endometriosis).*

12. *If the answer to question 11 is yes, can the Respondent show that such a PCP was a proportionate means of achieving a legitimate aim?*

    Discrimination because of something in consequence of a Disability (s.15 EqA 2010)

13. *Was the Claimant treated unfavourably by the Respondent by any of the following:*

    a. *~~the failure to properly advise her about the sickness absence process and the risk that she would be dismissed;~~*

~~b. the Respondent's sickness absence process itself;~~

c. her dismissal; and / or

d. the failure to uphold her Appeal against dismissal.

14. Was the unfavourable treatment complained of above because of something arising as a consequence of the Claimant's ~~dismissal~~ disability, namely her absences and / or the possibility of future absences?

15. If the answer to question 13 is yes, was the unfavourable treatment a proportionate means of achieving a legitimate aim?

a. What was the Respondent's legitimate aim? To have staff achieve decent levels of attendance.

Failure to make reasonable adjustments (s.20 and 21 EqA 2010)

16. Was there a provision, criterion or practice ("PCP") of the Respondent's that put or would put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

The Claimant relies on the following alleged PCPs:

a. the Respondent's sickness absence process;
b. the Respondent's policy of requiring any time off to be made up during the week in which it was taken;
c. the Respondent's requirement for employees to work within their set hours without any flexibility; and
d. the Respondent's requirement for full attendances following a period of long term sickness absence.

17. If there was such a PCP, did that PCP put the Claimant at a substantial disadvantage?

The Claimant will say that the substantial disadvantage was:

a. that people with disabilities are more likely to have more sickness absence so as to risk dismissal under the Respondent's sickness absence process;

b. that people with disabilities are more likely to require flexibility in carrying out their duties outside of set hours such that a lack of flexibility would mean such people are more at risk of disciplinary / capability processes and / or dismissal; and

c. that people with disabilities are less likely to be able to achieve full attendance following a period of long term sickness absence, such that a requirement of this nature would mean such people are more at risk of disciplinary / capability processes and / or dismissal; the Claimant will say that she was so disadvantaged.

18. *If there was such a PCP (or PCPs) so as to trigger the duty in s.20 EqA 2010, did the Respondent take such steps (or any steps) as were reasonable to have to take to avoid the disadvantage?*

~~*Time*~~

~~19. *Are any of the Claimant's claims out of time?*~~

~~20. *If so, are any or all of the Claimant's claims regarding conduct extending over a period of time such that they should be treated as taking place at the end of that period and therefore be in time?*~~

~~21. *If not, would it be just and equitable to extend time?*~~

Compensation

22. *What compensation should the Claimant receive?*

    a. *What are the Claimant's past losses?*
    b. *What will be the Claimant's future losses?*

23. *Has the Claimant unreasonably failed to mitigate her losses? This includes the Claimant rejecting the Respondent's offer of a return to her substantive post and / or being placed in its re-deployment pool for 12 weeks.*

24. *Has the Claimant suffered any injury to feelings arising from discrimination outlined above?*

~~25. *Should any compensation awarded by uplifted as a result of the Respondent's failure to follow the ACAS Code of Disciplinary and Grievance Procedures?*~~

Disability

5. The Respondent has conceded that the Claimant was disabled at the material times by virtue of her conditions of endometriosis and depression. Accordingly, this is not an Issue for the Tribunal to determine.

Hearing

6. We were provided with a hearing bundle of 558 pages together with an opening skeleton argument from the Claimant which we read in advance of the hearing, and which was helpful. We heard evidence from the Claimant, and for the Respondent we heard from Sara Brown and Lorrayne Barrett. Witness statements were provided by all three witnesses. We also received a chronology and cast list from the Claimant together with 200 pages of authorities which were also helpful.

7. The parties also provided detailed closing submissions in writing which were also delivered orally.

Findings of fact

8. From the information and evidence before the Tribunal it made the following findings of fact. We made our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgment all the evidence which we heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the issues to be decided.

9. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against any contemporaneous documents. We have not referred to every document we read or were directed or taken to in the findings below, but that does not mean they were not considered.

10. The Respondent is a large local authority and at the material times employed in the region of 8,000 members of staff.

11. The Claimant commenced employment with the Respondent in January 2017, and at the time of her dismissal she was employed as a Development Worker. We were provided with a job description for this role, and we also heard from the Claimant as to the main duties of the role which will be summarised as follows.

12. The Claimant's role was based within the Respondent's Social Services directorate and the purpose of the role was to promote community engagement and development in Adult Social Services across the county. The role involved working with vulnerable people referred into the service, assessing them and conducting research to provide them with up-to-date information on local resources to improve their wellbeing and quality of life. This would also include assisting older people who had returned to home from long hospital stays and providing them with information on local resources and organisations to help them to adjust being back home. Other aspects included working with local community organisations to develop local resources where there is a gap in provision, supporting community groups to expand or to develop their existing resources, researching local resources and keeping an up-to-date record of them and maintaining a stock of leaflets for distribution to external service users and internal colleagues.

13. Part of the role included working alongside the Council's social workers with respect to Information Reports or Intervention Requests. Whereas some of the work did not require an immediate response, inevitably a timely response would be needed given that vulnerable people would need to know what resources would be available to them.

14. Whereas the job description indicated that the role may require some occasional evening and weekend work, this related to those development workers who would go out to work in the local community and who would occasionally need to attend events which may be out of normal working hours. The Claimant was not required to attend events and as such this did not apply to her after she was previously moved to a static location and then home working to accommodate her disabilities.

15. As a result of the COVID-19 Pandemic lockdown, part of the role of development workers changed and their duties included processing food parcel requests, telephoning people who called the Respondent's emergency call out service (the Norfolk Swift Response Team) to offer information and advice on community organisations and resources, and providing information and advice to people who requested help via the Social Services telephone support service (now called Social Care Community Engagement or "SCEE").

16. It was possible that whilst a development officer was speaking to vulnerable service users that safeguarding issues may come to light, in which case the post holder would need to raise this with the manager (Sara Brown) or the Senior Development Worker who may refer the matter to the SCEE as some of these safeguarding issues could potentially be urgent.

17. The team where the Claimant worked operated in normal business hours (8am to 6pm). The Respondent has an Emergency Duty Team which can be contacted 24/7 for the public to report urgent safeguarding issues to.

18. The team in which the Claimant worked comprised of sixteen female members of staff (including the Claimant) and one male.

19. The Claimant was initially contracted to work 22.5 hours per week, however this was reduced at her request to 15 hours after she had a child. At the time of her dismissal the Claimant worked those 15 hours on Thursdays and Fridays. The Claimant did not work on Monday or Tuesdays as she did not have childcare for those days, and she did not work on Wednesdays so that she could work on writing a book / undertaking creative writing.

20. The Claimant says that she previously worked out of hours however her line manager Ms Brown says that she was not aware of this, save for mandatory online training for 1.5 hours which the Claimant did during a phased return (dealt with below). We find that it is likely that the Claimant did some research out of normal working hours in her own time, however we found no evidence to suggest that she would have done more than that nor performed her full range of duties out of hours. Ms Brown said that it was not usual for staff to work out of hours and we accept her evidence in that regard as we were not provided with evidence to the contrary.

21. It was clear from the Claimant's evidence that this was a role which she enjoyed a great deal and one which provided her with much satisfaction by helping those in need in the local community. It was also clear from the documents and the oral evidence we heard that there were no issues with the Claimant's performance whilst she was at work, and that the Respondent viewed her work to be excellent. The Claimant's dismissal letter noted that she had *"undertaken some excellent work and made sustainable changes in local communities for the residents of Norfolk."*

22. Following the Covid Pandemic the Claimant worked solely from home.

23. The Claimant has suffered from endometriosis for over twenty years. This condition has previously caused her considerable pain. This is a condition which only women can suffer from. The condition is unpredictable and the pain it caused the Claimant could range from mild, to medium, to severe or in the words of the Claimant "high severe." When the pain was mild the Claimant

could continue to work. When the pain was medium the Claimant would work whilst lying on a settee to ease the pain. When the pain was severe the Claimant would not be able to work due to the level of pain she was experiencing, and she would have to go to bed with a hot water bottle to try to ease the pain.

24. The Claimant's evidence was that the condition became unbearable from 2020 from which time she was in some level of pain every day, however the level of pain would vary from day to day and was unpredictable. The duration of the pain could also vary but if it was severe then it would gradually diminish in severity over the next few days.

25. The Claimant would take a variety of medications for her condition and would also attend a Pain Management Clinic to try to address the levels of pain experienced. The Claimant was notified that she would need a hysterectomy to help alleviate the pain, however this would be to address the symptoms as there is no cure. The Claimant's operation was postponed by the NHS on several occasions during the Pandemic.

26. The Claimant also suffered from depression, and this was exacerbated due to the pain she was experiencing and in response to delays in having the hysterectomy due to postponements by the NHS. We understand that the Claimant had also undergone several medical procedures for her endometriosis previously.

27. The Claimant was line managed by Sara Brown. Up until the point of dismissal, it would appear that they had a good working relationship and the Claimant's evidence was that this had worked well, and she described Ms Brown as having been *"as supportive as a manager anyone could wish for."* The emails between Ms Brown and the Claimant within the hearing bundle were professional, courteous, and friendly.

28. The Claimant also spoke positively of the support from the Respondent generally with respect to adjustments which had been made for her, as well as the provision of equipment or a small allowance for equipment to enable her to work from home during the Pandemic. In her evidence the Claimant also described the Respondent's sickness absence management policy as being generous.

29. The Respondent's Sickness Absence Management Policy **[bundle page 485-489]**. The policy has two stages, the first of which is engaged when the employee's absence either reaches the trigger points or where it is known that the employee will be off long term due to sickness absence. The short-term absence trigger periods are:

    i. Three or more instances of sickness absence in any six-month period.
    ii. Seven or more days sickness absence with any twelve-month period.
    iii. Any other recurring recognisable patterns.

26. The long-term absence trigger is reached when an employee is absent or expected to be absent for a period of more than four weeks (more than two weeks where sickness absence is due to stress, anxiety, depression, other mental health conditions, or a reoccurrence of a previous condition). The reduced trigger in cases of mental health and recurring conditions is to ensure

an early intervention by the Respondent from a welfare perspective, rather than singling out those with mental health or recurring conditions so that they are not left without support. We found no evidence to suggest that those recurring conditions or mental health conditions were intended to be managed more strictly by the Respondent – the short timescales appeared to be genuinely intended to provide earlier support.

27. The policy provides that it may not always be necessary to conduct a stage one meeting with an employee on long term sickness absence as it may be more appropriate to initiate stage two to understand whether they are able to return to work. The policy further provides that absence needs to be reviewed throughout this period at the end of which a decision can be made as to whether the employee has improved or is likely to return to work, or whether stage two of the process should be engaged.

28. As regards stage two, the policy provides that where the short-term sickness does not improve under stage one, or the employee is off long term due to sickness absence and it is not known if or when they are able to return to work, then action under stage two must be initiated and this may include dismissal or further formal sanction. The policy also provides for an appeal stage. Further provisions are set out on the stage one meeting form which will be detailed below.

29. We note that at stage two there are a range out of outcomes. One of which may be dismissal, however it states that other formal sanctions may be applied.

30. The Claimant was sick on 27 February to 28 February 2020 for 1.5 days. This was recorded as being due to a neurological condition (including headaches and ME).

31. The Claimant went on sick leave from 30 July 2020 until 24 December 2020, for a total of 43 days. The fit notes for the period of absence record the Claimant as suffering from endometriosis and stress.

32. On 24 November 2020 the Respondent informed the Claimant that she would move onto half pay from 24 December 2020.

33. On 25 November 2020 the Claimant contacted Ms Brown to discuss a return to work. In the call the Claimant said that she was still in pain but feeling a little better and that she was on the waiting list for a hysterectomy. The Claimant said she was still feeling low in mood, that she would be taking some new pain medication, and that she would like to try to return to work in January 2021. Ms Brown asked the Claimant if she was well enough to return or if she was doing it for financial reasons, to which the Claimant said that both factors contributed to her decision to return. It was agreed that the Claimant could take annual leave until she returned to work in January and that she would be referred to Occupational Health for advice.

34. A phased return to work was agreed with the following adjustments for the Claimant:

    i. Limiting her work to IT based tasks, such as information reports as the Claimant did not feel ready to speak to people on the telephone;

ii. Limiting her functionality on the Teams software to reduce constant messaging popping up on screen; and
iii. Not meeting up with colleagues as part of a support bubble.

35. The Claimant was asked to provide a fit note from her GP to confirm that she was well enough to return and with any recommendations from her GP. This was summarised in an email to the Claimant from Ms Brown to the Claimant on 26 November, and the Claimant responded the same day with her agreement and stated *"Thanks again for all your help and support. You've been fantastic through all this."*

36. The fit note for the period 24 December 2020 to 31 January 2021, records the Claimant as being fit to return to work but with a recommendation of light duties.

37. The Tribunal was referred to the Occupational Health report dated 24 December 2020 which recorded some improvements in the Claimant's condition. The recommendations included taking breaks, undertaking 50% of her working hours on her phased return, and not having client contact and working from home during the phased return. It was recorded that alternative temporary duties were not required.

38. The Claimant returned to work on 21 January 2021 on a phased return. A return-to-work meeting took place during the Claimant's first week back at work where the following phased return hours were agreed:

    i. Claimant to work half days for the first two weeks (weeks commencing 18 and 25 January 2021)
    ii. Claimant to work from 9:30am to 4:45pm for the week commencing 1 February 2021, with 1.5 hours to be worked flexibly for her to undertake mandatory online training.
    iii. Claimant to return to full duties from the week commencing 8 February 2021.

39. There was also discussion as to a DSE Assessment which would be required before the Respondent could approve working from home equipment to be purchased for her, however the Claimant declined this.

40. On 5 February 2021 the Claimant attended a formal Stage One sickness absence meeting with Ms Brown as she had triggered 7 or more days sickness absence within a 12 month period. The Claimant has alleged that during December 2020 Ms Brown made her aware that she would be invited to a Stage One meeting but she had told her that the invite was just a template and that whilst someone could be dismissed if they got to Stage Two, this would not apply to her so she should ignore the "scary language" in the invitation letter and that her job was safe. The Claimant says that this was told to her on numerous occasions by Ms Brown, and the Tribunal's findings in this regard are set out fully below.

41. During the Stage One meeting on 5 February 2021, it was recorded that the Claimant had ongoing pain management and that she was still awaiting a hysterectomy which would likely take place after December 2021.

42. There was also discussion as to the Claimant's depression/stress and the available support for her, and also discussion as to her workstation set up as

the Claimant was working from her dining table at home but also her sofa when she was in pain. The Claimant was advised that working from the sofa was not appropriate from a health and safety perspective and therefore the Respondent would not provide a lap tray for working on the sofa. Ms Brown offered to reimburse the cost of a headset for the Claimant to use at home, and she also offered the Claimant the opportunity to work from County Hall due to the conditions at home not being suitable, however the Claimant declined this due to her fears around Covid.

43. The sickness absence Stage One forms do not appear in the Respondent's sickness absence policy but are handed to managers to use when conducting these meetings. They are intended to supplement the policy and they contain guidance to managers on conducting the Stage One meeting.

44. The form requires consideration of setting targets for improvement where appropriate with a maximum number of sickness absences over a defined period. We note that the form addresses target setting. It states that realistic targets should be based on absence history and the need to achieve less than the trigger points over a reasonable timeframe. It states that it would normally be reasonable to set a target of no more than two instances in six months totaling in three days for a full-time employee. It also states that if the employee has a disability and is covered by the Equality Act, the manager should check with HR whether the target needs any reasonable adjustment.

45. The form then goes on to set out how this target will be monitored and suggests a three month and six month review meeting. The form also requires managers to be clear with the employee about the next stage in the process if targets are not met. The form states that if targets are not met, then a meeting will be arranged to discuss further action as soon as the employee has exceeded the targets. This may be a second stage one meeting, with the possibility of advice from occupational health. The form also states that if targets are not met following a second stage one meeting then an absence review meeting at stage two will normally be arranged. An outcome of a stage two meeting could be determination of the employee's contract of employment.

46. Ms Brown issued the Claimant with a target of a maximum of four days sickness absence over two occasions in the next 6 months. Further review periods were set for May (in three months' time) and August (in six months' time).

47. The Claimant asked whether she could make up the time when she was unwell rather than taking sick leave. In her witness statement the Claimant suggests that she was still worried despite the alleged assurance from Ms Brown that her job was safe. The Claimant asked if she woke up on a bad day and felt unable to work due to the endometriosis pain, whether she could make up the time which she felt could be done at any time, including outside working hours. Ms Brown advised the Claimant that she could work flexibly with her working week, working different days if that suited, however the contracted 15 hours must be worked within the same working week **[bundle page 85]**.

48. The form requires the manager to clarify what further action may be taken if the improvement targets are not met and what stage in the procedure that would be. Ms Brown recorded that further advice would be sought from Occupational Health and further *"Progression to stage 2 Sickness Meeting (HR will be in attendance)."*

49. The Claimant had asked if the recovery time following her hysterectomy would mean that she would move to stage two of the process, however Ms Brown assured her that management discretion could be used as this was a necessary medical procedure relating to a long term health condition, however her pay would still be calculated in accordance with the Respondent's procedures based upon the rolling 12 months rolling sickness record.

50. On 5 February 2021 Ms Brown emailed the Claimant to summarise the discussions. The email contains a summary of the work the Claimant did during her phased return. The Claimant spent the first week speaking to ICT and to get access to the systems and she took part in the back to work review. During the second week the Claimant obtained a new laptop and spent the remainder of her time catching up on emails. On the third week the Claimant returned to working two full days and she continued catching up with emails and undertaking mandatory training, and she also attended a phased return review and the stage one meeting. The email records that the Claimant said that her return to work had been good, and she felt it had been a nice easy way to return. It therefore appeared that the phased return to work had worked well.

51. The Claimant was sick for 1.5 days on 22 and 23 April 2021. This was due to her endometriosis condition. The Claimant says that at this time Ms Brown told her that she would support her and that she would not lose her job. The Tribunal's findings as to the alleged assurances from Ms Brown are set out below.

52. The Claimant says that the pain became worse during 2021 but she had no choice but to keep working due to the Respondent's Flexible Working Policy which was a reference to the inability to make up time missed due to sickness absence.

53. During May 2021 the Claimant's hysterectomy was postponed again. The Claimant says in her statement that it she found out it had been delayed again but *"this time for another year."*

54. The Claimant commenced another period of sickness absence from 13 May 2021 due to endometriosis and depressive disorder. The Claimant spoke to Ms Brown on her first day of absence, and Ms Brown emailed the Claimant that day to summarise their discussions.

55. In the email Ms Brown recorded that the Claimant had been concerned about the impact of taking further time off sick and *"the impact this may have on your tenure with NCC going forward."* **[bundle page 89A]**. Ms Brown said that she had spoken to HR and explained that the Claimant's standard of work was excellent, but that the worry was the impact of her ongoing ill health on her physically and mentally and that was making it difficult for her to feel well enough to work. It was agreed to wait and see if the Claimant's GP signed her off sick following an appointment the following week, and the Claimant would then be referred to Occupational Health again for further advice on reasonable adjustments that could be made to support her.

56. The Claimant was also told that the stage two process would likely be initiated and that there would be a meeting between the Claimant, Ms Brown and HR. The Claimant was told that she could bring someone for support, and they

would go through the Occupational Health recommendations to explore ways to support the Claimant to stay in her role (with a further review 6-8 weeks later). Ms Brown inserted the following in bold text *"the aim and focus of this meeting would be firmly on what we can do to support you, and any reasonable adjustments that can be made to keep you in work."* **[bundle page 89A]**. We find that there was no express promise that the Claimant would not be dismissed within the email.

57. Ms Brown included a copy of the Respondent's Sickness Management Policy and she added "*I hope this goes someway to reassure you Alex. I know this is a worrying time for you, but please be assured that I am here to help and support you, and when you are well enough to return to work we will do all we can to help you remain in work. For now, your health must be the priority."*

58. The Claimant moved onto half pay from 16 May 2021.

59. Ms Brown was provided with advice and guidance in managing the Claimant's sickness absence by Nathan Everitt in the Respondent's HR department.

60. Ms Brown spoke to the Claimant on 17 June 2021 and she emailed the Claimant a summary of their discussions on the same date **[bundle page 106]**. During the call the Claimant said that the past two weeks had not been good as her health was getting progressively worse and she had suspected labyrinthitis and low calcium levels, and that she was hoping that her hysterectomy operation would be brought forward.

61. During the call the Claimant said that she had been taking steps to combat her poor mental health, and she had signed up for rock climbing and reached the top of the wall on her first attempt, she had been to Brighton to meet friends for a long weekend, and she had booked a flight to go to America for a week as she was concerned for her father who was in poor health. The Claimant said that she hoped to change her antidepressants upon her return to the UK, however she said that she was unable to envisage a return date at that time due to how she was feeling, and she asked how much longer her pay would last. Ms Brown advised the Claimant that her sick pay was short term for a few months only and then she would receive statutory sick pay. The Claimant agreed to be referred to Occupational Health.

62. On 24 June 2021 the Claimant sent Ms Brown a WhatsApp message to tell her that her operation had been reclassified as urgent and would likely be in September or October that year and that she would have six weeks' notice of the date. The Claimant also said that she had an appointment at the Pain Management Clinic on 22 July. It was agreed that the Claimant would be referred to Occupational Health on 14 July 2021.

63. An Occupational Health report dated 29 July 2021 recorded that the Claimant advised that she did not feel well enough to return to work due to her physical and psychological symptoms, however she was keen to attempt to return to work when well enough to do so. It was recorded that the Claimant's GP planned to change her depression treatment, but she would need to gradually decrease her current medication before gradually increasing her new dose. It was also recorded that the Claimant had been advised that the hysterectomy had been moved to the urgent waiting list, however Occupational Health were unable to advise as to when the Claimant would be able to return to work.

64. Occupational Health also advised that temporary alternative activities would not facilitate a return to work, however if flexible work hours could be accommodated for the Claimant once she felt psychologically well enough to undertake her role then she may be able to return to work from home. It was further recorded that the Claimant's symptoms of endometriosis may vary in severity from day to day and throughout the day, and she may be able to undertake short periods of work as her symptoms allow throughout a working week which would enable her to complete her contracted hours, however the Claimant would need to note an improvement in her psychological symptoms before she would be able to consider it. As regards lighter duties, it was recorded that the Claimant did not feel able to return to work on the amended duties assigned to her due to her physical and psychological symptoms.

65. It was further recorded that once the Claimant had her hysterectomy, she should note an improvement in her symptoms of endometriosis however the symptoms could return elsewhere despite surgical interventions and it was not possible to provide a definite prognosis. As regards the Claimant's depression, it was noted that the Claimant had a long history of the condition and she was likely to experience symptoms of it to some degree on an ongoing basis, however her GP hoped that changes to her treatment regime would be beneficial to symptom management which might help the Claimant to maintain attendance and to continue in her role.

66. In conclusion it was recorded that Occupational Health were unable to advise as to when the Claimant may be well enough to consider a return to work, however, *"supporting a flexible approach to her working hours may facilitate an earlier return to work for her."* The Claimant initially relied upon this in her evidence as suggesting that Occupational Health had advised that she should be able to work evenings and weekends to make up her time. However, under cross examination the Claimant accepted that she had misspoken – by which we understand the Claimant accepted that she had misinterpreted the sentence as Occupational Health had not gone as far as to recommend making up her time at evenings and weekends.

67. On 3 August 2021 Ms Brown sent the Claimant a message and said that her Occupational Health report had come through and she asked to discuss it with the Claimant later in the week. The Claimant responded to say she was going to email Ms Brown because *"the report kind of gives the wrong impression. I think I'll be able to return to work soon – i.e., before my op*." Ms Brown responded to say that she would let her know some times to speak, and that she did think that it was strange when they had talked about her returning. During this hearing Ms Brown was questioned on her reference to the word strange in her email as it would tend to suggest that she assumed that the Claimant was coming back to work earlier. Ms Brown's evidence was that she was not really thinking when she sent the message and that she had written it outside of normal working hours.

68. On 4 August 2021 Ms Brown emailed Mr Everitt in HR to ask for advice as the Claimant had messaged her to say that the report was misleading and that she was hoping to return to work soon. We were not provided with any reply from Mr Everitt.

69. On 6 August 2023 the Claimant emailed Occupational Health to say that she had told her manager that she would be well enough to return to work within 2-3 weeks and that her manager had asked her to ask Occupational Health to amend the report to reflect this as she would not be able to return to work unless the report said she was well enough. The Claimant suggested amending the report to say that she would be well enough to return *"perhaps week commencing 23 August. She would then like to use annual leave to work half days for approximately 2 weeks, and then return to her full hours."* We were not provided with any evidence of this alleged discussion with Ms Brown. We note that Ms Brown does not agree that she gave such an instruction, and we find no evidence that she did.

70. Fiona Allen (Senior Occupational Health Nurse Adviser) responded the same day to decline to amend the report and she stated that the report contained guidance on her return to work when she felt well enough and that her manager did not need a report from them to tell her that the Claimant now felt able to return to work. The Claimant passed this to Ms Brown who raised it with Mr Everitt in HR, who advised that it could be discussed in the Claimant's stage two meeting.

Stage two meeting – 20 August 2021

71. On 9 August 2023 the Claimant was invited to a stage two sickness absence meeting by Ms Brown. The meeting was scheduled for 20 August 2021. The Claimant says that she had relayed the response from Occupational Health to Ms Brown and that they *"agreed to meet on Teams with Nathan Everitt on 20 August 2021 to determine arrangements for my return, as well discussing the necessary HR particulars regarding my reaching Stage 2."* However, we find that the purpose of the meeting was not as described by the Claimant given that within the invitation letter itself the purpose of the meeting was clear that it was to discuss the Claimant's absence, to discuss the latest Occupational Health report and any implications on the Claimant's ability to perform her role, to identify any temporary or permanent reasonable adjustments to help the Claimant remain at work or to improve her attendance, to identify any actions the Claimant can take to help her remain at work or improve her attendance, and to consider whether medical redeployment or ill health retirement should be investigated.

72. The invitation letter made the Claimant aware that *"following these discussions, if I do not believe that there will be any further improvements in your attendance at work, then you will unfortunately be at risk of dismissal. Therefore, please note that at the conclusion of this meeting you may be given notice that your employment is to be terminated due to lack of capability due to ill health."* The Claimant was notified of her right to be accompanied **[bundle page 124-125]**.

73. The Claimant confirms that she was told that she could have someone accompany her, but she says she did not think at the time this would be necessary given Ms Brown's multiple assurances to her.

74. On the date of the stage two meeting Ms Brown emailed the Claimant to send her a link to the online meeting. In her email she said that she was looking forward to having the Claimant back. In this hearing we heard evidence from Ms Brown that this reference to having the Claimant back was meant in general terms, rather than a specific date.

75. The notes of the 20 August stage two meeting **[bundle pages 551- 554]** demonstrate a thorough discussion into the Claimant's conditions. The Claimant reported a slight decline in her physical health and an improvement in her mental health as the end was in sight for her operation which had yet to be scheduled but she was now on the priority list and would have as little as two weeks' notice of an operation date. The Claimant said that she was in daily pain, however it appeared that there had been worse pain the week before.

76. There was a discussion around the Claimant's pain levels and Ms Brown asked the Claimant to rate her pain in line with the NHS guidance on endometriosis. The Claimant said that it was mild that day, but the week before it had been severe. The Claimant said that it could come on suddenly and when it was severe she would unlikely to be able to stand or walk and she would have to go to bed with a hot water bottle. The Claimant said she would be able to work when the pain was mild, but when it was moderate she would only be able to attend to administrative tasks and likely from bed. The Claimant also confirmed that when the pain was mild she may feel like she was going to black out upon standing up, although she felt that this could also be due to low blood pressure. The Claimant also said that it wasn't just the pain but also *"everything that comes with it."*

77. There was then discussion around the Claimant's depressive condition and the Clamant confirmed that she was changing her medication and would need to vary the dosage. The Claimant indicated that the prospect of an operation had helped with her mental health, and that she was doing things to help herself, such as getting out, writing her book, and undertaking counselling.

78. There was discussion of the Occupational Health report which the Claimant agreed with generally, however she took issue with the part of the report where it was recorded that the Claimant had said she was not sure when she would be able to return, whereas the Claimant said that she felt that she would be able to return back in the short term. With respect to a return date, the Claimant suggested *"another week maybe. If I can do a slightly phased return, with some A/L. I'm conscious that I don't have enough sick leave for my operation. It is my own doing."* We note that there was some implication in the Claimant's comments that she may be attempting to return to work not because she was better but because she wanted to accrue some sick leave entitlement for her operation.

79. It was agreed that medical redeployment and ill health retirement were not appropriate at this stage.

80. Ms Brown asked the Claimant what sort of phased return she envisaged, to which she replied *"two half days, then 1 full day and half day, then your two full days. Don't feel it would need to be over a month, but a couple of weeks return."*

81. After a brief break and subsequent discussions with the Claimant, it was recorded that the Claimant felt that she would be able to come back on 2 and 3 September for half days, the stage two meeting would be adjourned until that date, and that the Claimant could not use annual leave to cover periods when she was off sick. Ms Brown also recorded *"Operation – Disability leave"* on the notes which we find was intended to record that the Claimant would be given disability leave during her operation recovery period. The reason for adjourning

the meeting was to allow the Claimant to return to work if she was able to do so, or to obtain further information relating to the prognosis if she was unable to return at the time of the reconvened meeting.

82. The subsequent letter dated 26 August 2021 to the Claimant from Ms Brown, which summarised the discussions, notified the Claimant that the meeting would be adjourned until 2 September 2021, and it repeated the purpose of the meeting as previously described, and it also reminded the Claimant that she may be at risk of dismissal if Ms Brown did not believe that there would be any further improvements in her attendance. The Claimant was again notified of her right to be accompanied to the meeting.

83. We find that the Claimant had sufficient notice of the meeting of 2 September, it was part of an adjourned meeting, and she had sufficient time to prepare for it.

84. On 25 August 2021 the Claimant contacted Ms Brown to say that her hysterectomy appointment had been postponed again *"until at least until the end of the year"* and that she was pretty devastated and nervous about coming back to work, and she asked what happens when she has bad "endo flare-ups" and has to go off sick. The Claimant asked if she would be penalised and whether there were a maximum number of sickness [days] for which she could be off sick. In her evidence the Claimant said that she was worried about work and specifically about being set new absence targets that were impossible to meet without flexible working hours. The Claimant said *"I worried what might happen when I couldn't meet the targets, that I might lose my job at that point"* but it did not cross her mind that she might be dismissed earlier.

85. Ms Brown passed the Claimant's query to Mr Everitt in HR and Veronica Mitchell, (Head of Prevention, Adult Social Services). Ms Brown told the Claimant that this would be discussed at the reconvened stage two meeting on 2 September 2021.

86. The following day on 26 August 2021, Ms Brown sent the Claimant a letter summarising the discussions at the stage two meeting. Ms Brown said that she was sorry to hear that the Claimant's operation had been postponed and that her concerns about ongoing potential sickness would be discussed further at the meeting on 2 September 2021. In her covering email Ms Brown informed the Claimant that she would be on leave and would return on the date of the meeting, therefore the Claimant should raise any concerns or worries with Ms Mitchell.

87. It did not appear from the documents before us, nor the witness evidence, that the Claimant made any contact with Ms Mitchell. The issue of her return to work date appeared to have been left unresolved by both the Respondent and the Claimant. The Claimant says that she ignored the parts of the letter that were clearly from a template which she said that Ms Brown had told her to ignore, including the possibility of being dismissed.

88. The Claimant's evidence was that there was an agreement during the meeting on 20 August 2021 that she would return on 2 September on a phased return and she states that the written notes reflect this agreement. The Claimant says that *"we agreed to adjourn the meeting and reconvene on my first day back at work on 2 September."* The Claimant says that Ms Brown asked her to work at

home that day, to start at 9am and to phone the IT department to get her account reactivated, and to go over her emails until the meeting was reconvened at 9:30am. The Claimant also said that she had no reason to think that the meeting was anything to worry about.

89. We have paid close attention to what the Claimant says was agreed at the meeting on 20 August 2021 about her return, and we have also looked closely at the contents of the letter dated 26 August from Ms Brown to the Claimant which summarised those discussions and invited her to the second part of the meeting. We have noted that at the bottom of the third page under the heading "Outcome" Ms Brown wrote the following:

    "Having considered the information available to me at the meeting, I felt that it was right to adjourn the meeting pending your expected return in September. This is because we can discuss your health and ensure you are in a good place to be able to return to work safely and discuss any appropriate reasonable adjustments to help facilitate this."

90. There was no mention of a return on 2 September. There was however mention of an expected return at some point in September. Had there been an agreement that the Claimant would return on 2 September then we would have expected this to have been captured in the letter, and there is no credible reason why Ms Brown would have deliberately left it out if that is what was agreed. We are not persuaded to the level that we need to be satisfied (on the balance of probabilities) that there was an agreement to return on that date. The reference to 2 September in the meeting notes was simply a note made by HR of what the Claimant had said, it was not an agreement between the parties that the Claimant would return on that date.

91. On 1 September 2021 the Claimant sent Ms Brown a copy of her recent fit note. The fit note was for the earlier week and confirmed that she had been classed as unfit by her GP due to low mood and endometriosis in her email. The Claimant said *"here's my fit note. Look forward to speaking with you tomorrow."* There is no indication in that email that the Claimant intended to return to work the following day.

Reconvened stage two meeting – 2 September 2021

92. The stage two meeting was reconvened on 2 September 2021. The Claimant was in attendance but was unaccompanied.

93. It was recorded that the initial stage two meeting had been adjourned because the Claimant felt she may be able to return to work in some capacity on or around 2 September due to her improvement in well-being as she knew that her operation was going to be within a matter of weeks, and the purpose of adjourning until this date was to reassess her ability to return to work that day. The Claimant acknowledges that Ms Brown informed her of this purpose at the start of the meeting to which she agreed, however she said she thought that was incorrect and that the purpose was to discuss her phased return to work due to start that day, however she acknowledged that she did not say anything due to concerns she might be thought of as being pedantic.

94. The notes show that there was discussion around the subsequent postponement of the Claimant's operation until some point by the end of 2021

or the beginning of 2022. It was clear that there was no new date for the operation. The Claimant said that she would be having a medical review for pain management options scheduled for 23 September 2021. The Claimant has said that this shows that her health was likely to improve, however we cannot make that finding as this was merely an appointment – there was no mention of any specific new treatment nor the prospects of it working.

95. The Claimant was asked about her pain levels to which she replied that it was mild that day but had been mild to moderate over the past two weeks but that it had not stopped her doing anything.

96. We note that Ms Brown sought to clarify with the Claimant her thoughts on an improvement in her attendance given that the new information about her operation had changed things.

97. The response from the Claimant was that her pain was unpredictable and that if it fell onto a working day she would not be able to work and that she could not commit to being able to work her full contracted hours each week. The notes record the Claimant as saying *"I cannot guarantee to be available / cannot commit to being able to work those hours each week."* The Claimant's evidence to the Tribunal was that she told Ms Brown that she knew that *"it was impossible to guarantee any improvement in my attendance because of the nature of the disease."*

98. Instead, the Claimant suggested that she may be able to work flexibly to meet her hours including the possibility of working on a Wednesday and evenings where she might be able to undertake tasks such as research and information reports.

99. As regards evening and weekend work, the Claimant said that she could complete paperwork, deal with emails, work strategically on development projects (such as planning, research and correspondence), complete Information Reports and Complete Intervention Requests and complete research for both of these, and then on Wednesdays she could do Swift welfare call checks and work which needed to be done in core hours.

100. We note that Ms Brown expressed concern with the Claimant's suggestion about making up her time the following week out of hours. This was on the basis that due to the nature of work, phone calls would need to be completed within normal working hours. Ms Brown and Mr Everitt reiterated the Respondent's policy that employees had to make up time within the same week to which the Claimant said that it would put her at a disadvantage as she only worked on Thursdays and Fridays.

101. We understand from Ms Brown that the service that the Department provides involves inter-agency working and that is only possible between the normal opening hours of those other agencies. Moreover, the service requires a manager to be available to deal with any safeguarding or management concerns that may arise, and this was only available during normal working hours. We understand from Ms Brown that the Respondent has an Emergency Duty Team which provides out of hours service for emergency safeguarding matters, and it would be necessary for a manager with specialist knowledge of the service to be on duty to provide oversight rather than to rely on the Emergency Duty Team. Ms Brown said that much of the service provision can

only take place during normal working hours due to the availability of key stakeholders.

102. As to what work the Claimant could have completed out of hours, it was Ms Brown's evidence that there was a limited amount of administrative tasks, and in any event a manager would need to be present in case of any immediate safeguarding concerns when completing these tasks. Ms Brown says that without this the safety of service users would be compromised, and the only option in order to allow this to occur would be to ask another member of staff to adjust their working hours, however Ms Brown considered that to be unreasonable as it may involve involuntarily changing the working pattern of another manager on a permanent basis, contrary to their terms of employment. In addition this could have reduced management resourcing during ordinary working hours and left a potential gap in safeguarding provision during ordinary working hours.

103. Ms Brown also told us that it was unpredictable when the Claimant may be able to work and no established timings were proposed by the Claimant. In Ms Brown's view the Claimant was seeking to work entirely flexibly, and as such it was not reasonable to expect a manager to effectively be on call on a 24 hour basis in order to be available when the Claimant may feel able to work.

104. There was a difference of opinion between the Claimant and Ms Brown about how much time the Claimant spent on research work. The Claimant said that it was in the region of 60% of her time, Ms Brown said that it would have been closer to 10%. We had no evidence before us to enable us to make a finding, however we find that Ms Brown was far more likely to be in a position to know how much research work came into the team, and given the changes in the team following the Pandemic it is likely that 10% was perhaps more realistic.

105. During the stage two meeting the Claimant was asked if it was her hope to return to work that day to which she replied that it was and that she had been speaking to IT about a laptop. The Tribunal noted that the Claimant did not state during the meeting that Ms Brown knew that she was coming back that day as there had been an agreement. Had there been an agreement to work that day, we would have found it strange that the Claimant had not mentioned it.

106. We also note that Ms Brown expressed concern about setting targets for the Claimant.

107. There was a break of approximately 30 minutes, during which time Ms Brown discussed the matter with Mr Everitt and made the decision to dismiss the Claimant. Ms Brown discussed this with Ms Mitchell who approved the decision. It was during this break that the Claimant says that her husband came into the room and told her that his teaching schedule had been changed at the last minute and that he would be working on Thursdays and Fridays and could look after their child if the Claimant needed to make up work on Mondays and Tuesdays.

108. Upon returning to the meeting Ms Brown informed the Claimant that she had no alternative other than to issue her with formal notice to end her contract employment due to lack of capability due to ill health. This was on the basis of

concerns around the Claimant's ability to attend work regularly to fulfil the responsibilities of her role, and this included concerns about an improvement in her attendance at work due to her physical health being no longer likely to improve within the short term and the unpredictability as to the days she would be able to work which would cause issues with work, allocation and timely completion of that work.

109. Ms Brown said that she felt that if the Claimant was to return with target set for her absence, based upon her physical health at that time, her previous absence history and the advice from previous occupational health reports around her prognosis, there would be a high chance of these targets being exceeded. Ms Brown said she felt this would be setting the Claimant up to fail, and would likely have an impact on her mental well-being and physical health. The Claimant was informed that she would be given one month's paid notice and that her last date of employment would be 2 October 2021. The Claimant was advised of her right to appeal.

110. In her evidence Ms Brown has placed considerable weight on the Claimant's previous attendance. As the Claimant worked two days per week and had accrued 76.5 days sickness absence since 30 July 2020, Ms Brown noted that the Claimant had worked 36.5 out a possible 114 working days, thus she had an attendance rate of 32.02%. Ms Brown was clear in her evidence that *"this level of absence was entirely beyond any adjustment that could reasonably be made to the Sickness Absence Management policy, especially given that no definitive end date to this level of absence was in sight."* Ms Brown in her evidence placed weight on the fact that the Respondent pays its officers from the public purse and that it was prudent upon the Respondent as a local authority to ensure that its employees attended work and carried out their duties *"to ensure that the Council's fiduciary duties to the public are being properly exercised."*

111. The second page of the meeting notes includes a list of bullet points which summarises the discussions. Ms Brown confirmed that she had not seen this note until she saw it in the hearing bundle and she believes that it was prepared by Mr Everitt, however she agrees with the contents. The first paragraph records the rationale for dismissing the Claimant and it states:

*"Due to conversations, we have had today and previously, I have concerns around your ability to attend work regularly to fulfill the role. **unable to commit to being able to work the hours each week for health reasons**. Physical heath is not going to change in the immediate future and because of the likelihood of future absences, it's something the service cannot accommodate any further."* **[bundle page 556]**

112. We note that the font of this page is different from that used for the notes of the meeting. We also note that the document makes use of the third person when summarising the decision. The Claimant has argued that these two factors suggest that the decision to dismiss had already been made in advance. We do not agree. Ms Brown was clear in her evidence that she had not produced this document nor had she seen it before it was in the hearing bundle.

113. The Tribunal has found Ms Brown to be a clear witness who gave a credible account in her evidence to the Tribunal and have found no reason to doubt her honesty. Accordingly, we find that this page was likely produced by Mr Everitt

in HR who is no longer employed by the Respondent and who did not attend to give evidence. It appeared to us that the second page was Mr Everitt's summary, and it was possibly based on a template. There was certainly nothing in that document which suggested to us that the decision had already been predetermined.

114. Ms Brown was clear in her evidence to the Tribunal that she had regard to the possibility of a phased return for the Claimant however this was not implemented due to concerns that her return to work was not likely in the near future and also due to concerns about continued absences. Ms Brown was also clear that she did not consider alternative employment for the Claimant prior to dismissal. Ms Brown denied that the Respondent required the Claimant to return to work on a full time basis immediately following her sickness absence. Ms Brown pointed to the previous phased return following the Claimant's first long period of sickness absence, and she said that there was no reason why a similar phased return could not have been arranged if it this had been thought appropriate, however in the view of Ms Brown the Claimant had demonstrated that she would not be able to carry out her role and there was no date in the near future where this would be the case.

Appeal against dismissal

115. On 16 September 2021, the Claimant filed her appeal against the decision to dismiss her. The Claimant said her appeal covered three main areas:

i. She was completely unaware of the possibility that her job was at risk;

ii. Ms Brown did not provide proof of her medical grounds for dismissal;

iii. Reasonable adjustments were not made in line with the Equality Act.

116. Within her appeal, the Claimant said that Ms Brown had assured her on multiple occasions that her job was safe and that she told her that the stage one and stage two letters were templates, and not to be alarmed at the mention of the possibility of dismissal and that it did not apply to her. The Claimant said Ms Brown told her that she would support her in her return to work and that her job was safe. The Claimant said this was the reason she did not have anyone to accompany her to the meeting as she didn't feel there was any reason to. The Claimant also said that she thought she was returning to work on 2 September so she was stunned when she was dismissed.

117. Much of the Claimant's appeal sought to clarify her comments to Ms Brown in the stage two meeting about her ability to attend work regularly. The Claimant did not seek to suggest that she had been misquoted. The Claimant also admitted that when Ms Brown asked her how she would improve her attendance she did say that her pain was unpredictable, and that she couldn't guarantee that her attendance would approve, but that she had no idea that she was incriminating herself, because she didn't know that her job was at risk, and that she was simply being honest.

118. The Claimant admitted that her attendance had been less than ideal, but she said it didn't necessarily mean that would continue to be so especially if reasonable adjustments were made. The Claimant said that when she said she could not guarantee she would be able to do 15 hours each week, it did not

mean she was likely to miss work each week, rather it meant that there would be weeks when she wouldn't be able to work. The Claimant said had she known she could be dismissed she would have realised the importance of making this clearer.

119. The Claimant said that she did not say that if she had pain on the workday then she wouldn't be able to work, she said that if the pain was severe she would not be able to work.

120. The Claimant reiterated that there was no medical evidence that she would be unable to return to work or that her attendance would continue to decline. The Claimant said she decided she was ready to return on 2 September despite the operation having been delayed and that there was no medical reason why she could not work as long as adjustments have been made for her. The Claimant confirmed that working on Mondays and Tuesdays were difficult but not impossible due to childcare issues, but she said that she could easily make up any time in the evenings and on weekends to do the following:

i. Complete any paperwork.

ii. Write and respond to emails.

iii. Work strategically on development projects.

iv. Complete information reports and intervention requests and undertake necessary research.

121. The Claimant also said that on Wednesdays she could do calls and any other work that needed to be done in core hours. The Claimant said that none of this was discussed and every suggestion she made was rejected without a justification.

122. The Claimant said that she could easily meet targets set for her provided those targets were reasonable, and that her work was not time sensitive or had a *"decent grace period for completion."* The Claimant said *"If I were allowed to complete my tasks a few days later, then I don't see what the issue is."*

123. The Claimant referred to the flexible working policy and the requirement that employees are expected to make up any last time within the same week. The Claimant said that given the unpredictability of her pain and her normal working days, this put her at a distinct disadvantage.

124. The Claimant said that she was the first to admit that the Respondent's sickness absence policy was very generous, but she felt that she had been punished for having two conditions which forced her to be off work. The Claimant noted that Ms Brown was kind and supportive throughout absences, but said that this had made her decision to dismiss her even more shocking and hurtful.

125. The Claimant said that there was a crucial fourth point to be considered and that was the standard of her work was excellent. The Claimant said that the only reason she had been dismissed was because the operation had been delayed, and that she had since spoken to her surgeon and that he had rearranged her operation to happen on 29 September 2021. The Claimant said

that this new information should make the Respondent rectify the decision to dismiss her. The Claimant subsequently provided the Respondent with a copy of the letter from the hospital, confirming the date of her surgery.

126. The appeal hearing did not take place until 30 November 2021 due to the Claimant having a period of recovery following her hysterectomy operation. The appeal was chaired by Lorrayne Barrett (Head of Quality Assurance and Performance Improvement). Ms Barrett was supported by Paul Wardle from HR who had not been involved in the matter previously. Mr Everitt from HR was also present and was asked some questions on the decision to dismiss. The Claimant was accompanied by her friend Ian Finlay.

127. We have reviewed the Respondent's policies as regards the conduct of an appeal hearing. Page 5 of the sickness absence management policy simply states that *"an employee may appeal against any formal sanction or dismissal resulting from any of the formal stages. Please see Disciplinary Policy and Procedure P303 for further detail about the appeal process."* An examination of the disciplinary policy and procedure does not indicate whether the appeal is to be a rehearing of the entire case, or a review of the original decision. Having reviewed the notes of the appeal hearing which will be discussed further below, as well as having heard the evidence of the witnesses, it is clear to us that the appeal was a review of the original decision and not a rehearing. We also note that there was no express or specific provision by which new evidence might be considered at the appeal stage.

128. We have carefully reviewed the notes of the appeal hearing. The Claimant has suggested in her claim that at some point she was not allowed to speak, however she has since confirmed what she meant was that this was a formal meeting and as such she did not seek to interrupt people when they were speaking. The Claimant has also suggested that Ms Barrett had cut her off speaking or presenting her case during the appeal, however we do not find that to be the case. Having considered the record of that meeting (discussed below) together with Ms Barrett's witness statement and her responses to cross examination, we find that she approached the hearing in a fair, courteous and professional manner, giving the Claimant the full opportunity to present her case.

129. The Claimant's appeal hearing followed a clear structure. The Claimant presented her appeal and read out her opening statement and provided more detail on the points she sought to make. The opening note was incorporated into the notes of the hearing, and the Claimant was questioned by Ms Barrett.

130. The management case was presented by Ms Brown and Ms Mitchell, and they produced a written summary of the reasons for dismissal. The Claimant had the opportunity to consider this and to provide her comments in advance of the hearing. Ms Brown and Ms Mitchell were questioned on the management case by both the Claimant and Ms Barrett.

131. We do not intend to recite the entire contents of the appeal hearing in this judgment, and will instead focus on the key arguments and disputes of fact between the parties.

132. As regards the suggestion that the Claimant did not know that she was at risk of dismissal, Ms Brown denied this and referred to the letters sent to the

Claimant (referenced above) together with the sickness absence policy, which made it clear that dismissal was an option. The Claimant disputed this and was adamant that Ms Brown had told her that the letters were a template that she had to follow and to ignore the references to dismissal.

133. There was discussion around the Claimant's return to work following her second long period of sickness absence. The Claimant challenged aspects of the Occupational Health report and said that whilst she had not been ready to return to work at the time of the report in July 2021, she felt she was *"very nearly ready to return but didn't feel totally ready at that precise moment."* There was consideration of why the Claimant could not return to work until 2 September, and the Claimant confirmed that she wanted to give her changed medication (for her mental health) a chance to settle in, and that the beginning of September seemed the right time, and that by the end of August she was nearly there. Ms Brown disputed that there had been any agreement that the Claimant would return to work on 2 September.

134. Ms Brown said that the Claimant's return appeared to have more to do with financial concerns rather than being fit to return to her duties. Ms Brown relied upon comments in previous meetings which she said suggested that the Claimant wished to return to build up sick pay entitlement for the period after her hysterectomy.

135. There was also discussion about the reason for the Claimant's dismissal. The Claimant suggested that the sole reason was due to her operation being postponed, whereas Ms Brown said that it was due to concerns around the Claimant's ability to attend work regularly, and concerns that her attendance was no longer likely to improve in the short, medium or the long term. It was clear that Ms Brown placed weight on both past absences and also what she regarded as the Claimant's likely absences in the future.

136. On the issue of future attendance, Ms Brown placed significant weight on the Claimant's own comments during the stage two meeting about not being able to guarantee to commit to her substantive hours. The Claimant said that what she had meant when she said that was that there would be occasions when she would not be able to work rather than weeks on end when she couldn't do so. The Claimant added that *"I don't see how the odd week would make things difficult from a management standpoint, even in the above worst case scenario it wouldn't in case allocation or make it difficult to know if the work could be done on time."*

137. Ms Brown said that issuing an attendance target for the Claimant would be akin to setting her up to fail, and she repeated that alternative duties were not appropriate.

138. There was also consideration of the Claimant's suggestion that she be allowed to work flexibly by making up time out of hours in evenings and weekends or to carry over tasks until the following week to be completed on the Monday. The Claimant said this would be a reasonable adjustment to allow her to work in this way. The Claimant also referred to the flexible working policy within Social Services which required that missed hours should be made up in the same working week and she said that this was discriminatory with respect to disabled people whose conditions were unpredictable.

139. The Claimant also said that she would be able to make this arrangement work by working on some Wednesdays and also her husband had "stuck his head around the door" to say that he could possibly rearrange his working arrangements to allow her to work on some Mondays and Tuesdays. The Claimant said that this offer was ignored by Ms Brown and Mr Everitt during the stage two meeting as they had already made their minds up.

140. With respect to making up her hours, the Claimant said that she could easily do research over the weekend and upload it to the person requesting the information on the Monday, and even if she needed to speak to the service user requesting the information she could do that on the Monday so there would be no delay. The Claimant added that she would still be able to report safeguarding issues straightaway. The Claimant said that the role did not involve making emergency calls and that calls were just to check and see if a community service was needed, and that she couldn't see why they couldn't wait and she did not consider that there would be any delay.

141. The response from Ms Brown was that the Claimant had always said that she would not work on Mondays and Tuesdays due to lack of childcare, and that Wednesdays were not possible due to the Claimant's outside interests.

142. We find that the Claimant's suggestion that her husband may be able to rearrange his own working arrangements on Mondays and Tuesdays was not raised by the Claimant until after the break in the adjourned stage two meeting, and only after Ms Brown had issued the Claimant with her decision to dismiss her. In addition, the offer to rearrange working hours appeared to be quite vague and certainly not a guarantee that the Claimant would be able to work those days. We find that there was a definite lack of clarity from the Claimant about when she would have been able to work.

143. We also find that the Respondent had a policy that flexi-time hours should be made up within the same week. This is uncontentious as it was agreed by the Respondent that such a policy existed within Social Services. However we also note that during the appeal hearing Mr Everitt from HR made it clear that there was no requirement from the Respondent that time off sick had to be made up. This was not challenged by the Claimant during the appeal hearing, nor in these proceedings. Whereas the Claimant had asked to be able to make up missed hours either during evenings, at weekends, or the following week, there was no requirement upon the Claimant to make up missing hours for sickness absence. We also note that Mr Everitt went on to add during the appeal hearing that time spent off sick must be recorded as sickness absence.

144. We have heard from Ms Brown as to the purpose of this policy within Social Services. Ms Brown said that it was because *"the service as constantly changing in terms of what was required, and these constant changes required knowledge that staff would be able to work the required hours on a week by week basis."* Ms Brown said that staff could still apply for flexible working arrangement in other ways outside of flexi-time, such as requesting compressed hours, part time hours, or a job share. We also heard from Ms Brown that she would not have agreed to the Claimant rolling over missed hours into the following week as she would have accrued a deficit in hours that she would not have been able to make up given that she only worked two days per week.

145. Ms Brown also reiterated that allowing the Claimant to make up time due to sickness the following week or out of hours in the evenings or at weekends would not be appropriate due to concerns about service delivery.

146. Ms Brown said the basis for this was because the Claimant's role was part of the customer facing service for adult social services and the role included interacting with vulnerable adults and their families to ensure they were aware of the services available to support them living at home independently. Part of this was the need to ensure that timely advice and information was provided and that any delays would have a negative impact upon frontline social work practitioners completing their work. According to Ms Brown, this work needed to be carried out during working hours (Monday to Friday 8am to 6pm) when management support was available, particularly in the event of any safeguarding issues arising.

147. Ms Brown gave evidence on the impact upon the service from the Claimant's absences. We heard that the Claimant's first period of long term sickness caused some disruption to the Respondent as it had to move other staff in to support the team thus taking resources from other parts of the organisation. The Claimant's second period of absence was covered by reallocating her duties and reorganising some of the work of the team. We heard that this created a great stress upon the team because of the volume of calls received in the team with work spread across a smaller pool of staff. The Respondent appeared to have coped without the Claimant for the two previous periods of sickness absence of many months at a time but this came at a cost of increasing the workload for the Claimant's colleagues. We noted that the Claimant worked in a busy area which delivered an important function to vulnerable people in the local community and that a quick turnaround time would be needed so that people could be pointed in the right direction where they may find support.

148. We note that Ms Brown was also concerned that not having knowledge of when the Claimant would be working would make it difficult to plan or to know when work would be completed, or if it would be completed within the required time frame.

149. As regards the speed of dealing with calls, Ms Mitchell said that the Claimant had only been referring to one type of call, and that the team provided new services, including working with the Social Care Community Engagement team ("SCCE") which had a faster turnaround and that the service had changed significantly over recent months and there was no fixed timeframe to respond but the information reports should be provided within two days, assessments could vary depending on complexity, but should be provided within a few days, and telephone assessments had the turnaround in a similar timeframe. The Claimant said that she would still be able to meet this deadline if she was granted flexibility when she needed it, to allow her to work over the weekend or on a Monday or a Tuesday.

150. The Claimant also maintained that she had been dismissed without medical proof. We find that the reports from Occupational Health were prepared by qualified medical professionals and as such the Respondent was entitled to rely upon them.

151. The Claimant said that she would consider reinstatement or redeployment and would be grateful of the opportunity to do so, although he felt that she had been badly treated by management and HR and her old team would not be a comfortable environment to return to, even when Mr Wardle pointed out that Ms Brown was no longer managing the team. When asked what other outcome the Claimant would want, she said she would like to receive a redundancy payment if the role was to be made redundant or if not *"some compensation for the way she being treated, but not millions"* just a payment to compensate her.

152. Ms Barrett was unable to make a decision that day due to the amount of information presented, and the hearing was reconvened on 7 December 2021. The Claimant was informed that her appeal had not been upheld on a number of grounds which are summarised below.

i. Management had the benefit of Occupational Health advice available at the stage two meeting, and the advice was that there was no clear timescale for the Claimant's return to work.

ii. The Occupational Health advice was medical evidence and it had been prepared by a professional qualified occupational health adviser.

iii. Whereas the Claimant said at the stage two meeting that she was able to work, the information gathered did not assure management she would be able to appropriately undertake the duties and hours required for her role and to sustain her attendance at a reasonable level.

iv. Reasonable adjustments had been considered by management, however working at evenings and weekends would not have been reasonable due to the quick turnaround needed for her work, and also the lack of management support available at those times.

v. The Claimant's suggestion that she might be able to possibly work on Mondays or Tuesdays was not a firm offer and the Claimant only gave an indication at this could be a possibility depending upon her other commitments.

vi. Sickness absence due to a disability should still be recorded as sickness absence, although it should be noted where this absence was due to a disability.

vii. The dismissal was because of concerns around the Claimants ability to attend work regularly to fulfil the responsibilities of her role and that her health was no longer likely to improve within the short term and there was unpredictability as to the days she may be able to work which would cause issues with work allocation and timely completion.

153. By way of summary, Ms Barret said that due to a combination of factors, including that the proposed adjustment could not be implemented, and in view of her sickness absence record, the decision to terminate had been reasonable at that time based upon the information available to management at that time.

154. As regards the alleged assurances which the Claimant said that Ms Brown gave her that she would not be dismissed, Ms Barrett did not address this directly but said that in her experience, this was an incredibly difficult process

to experience, especially when the Claimant's work had been good and the relationship with her line manager has been positive. Ms Barrett said that every effort had been made to reassure and support the Claimant, but she did not find that Ms Brown had intended to mislead her. Ms Barrett determined that the Claimant would have been on notice that dismissal was a potential outcome even if in her perspective the prospect was slim.

155. We note that this alleged assurance from Ms Brown was never put in writing, and nor did the Claimant ever raise this with her in writing either. The closest two pieces of evidence in the bundle was the email from Ms Brown to the Claimant on 13 May 2021 **[bundle page 89A]** where Ms Brown sent a very supportive message to the Claimant indicating that she would do all she could to help keep the Claimant in work. However, that email falls far short of saying that she would not be dismissed.

156. We were also referred to the notes of the appeal hearing where this issue was discussed. The following comments from the notes were attributed to Ms Brown:

"We did have multiple conversations around our return to work and specifically safety of job and dismissal not applying – did have a conversation regarding the letter, and the fact that the letter was a template. At this point at the initial stage 2 meeting discussion at the beginning of August, this was supportive. I'm not sure what other occasions you are referring to. Can you please clarify this." **[bundle page 313]** and

"Conversation 09 August – advised AI of the move to Stage 2 proceedings. Reassured AL at this stage was a supportive meeting to explore potential return to work. I did talk to AI about the harshness of the templated letter being sent out, particularly last paragraph referring to dismissal but in context to reassure at this stage is a 'supportive' meeting. But that dismissal may still be an end result further down the line." **[bundle page 319]**

157. The Claimant has relied upon these passages in these proceedings as lending support to her argument that she was told by Ms Brown that she would not be dismissed. This passage gives the impression that in the appeal hearing Ms Brown admitted to telling the Claimant that she was not at risk of dismissal.

158. We note that within her witness statement Ms Barrett said that the notes of the appeal hearing were accurate. However, in her oral evidence Ms Brown said that the note was not entirely accurate and that there was an issue with the punctuation and that the part of the sentence regarding dismissal not applying followed by a hyphen, was intended to read as a proposition or a question which she then answered after the hyphen by saying that they did have a conversation about the stage two letter being a template and that Ms Brown was being supportive, but she did not say that the Claimant would not be dismissed.

159. Having considered all the evidence before us, and on the balance of probabilities, we cannot find that Ms Brown gave the Claimant an assurance that she would not be dismissed. We find that the minutes of the appeal hearing were not verbatim and that they suffered from a lack of attention to detail and a failure to adequately check them after the hearing. We understand that the notes of the hearing were prepared by a junior member of staff.

160. It is an unfortunate feature of this case that on several occasions written records have not been entirely complete. Whilst we accept that Ms Brown and the Claimant had good relations throughout the latter's employment, we find that it would be unusual for someone in Ms Brown's position to have given such an assurance which would run contrary to the Respondent's own sickness absence policy. Moreover, none of these alleged assurances were ever committed to writing by Ms Brown. Despite having received letters which said she may be dismissed, at no point did the Claimant contact Ms Brown to query her alleged assurance that she would not be dismissed.

161. The Claimant's conduct was at odds with someone who had been given an assurance that they would not be dismissed. There were numerous occasions where the Claimant said that she was either worried or concerned about the next stage and she repeatedly asked for clarification about what would happen if she continued to be off sick. We find that such behaviour is at odds with someone having been told to "ignore the scary language in the letters" and having been given an assurance that they would not be dismissed.

162. We also note that the Claimant has made use of quotations within her witness statement, however it transpired during cross examination that not all the quotes were verbatim, and that the Claimant said that she had used quotes to distinguish things from her own narrative. When asked why she was worried if she had been told that she would not be sacked, the Claimant said that Ms Brown did not say that you are not going to be sacked in those words, she had said to ignore the scary language on dismissal as these do not apply to you. Given those answers from the Claimant it appeared to the Tribunal that the Claimant's interpretation of what Ms Brown had said was not clear and that she may have misinterpreted what Ms Brown had said to her.

163. We find that it is far more likely that Ms Brown found it quite difficult to have these sorts of conversations with the Claimant as someone she clearly worked well with and had good relations with. We find that Ms Brown told the Claimant that she had to send these letters and that they were templates, and that she was going to do her best to support the Claimant to keep her in work. This was clear from the earlier email of 13 May 2021. This does not mean that we find that the Claimant has lied on this issue – we have found the Claimant to be a generally reliable witness, however some of her responses which we have referred to in the preceding paragraph suggest to us that the Claimant has misinterpreted the assurances from Ms Brown and formed the mistaken view that she was unlikely to be dismissed, especially given that on numerous occasions she felt that she was about to have an operation.

164. We note that it is entirely possible that Ms Brown could have given this assurance on at least one or a number of occasions, however we have no evidence to support that conclusion. We are not satisfied to the level that we need to be (on the balance of probabilities) that these comments were made. The inference we can draw from the parties' conduct is that they were not made. We would need more evidence for us to draw an inference that the comments were made.

165. It is clear from the letters and the provision of the Respondent's sickness absence policy to the Claimant that she was aware that dismissal was a

potential outcome, and further that she had the right to be accompanied to the meetings but she chose not to exercise that right.

166. Whereas Ms Barrett dismissed the Claimant's appeal, she offered to provide the Claimant with a reference which reflected the quality of her work. However Ms Barrett noted that the Claimant's circumstances had changed, she had undergone a hysterectomy and she had reported that her health had improved considerably, and moreover the Claimant had expressed a positive effect from taking different anti-depressants. Whilst the decision to dismiss the Claimant had been upheld, Ms Barrett offered the Claimant the opportunity to be reinstated to her old role or to enter the Respondent's redeployment register for 12 weeks and given access to information regarding roles and preferential consideration for appropriate roles, although she would not be paid that period it would enable her to see alternative employment. This was conveyed to the Claimant by letter dated 8 December 2021. We note that the Claimant was not told that reinstatement would also have involved giving her back pay for her loss of wages.

167. We note that the decision from Ms Barrett was based upon the validity of the original dismissal and it was entirely focused on the previous circumstances and not how things presented them at the time of the appeal.

168. We note that the Claimant has referred to a comment made by Ms Mitchell during the appeal hearing. Ms Mitchell was asked by Mr Wardle if it would be possible to reinstate the Claimant and having made reference to the need to get work completed, she said that she would share the same concerns that the Claimant had mentioned earlier. We have looked at the Claimant's concerns about returning to her team and she said that she felt that she had been badly treated by management. We note that by this time Ms Brown had left the team.

169. The Claimant commenced ACAS early conciliation on 8 December 2021.

170. On 13 December 2021. The Claimant sent an email to Ms Barrett, which she said she would like to accept the offer to be put into redeployment however she didn't feel comfortable returning to her old job. Two hours later, the Claimant emailed Miss Barrett again to say that she had given the matter some more thought, and she had decided that she was too hurt about the whole situation and felt that she had been so unfairly treated by the Respondent that she could not accept the offer of redeployment after all.

171. Ms Barrett contacted the Claimant one further time the following day to ask the Claimant to reconsider her decision. The Claimant's evidence was that she found this strange, she did not know why Ms Barrett was so keen to get her into redeployment as she barely knew her. The Claimant has suggested that there were other reasons at play as Ms Barrett had forwarded the emails to HR. The Claimant declined the offer on 17 December. The Claimant's evidence was that she was profoundly affected by how she was treated by the Respondent, that it exacerbated her depression and made it difficult to trust people and that she is cagey with everyone now. The Claimant said that part of her had been irrevocably damaged by what had happened and that she had trusted Ms Brown but felt let down by management personally and professionally.

172. The Claimant filed her ET1 claim form on 17 February 2022.

173. During the tribunal hearing the Claimant was questioned about her decision to refuse reinstatement and decline to join the redeployment pool. The Claimant said that this was due to various factors including things said in the management case during her appeal. The Claimant helpfully referred us to those sections during the hearing some of which we will refer to below.

174. In the management case Ms Brown had denied telling the Claimant that she would not be dismissed or that punitive measures would not apply to her, and she said she also told the Claimant that she could be accompanied to the formal meetings. The Claimant has disagreed with both and we have already addressed these in this judgment.

175. The Claimant also challenged Ms Brown's comments about reverting to Occupational Health to amend the report with respect to when she might be able to return to work. It appeared to the Tribunal that this was no more than a difference in recollection.

176. The Claimant also disputed the management version of the end of the first part of the stage two meeting on 20 August 2021 as she said that she recalled stating that she would definitely return to work on 2 September and that Ms Brown had discussed this with her. Again, it appeared to the Tribunal that this was no more than a difference in recollection and we have already made findings above and about the record of that meeting.

177. The Claimant also took issue with the comment that the Claimant might be returning to work for financial reasons. During the hearing the Claimant accepted that this was a factor in her decision. The Tribunal understands the point which was being made was that the Claimant may not have been well enough to return but was forcing herself to do so for financial reasons. We find that this was not a criticism of the Claimant.

178. The Claimant has also taken issue with the management case appearing to disagree that the postponement of her operation was the sole reason for dismissal. The Claimant's version was that she asked Ms Brown if this was the reason and she had replied yes. We do not consider that a great deal turns on this statement as the cancellation of the operation was clearly a factor in whether she would be able to provide effective attendance in the near or foreseeable future.

Law

Discrimination

179. Part two of the Equality Act 2010 sets out the protected characteristics of disability under section 9 and sex under section 11.

180. Section 39 Equality Act 2010 provides:

Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

…

(c) by dismissing B;

…

Burden of proof

181. Section 136 Equality Act 2010 provides:

…

(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.

182. There is a two-stage process. At the first stage, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. At the second stage, if the Claimant is able to raise a *prima facie* case of discrimination following an assessment of all the evidence, the burden will then shift to the Respondent to show a non-discriminatory reason for the difference in treatment.

183. Guidance to Tribunals on the burden of proof can be found in a number of cases including ***Igen v Wong*** **[2005] IRLR 258** which was approved in ***Madarassy v Normura International Plc*** **[2007] EWCA 33**.

184. In ***Igen*** the Court of Appeal cautioned tribunals *"against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground"* [51]. Similarly In ***Madarassy*** Mummery LJ cautioned:

> *"…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 act of discrimination."* [56]

185. More recent guidance on the burden of proof can be found from the case of ***Efobi v Royal Mail Group Ltd*** **[2021] ICR 1263**. Here the Supreme Court reiterated that it is for the Claimant to prove facts from which a tribunal could conclude, in the absence of an explanation, that an unlawful act of discrimination had occurred – however this may include consideration of the employer's evidence and not just the Claimant's evidence. It was noted that:

> *"…the Court of Appeal in Igen Ltd v Wong, at para 24, made it clear that the employment tribunal could take account of evidence from the respondent*

which assisted the tribunal to conclude that, in the absence of an adequate explanation, discrimination by the respondent on a proscribed ground would have been established." [21] and further:

"The central point made in this passage is that section 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not "there are facts" etc. I agree that this is what section 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was already what the old provisions required as they had been interpreted by the courts. As discussed at paras 20—23 above, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case." [26] and:

"… the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. This is not the whole picture since, as discussed, along with those facts which the claimant proves, the tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. But that does not alter the position that, under section 136(2) of the 2010 Act just as under the old A provisions, the initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent." [30]

186. Accordingly, only once that first stage is satisfied, does the burden then shift to the employer to explain the reasons for the treatment and to satisfy the Tribunal that the protected characteristic played no part in those reasons – however a tribunal is entitled to take into account evidence from the Respondent at that first stage.

187. Mere unreasonable treatment by an employer "casts no light whatsoever" as to the question of whether an employee has been treated unfavourably - ***Strathclyde Regional Council v Zafar*** **[1998] IRLR 36**. This has also been followed by the Employment Appeal Tribunal in ***Law Society and others v Bahl*** **[2003] IRLR 640** where it was held that mere unreasonableness is not enough as it tells us nothing about the grounds for acting in that way. Unreasonable behaviour can go to the credibility of a witness who is trying to argue that their actions were not motivated by the characteristic in question. If there is unreasonable treatment then a Tribunal will more readily reject the employer's explanation for it than it would if the treatment had been reasonable. In any event, a Tribunal must also take into consideration all potentially relevant non-discriminatory factors which could realistically explain the conduct of the alleged discriminator.

Direct Discrimination

188. Section 13 Equality Act 2010 provides:

"Direct discrimination

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

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

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

…"

189. There are two aspects to direct discrimination that must be considered by the Tribunal. The first is the alleged less favourable treatment, and the second is the reason for the treatment complained about with a causal link between the two.

190. As above, less favourable treatment does not mean unreasonable treatment, but it also does not mean detrimental treatment or unfavourable treatment or simply different treatment. There must be a comparison either actually or hypothetically that shows less favourable treatment. It is the treatment rather than the consequences of the treatment that are the subject of the comparison - ***Balgobin v Tower Hamlets London Borough Council*** **[1987] ICR 829.**

191. As regards what may amount to less favourable treatment, this does not require a Claimant to show that objectively they are less well off as a result of the conduct complained of. It may be sufficient for a Claimant to reasonably say that they would have preferred not to have been treated differently - ***Chief Constable of West Yorkshire Police v Khan*** **[2001] UKHL 48.** In that case it was held:

"It cannot, in my opinion, be enough… simply to show that the complainant has been treated differently. There must also be a quality in the treatment that enables the complainant reasonably to complain about it." [76]

192. It is insufficient for a Claimant to argue that the Respondent would have treated them less favourably in certain circumstances. The alleged less favourable treatment must actually have occurred in order for liability to arise - ***Baldwin v Brighton and Hove City Council*** **[2007] IRLR 232.**

193. Whether less favourable treatment is proven requires a comparison to a suitable comparator. The comparators do not need to be identical, however there is a general requirement that there be no material difference between the people being compared either actually or hypothetically. It was held in ***Macdonald v Ministry of Defence*** **[2003] ICR 937** that:

"The sex of the comparator must, of course, be different. But, if the relevant circumstances are to be same or not materially different, all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator. They do not have to be precisely the same. But they must not be materially different." [64].

194. Section 23 Equality Act 2010 provides:

> *"Comparison by reference to circumstances*
>
> *(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*
>
> *(2) The circumstances relating to a case include a person's abilities if—*
>
> *(a) on a comparison for the purposes of section 13, the protected characteristic is disability;*
>
> *(b)…"*

195. In cases where there is no actual comparator it is permissible for a Tribunal to concentrate on asking why a Claimant was treated in the way he was. A Tribunal may ask the question was the Claimant treated in this way it because of the proscribed grounds? Where it was on the basis of the proscribed grounds then there will need to be an examination of the facts of the case. Where it is for some other reason then the application will fail - ***Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland)* [2003] IRLR 285.** It may therefore be appropriate for the Tribunal to ask what is known as the "reason why" question, essentially did the Claimant receive less favourable treatment than others because of the protected characteristic?

196. For direct disability discrimination to occur, the less favourable treatment must be "because of" disability rather than something related to it. However whilst the protected characteristic needs to be a cause of the less favourable treatment it "*does not need to be the only or even the main cause"* - paragraph 3.11 of the Equality Human Rights Commission Employment Statutory Code of Practice ("the EHRC Code"). Therefore where there is more than one reason put forward for why the Respondent treated the Claimant how they allegedly did, the discriminatory reason need not be the sole or even principal reason for the actions - it only needs to have had "a significant influence on the outcome" - ***Owen & Briggs v James* [1982] IRLR 502 (CA).** It follows that there must be some evidence that the Respondent knew of the disability – ***Patel v Lloyds Pharmacy Ltd* UKEAT/0418/12**.

197. The Tribunal will need to consider the reason why the Claimant was treated less favorably – ***Nagarajan v London Regional Transport and others* [1999] IRLR 572**. Generally, motivation of the alleged discriminator is irrelevant to a direct discrimination claim. It was held here that if the protected characteristic had a *"significant influence on the outcome"* then discrimination was made out [886].

198. In ***Macdonald*** the court applied the "but for" test which was identified in ***James v Eastleigh Borough Council*** **[1990] ICR 554**, and held that *"the issue is whether the complainant would have received the same treatment from the employer "but for ... her sex.""* [65]. Further consideration of the but for test was provided in ***Ahmed v Amnesty International*** **[2009] IRLR 884** where it was held:

"if the discriminator would not have done the act complained of but for the Claimant's sex (or race), it does not matter whether you describe the mental process involved as his intention, his motive, his reason, his purpose or anything else—all that matters is that the proscribed factor operated on his mind." [37].

199. However in ***R v The Governing Body of JFS and the Admissions Appeal Panel*** **[2009] UKSC 15** it was confirmed that where it is self-evident that discrimination is taking place because there is reference made to the protected characteristic, it is not necessary to analyse the motives of the discriminator as they are irrelevant. However where discrimination is not immediately apparent, it is necessary to analyse the motivation (both conscious and unconscious) of the alleged discriminator but only for determining whether the characteristic played any part in the alleged discriminatory behaviour.

200. There is no justification defence for a direct disability discrimination claim. Unintentional direct discrimination done with or without good intention is therefore just as unlawful as intentional direct discrimination, - ***Khan v Royal Mail Group*** **[2014] EWCA Civ 1082** and ***Ahmed v Amnesty International*** **[2009] IRLR 884** which reaffirmed that a benign motive is irrelevant.

Discrimination arising from disability

201. Section 15 Equality Act 2010 provides:

"Discrimination arising from disability

(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."

202. The starting point is that the disability must have the consequence of causing something (the "something arising") and secondly the treatment alleged to have been unfavourable must have been because of that something arising - ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe*** **UKEAT/0397/14/RN)**. The ECHR Code states that the consequences of a disability:

> *"include anything which is the result, effect or outcome of a disabled person's disability and the consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet."* [5.9]

203. As to what constitutes "unfavourable treatment", the Supreme Court in ***Williams v Trustees of Swansea University Pension and Assurance Scheme and anor*** **[2019] ICR 230** held that it is first necessary to identify the relevant treatment then consider whether it was unfavourable to the Claimant. The Court said only a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others. A comparator is not required to show unfavourable treatment – paragraph 5.6 EHRC Code. Unfavourable treatment does not require a particularly high threshold of disadvantage, it can include creating a particular difficulty for someone or disadvantaging them in some way.

204. There must be a connection between the unfavourable treatment and the something arising from disability. It is insufficient for the disability itself to be relied upon, it must be the something arising in consequence of disability which is said to be the reason for or the cause of the alleged unfavourable treatment – ***Robinson v Department for Work and Pensions*** **[2020] EWCA Civ 859**. However, the something arising from disability only needs to be an effective cause of the unfavourable treatment - ***Hall v Chief Constable of West Yorkshire Police 2015*** **IRLR 893.** Any connection that is not an operative causal influence on the mind of the discriminator will not be sufficient to satisfy the test of causation.

205. In ***Charlesworth v Dransfield Engineering Services Ltd*** **EAT 0197/16** it was held:

> *"The statute requires the unfavourable treatment to be "because of something"; nothing less will do. Provided the "something" is an effective cause (though it need not be the sole or the main cause of the unfavourable treatment) the causal test is established."* [15]

206. Lack of knowledge that a known disability caused the "something" in response to which the employer subjected the employee to unfavourable treatment provides the employer with no defence – ***City of York Council v Grosset*** **[2018] ICR 1492 CA**.

207. Guidance for Tribunals as to the correct approach to claims of discrimination arising from disability can be found in ***Pnaiser v NHS England*** **[2016] IRLR 170:**

> *"(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 they 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 …

(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 … 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.

…

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

…

…

(i) As Langstaff P held in ***Weerasinghe****, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability.*

……..

Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to "something" that caused the unfavourable treatment." [31]

208. Where a Claimant proves facts from which the Tribunal could conclude that there was discrimination arising from disability, the burden of proof will then shift to the Respondent to prove a non-discriminatory explanation, or to seek to justify the treatment as a proportionate means of achieving a legitimate aim. The burden of establishing this defence is on the Respondent. It is the treatment or the outcome which requires justification, not the process which the employer followed - ***West Midlands Police v Harrod*** **[2015] ICR 1311** [43].

209. It is the PCP or the rule which needs to be justified rather than its application to the individual concerned – ***Rajaratnan v Care Clinical Services Ltd*** **UKEAT/0435/14** [48].

210. A three stage test is applicable to determine whether the steps taken were proportionate to the aims to be achieved. In ***R (Elias) v Secretary of State for Defence*** **[2006] IRLR 934** it was held:

"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?" [165]

211. The Tribunal must undertake a fair and detailed assessment of the Respondent's business needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary. What the Respondent does must be an appropriate means of achieving the legitimate aims, and a reasonably necessary means of doing so.

212. In ***Homer v Chief Constable of West Yorkshire Police*** **[2012] UKSC 15** it was held that what is required is (i) a real need on the part of the Respondent; (ii) what it did was appropriate (rationally connected) to achieving its objectives; and (iii) that it was no more than was necessary to that end. A measure will not be proportionate where less discriminatory means to achieve the outcome were available.

213. It is clear from the judgment in ***Land Registry v Houghton and others*** **UKEAT/0149/14** that the Tribunal should apply a balancing exercise having assessed the employer's reasonable business needs as against the discriminatory effect upon the employee.

214. In ***Hardy & Hansons plc v Lax*** **[2005] ICR 1565** it was held that it is for a tribunal to make its own judgment as to whether the practice complained of was reasonably justified, and that there is no range of reasonable responses tests. Rather the more serious the disparate impact, the more cogent must be the justification for it. A measure may be appropriate to achieving the aim but to go further than is reasonably necessary in order to do so may make it disproportionate.

215. It is also appropriate to ask whether a lesser measure could have achieved the employer's legitimate aim – ***Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice*** **[2017] UKSC 27.**

216. In ***Monmouthshire County Council v Harris*** **UKEAT/0332/14** it was held, in the context of a dismissal claim that:

"..the sole question was whether it was proportionate for the Respondent to act on its reason for dismissal in the light of any obligation to make reasonable adjustments at that time ; it would be unduly onerous to require more." [30]

Indirect discrimination

217. Section 19 Equality Act 2010 provides:

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

218. The practical effect of the burden of proof provisions under s. 136 Equality Act 2010 means that a Claimant will need to show:

(i) *Prima facie* the existence of a provision, criterion or practice ("PCP"), and

(ii) That such PCP placed the Claimant's group sharing her protected characteristic at a disadvantage as compared to another group that does not share his protected characteristic, and

(iii) That the PCP was applied to the Claimant which resulted in her being subjected to that disadvantage.

219. Put simply, indirect discrimination occurs where *"An employer or supplier has a rule or practice which he applies to all employees or customers, actual or would-be, but which favours one group over another and cannot objectively be justified."* – ***Taiwo v Olaigbe and another*** **[2016] ICR 756** [32].

PCPs

220. The case of ***Lamb v the Business Academy Bexley*** **UKEAT/0226/JOJ** provides guidance as to what may amount to a PCP. It was held that the phrase is to be construed broadly, having regard to the statute's purpose of eliminating discrimination. It is not necessary for a PCP to be a formal policy, nor is there a need that the employee was expressly ordered to comply - ***United First Partners Research v Carreras*** **[2018] EWCA Civ 323**.

221. A provision can include any contractual or non-contractual provision or policy as well as potentially a one off decision - ***Starmer v British Airways***

***Plc* [2005] IRLR 862.** A criterion means any requirement, pre-requisite, standard, condition or measure applied whether desirable or unconditional. A practice means the employer's approach to a situation if it does happen or may happen in the future. All that is necessary is a general or habitual approach by the employer - ***Williams v Governing Body of Alderman Davies Church in Wales Primary School* [2020] IRLR 589.** In ***Nottingham City Transport Ltd v Harvey* UKEAT/0032/12** Langstaff J referred to "practice" as having an element of repetition.

222. This approach has been affirmed in ***Ishola v Transport for London* [2020] EWCA Civ 112** as the Court of Appeal held that the words "provision criterion or practice" suggest a state of affairs indicating how similar cases will be treated in the future. A one off act can amount to a practice if there is some indication that it would be repeated if similar circumstances arise in future.

223. A requirement for an employee to provide regular attendance is essential to the wage work bargain. It was noted by Elias LJ in ***Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735** that *"Every bilateral contract requires mutual obligations; they constitute the consideration from each party necessary to create the contract."* [10]. Without mutuality of obligations an individual may not be an employee, they may be a worker.

Particular disadvantage

224. There is no statutory definition of disadvantage however it can encompass the same meaning as a detriment or unfavourable treatment which has been considered above, in particular with respect to the case of ***Williams*** Assistance can be gained from the EHRC Employment Code which provides:

"Disadvantage' is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about – so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently." [4.9]

225. More recently in ***Louis v Network Homes Ltd* [2023] EAT 76** the EAT gave consideration to whether there had been a disadvantage to a claimant as opposed to a failure to give an advantage. It was held:

"There is no disadvantage in not being given an advantage. A detriment, disadvantage or unfavourable treatment all refer to circumstances where a negative event occurs. In terms, this failure to be given an advantage cannot fall into that category. This is an advantage being given to a particular group that meet certain criteria. That advantage, it seems to me, cannot be converted to a disadvantage because it is not an opportunity given to those who do not meet that criteria." [39]

Group disadvantage

226. For a case of indirect discrimination to succeed, there must be both personal disadvantage and group disadvantage to those who share their protected

characteristic(s). The correct test for this is not whether there was an adverse effect on the group, but whether a seemingly neutral requirement has a discriminatory impact - ***Eweida v British Airways Plc*** **[2010] EWCA Civ 80.**

227. In doing so, the Claimant does not need to prove why a PCP had the effect of disadvantaging the group they belong to, they just have to prove that the PCP had that effect. The Claimant also does not need to prove that all people belonging to the comparison pool are in fact disadvantaged. It is however for the Claimant to simply prove on balance that the group is particularly disadvantaged as a result of the PCP whether or not it actually affects all of that group - ***Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice*** **[2017] UKSC 27**.

228. It is appropriate for tribunals to take judicial notice of matters where the facts are so well established and do not require further enquiry. In a claim for indirect sex discrimination it is appropriate to take judicial notice of the childcare disparity. In ***Dobson v North Cumbria Integrated Care NHS Foundation Trust*** **UKEAT/0220/19** it was held:

"(a) First, the fact that women bear the greater burden of child care responsibilities than men and that this can limit their ability to work certain hours is a matter in respect of which judicial notice has been taken without further inquiry on several occasions. We refer to this fact as "the child care disparity".

(b) Whilst the child care disparity is not a matter directed by statute to be taken into account, it is one that has been noticed by courts at all levels for many years. As such, it falls into the category of matters that, according to Phipson , a tribunal must take into account if relevant." [46]

229. The court in ***Dobson*** noted that whilst things have progressed and that men do bear a greater proportion of childcare responsibilities than they did previously, the position is still far from equal.

Personal disadvantage

230. The Claimant must also prove that the PCP put them at the disadvantage complained about and that the disadvantage they have is the same as the disadvantage their group has because of the words *"that disadvantage"* in s19 (1)(c).

Causation

231. Both the group disadvantage and the personal disadvantage must be caused by the application of the PCP rather than because of any particular characteristic. In ***Essop and Naeem*** the court said:

"Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic

are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot." [25]

232. Therefore, if the Claimant is not affected by the PCP themselves accordingly their claim will fail. These are primary facts which the Tribunal has to find before the burden of proof shifts to the Respondent - ***Project Management Institute v Latif*** **[2007] IRLR 579**.

Justification

233. The obligation is on the employer to show that the PCP complained of is a proportionate means of achieving a legitimate aim ("objective justification"). The relevant law with respect to justification is already set out above in connection with discrimination arising from disability.

Reasonable Adjustments

234. Section 20 Equality Act 2010 provides:

"Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

…

235. Section 21 Equality Act 2010 provides:

"Failure to comply with duty

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

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement

applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

236. In ***Environment Agency v Rowan*** **[2008] ICR 218** and ***General Dynamics Information Technology Ltd v Carranza*** **[2015] IRLR 4**, the EAT gave general guidance on the approach to be taken in the reasonable adjustment claims A Tribunal must first identify:

(1) the PCP applied by or on behalf of the employer;

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

(3) the nature and extent of the substantial disadvantage suffered by the Claimant in comparison with those comparators.

237. Once these matters have been identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified.

Burden of proof

238. In ***Latif*** **[2007]** the EAT gave guidance as to how Tribunals should approach the burden of proof in failure to make reasonable adjustments claims The burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, in the absence of an explanation, that it has been breached. It was noted that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given its own particular circumstances.

239. Therefore, the burden is reversed only once a potential reasonable adjustment has been identified. It will not be in every case that the claimant would have to provide the detailed adjustment that would have to be made before the burden shifted, but "*it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not"* [55]. The proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, not even until the Tribunal hearing.

Knowledge of disability and knowledge of disadvantage

240. For the section 20 duty to apply, an employer must have actual or constructive knowledge both of the disability and of the disadvantage which is said to arise from it (para 20, Schedule 8 Equality Act 2010). We note that knowledge has not been an issue in this case.

PCPs

241. The relevant law as regards PCPs has been set out above.

Substantial disadvantage

242. For the duty to arise, the employee must also be placed at a "substantial disadvantage" in comparison with persons who are not disabled. Therefore, a comparative exercise demonstrating substantial disadvantage is required. Substantial in this context means “more than minor or trivial” according to section 212(1) of the Act.

243. There is no requirement in the Equality Act for a strict causation test linking the disadvantage caused by the PCP to the Claimant’s alleged disability. All that is necessary is that the Claimant prove facts from which a tribunal could infer that the PCP simply put the Claimant at either:

(i) a disadvantage compared to non-disabled people because they are a disabled person (rather than because of the disability); or

(ii) that because the Claimant was a disabled person, the PCP, whilst causing a disadvantage to everyone whether disabled or not, put the Claimant at a more severe disadvantage because they were a disabled person when compared to non-disabled people ***Sheikholeslami v University of Edinburgh*** **UKEATS/0014/17 [2018] IRLR 1090.**

244. It is necessary for a reason connected with the employee’s disability to be the cause of the substantial disadvantage experienced - ***Hilaire v Luton Borough Council*** **[2022] EAT 166**. Whether an employee is placed at a substantial disadvantage depends on the actual facts, regardless of what the parties believe the facts to be.

Comparators

245. As set out in section 20(3), a comparative exercise is required, namely consideration of whether the PCP disadvantaged the Claimant more than trivially in comparison with others.

246. As indicated in ***Griffiths v Secretary of State for Work and Pensions*** **[2016] IRLR 216** the comparator is merely someone who was not disabled. They need not be in a like for like situation. This differs from the comparator in a direct or indirect discrimination claim (i.e. someone who shares the same circumstances as the disabled employee, but for the disability). It is only necessary to ask whether the PCP puts the disabled person at a substantial disadvantage when compared with a non-disabled person.

Adjustments

247. The next question is whether there were any reasonable steps which the Respondent could have taken to avoid the disadvantage which were not taken. It may be necessary in some cases for the employer to undertake a combination of steps.

248. When assessing whether a particular step would have been reasonable this involves considering whether there was a chance it would have helped overcome the substantial disadvantage, whether it was practicable to take it, the cost of taking it, the employer's resources and the resources and support available to it.

249. There must be a real prospect the step would have made a difference - ***First Group Plc v Paulley*** **[2017] UKSC 4.** However, this does not mean that a reasonable adjustment claim fails simply because, regardless of any adjustments, the same result would have occurred. The purpose of the Act is to level the playing field and give disabled people a fair chance even if, ultimately, it would have made no difference to the end result.

250. Reasonable adjustments need only be job related and the scope of the duty does not cover adjustments to cater for an employee's personal needs - ***Kenny v Hampshire Constabulary*** **[1999] IRLR 76** [36].

251. The question of whether a particular adjustment is reasonable is an objective test - ***Smith v Churchill Stairlifts Plc*** **[2006] ICR 524**. The Tribunal must examine the issue not just from the perspective of the Claimant but also consider wider implications including the operational objectives of the employer. Ultimately, it is the Employment Tribunal's view of what is reasonable that matters. In assessing what adjustments are reasonable, the focus must be on the practical result of the steps which the employer can take, not on the thought processes of the employer when considering what steps to take - ***Bank of Scotland v Ashton*** **[2011] ICR 632**.

252. In ***Romec v Rudham*** **[2007] All ER 206** the EAT held that if the adjustment sought would have had no prospect of removing the substantial disadvantage then it could not amount to a reasonable adjustment. However, if there was a real prospect of removing the disadvantage it may be reasonable. In ***Cumbria Probation Board v Collingwood*** **[2008] All ER 04** the EAT stated *"it is not a requirement in a reasonable adjustment case that the Claimant prove that the suggestion made will remove the substantial disadvantage."*

253. In ***Leeds Teaching Hospital NHS Trust v Foster*** **UKEAT/0552/10/JOJ** the EAT held that when considering whether an adjustment is reasonable it is sufficient for a Tribunal to find that there would be a prospect of the adjustment removing the disadvantage.

254. In **Noor v Foreign and Commonwealth Office [2011] ICR 695** Richardson J stated "*Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective"* [33].

255. The EHRC Code (chapter 6) contains guidance on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be considered in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

256. There is no objective justification defence available in respect of an employer's failure to make reasonable adjustments. The proposed adjustments are either reasonable or they are not.

257. Whereas an employee may have a honest belief in the need for a step to be taken, there is not an obligation upon the employer to provide a good reason to explain why it was not taken – ***HM Land Registry v Wakefield*** **UKEAT/0530//07/ZT**.

Unfair dismissal

258. The Employment Rights Act 1996 provides:

94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

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

…

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality,

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits

of the case.

259. The Employment Relations Act 1999 provides:

10 Right to be accompanied.

(1) This section applies where a worker—

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) reasonably requests to be accompanied at the hearing.

(2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who—

(a) is chosen by the worker; and

(b) is within subsection (3).

…

13 Interpretation

…

(4) For the purposes of section 10 a disciplinary hearing is a hearing which could result in—

(a) the administration of a formal warning to a worker by his employer,

(b) the taking of some other action in respect of a worker by his employer, or

(c) the confirmation of a warning issued or some other action taken.
…

260. In an unfair dismissal case, it is for the Respondent to show the reason for the dismissal and that that reason is a potentially fair reason. The reason for dismissal is the facts and beliefs known to and held by the Respondent at the time of its dismissal of the Claimant - ***Abernethy v Mott Hay and Anderson*** **[1974] IRLR 213**. The reasons relied on this case are capability and Some Other Substantial Reason "(SOSR"). These are potentially fair reasons for dismissal.

261. It will be for the Tribunal to decide the reason why a person dismissed an employee, and this is a question of fact and not a legal conclusion which is a question of law. A search for the reason involves an examination of the mental processes of the relevant employer – ***Pinnington v City and County of Swansea and other*** **UKEAT/0561/03/MAA** [68]. Once the reason for dismissal has been identified, the Tribunal can then proceed to consider whether the employer acted reasonably in treating that as a sufficient reason for dismissal.

262. Where a claim comprises of allegations of unfair dismissal and also (disability) discrimination, the court in ***Northumberland and Tyne and Wear NHS Foundation Trust v Ward*** **EAT 0249/18** warned against tribunals *"truncating their analysis of a claim of unfair dismissal claim where a s. 15 claim has been addressed"* and that *"the better approach, possibly in the majority of cases, would be to set out the analysis of the claim under each head more fully."* [74].

263. In cases where the employee is dismissed for long term absence, the question for the Tribunal to determine is whether the employer can be expected to wait any longer for the employee to return – ***Spencer v Paragon Wallpapers Ltd*** **[1977] ICR 301, EAT**. The Tribunal should ask whether the employer could have been expected to allow more time given the pressures the employer faced at the time and going forward – ***Monmouthshire County Council v Harris*** **EAT 00332/14** [60].

264. The Tribunal must address this question taking into account all relevant factors in the particular circumstances. Relevant factors may include the likely length of the absence, the nature of the illness, whether there are other staff available to carry out the employee's work, the cost of continuing to employee the employee, and also the size of the employer. This is to be balanced against the situation of having the employee on long sick leave - ***S v Dundee City Council*** **[2014] IRLR 131**.

265. Following on from this, it is essential that a fair procedure is followed. Whereas the ACAS Code on Disciplinary and Grievance Procedure is of general assistance, it does not apply for dismissals for SOSR nor does it apply to dismissals for ill health unless there are allegations that the employee was culpable in some way.

266. The court in ***First West Yorkshire Ltd (trading as First Leeds) v Haigh*** **[2008] IRLR 182** set out the essential steps an employer should follow when considering dismissing an employee due to their sickness absence:

"*As a general rule, when an employee is absent through ill health in the long term, an employer will be expected, prior to dismissing the employee, to take reasonable steps to consult him, to ascertain by means of appropriate medical evidence the nature and prognosis for his condition, and to consider alternative employment. An employer who takes such steps will generally meet the standard set out in section 98(4)."* [40]

267. As regards consultation with the employee, this should be to establish the true medical position. In the case of ***East Lindsey District Council v Daubney*** **[1977] ICR 566** it was held:

"It comes to 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 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." [not numbered]

268. The issue of the level of consultation required was also considered in ***Spencer v Paragon Wallpapers Ltd*** **[1977] ICR 301** where it was held that:

"What is required will vary very much indeed according to the circumstances of the case. Usually what is needed is a discussion of the position between the employer and the employee. Obviously, what must be avoided is dismissal out of hand. There should be a discussion so that the situation can be weighed up, bearing in mind the employers' need for the work to be done and the employee's need for time in which to recover his health." [not numbered]

269. In ***S v Dundee City Council*** **[2014] IRLR 131** the court reconfirmed the need to consult the employee and to take into account the employee's views on their likely return to work date. It was held:

"Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered." [27]

270. As regards the employer's approach to medical advice received, the court in ***Daubney*** held:

"While employers cannot be expected to be, nor is it desirable that they should set themselves up as, medical experts, the decision to dismiss or not to dismiss is not a medical question, but a question to be answered by the employers in the light of the available medical advice. It is important, therefore, that when seeking advice employers should do so in terms suitably adjusted to the circumstances." [not numbered]

271. When considering whether the medical information gathered was correct, the correct question for the Tribunal to ask is whether the employer knew or ought reasonably to have known that the medical advice given was flawed so

that no reasonable employer would have relied upon the medical advice ***First Manchester Limited v Kennedy*** **UKEAT/0027/05/DM.**

272. It is also clear that unless there has been no proper evaluation by the medical practitioner at all or the opinion is based on clearly erroneous facts of some sort, then it is not for the employer to evaluate that medical opinion and decide whether it is right or not from a layperson's perspective ***Liverpool AHA (Teaching) Central and Southern District v Edwards EAT*** **323/77.**

273. It is clear from the case of ***DB Schenker Rail (UK) Ltd v Doolan*** **UKEATS/0053/09/BI** that the test in ***British Home Stores Ltd v Burchell*** **[1980] ICR 303,** applies as much to capability dismissals as it does to conduct dismissals. Therefore, the Employment Tribunal is required to address three questions:

i. Whether the employer genuinely believed its stated reason;

ii. Whether it was a reason reached after a reasonable investigation; and

iii. Whether they had reasonable grounds on which to conclude as they did.

274. Accordingly, the employer must only establish an honest belief on reasonable grounds that the employee was incapable – ***Taylor v Alidair Ltd*** **[1978] ICR 445**.

275. The test of reasonableness applies to the procedure as a whole including the employer's investigations and that whether it was reasonable grounds for its belief as to the medical position and prognosis.

276. The range of reasonable responses test as set out in ***Iceland Frozen Foods Limited v Jones*** **[1982] IRLR 439,** ***Post Office v Foley*** **[2000] IRLR 827** and ***J Sainsbury plc v Hitt*** **[2003] ICR 111** requires the Tribunal to consider whether the decision of the Respondent to dismiss the Claimant fell within the band of reasonable responses of a reasonable employer acting reasonably. This applies equally to the procedure that was followed as well as the decision to dismiss. When considering whether a decision within the range of reasonable responses, this is not equivalent to a test of perversity.

277. More recent guidance on these considerations can be found in ***OCS Group Ltd v Taylor*** **[2006] ICR 1602**, where the Court of Appeal confirmed that Employment Tribunals should:

"…consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage." [47]

And

"consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss." [48]

278. Tribunals must take care to avoid the substitution mindset and not decide the matter on what the Tribunal would have done in these circumstances. Rather, a Tribunal must apply the standard of what a reasonable employer would have done. There may be a range of responses that a reasonable employer could have reached. Ultimately, the Tribunal must consider whether dismissal fell within the range of reasonable responses open to a reasonable employer. The test is not whether employers in a similar situation would have waited longer for the absence to improve before dismissal. The employer is entitled to look at the full absence history of the employee when making its decision – ***Kelly v Royal Mail Group Ltd*** **EAT 0262/18.**

279. As regards the employee's length of service, this is often a relevant factor to take into account in misconduct cases, however in cases of long term absence, it is less straightforward and it was held in ***Dundee*** that:

"In an appropriate case, however, it may show that the employee in question is a good and willing worker with a good attendance record, someone who would do his utmost to get back to work as soon as he could. The critical question in every case is whether the length of the employee's service, and the manner in which he worked during that period, yields inferences that indicate that the employee is likely to return to work as soon as he can." [33]

280. When considering dismissal, whereas there is no requirement for an employer to create a new role where none exists - ***Merseyside and North Wales Electricity Board v Taylor*** **[1975] ICR 185***,* it is appropriate to consider whether the employee could be offered an alternative position more suitable to the employee's state of health as an alternative to dismissal - ***Spencer v Paragon Wallpapers Ltd*** **[1977] ICR 301**.

281. In ***Lynock v Cereal Packaging Ltd*** **[1988] ICR 670** the court addressed the situation where an employee may be fit at the time of dismissal, and it provided a helpful summary of the factors which ought to be considered. It was held that:

"There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Second, every case must depend upon its own facts, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following: the nature of the illness; the likelihood of it recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee

realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding…" [not numbered].

282. In ***O'Brien v Bolton St Catherines Academy*** **[2017] IRLR 547** the Claimant indicated that she was fit to return to work on the date of dismissal. In a majority decision, the Court held that it was open to an employment tribunal to conclude that it was unreasonable of the employer to have disregarded evidence produced by the Claimant at the appeal stage suggesting that she was fit to return to work, without at least seeking a further assessment by its own occupational health advisers. However, the court also noted:

"The case can fairly be regarded as near the borderline because of the length of the appellant's absence and the unsatisfactory nature of the evidence about when she might be fit to return. But the essential point is that by the time of the appeal hearing there was some evidence, albeit not wholly satisfactory, that she was now fit to return; and in my view it was open to the tribunal to hold that it was disproportionate/unreasonable for the school to disregard that evidence without at least a further assessment by its own occupational health advisers." [56]

Some Other Substantial Reason ("SOSR")

283. A dismissal may be fair where an employer can show that it falls within the reasons set out within section 98(2) or for some other some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. There is no statutory guidance as to the meaning of the word substantial however it is clear that it will depend upon the facts of each case. The test is a subjective one but generally the reason should not be frivolous or insignificant, and the reason must justify dismissal rather than a lesser sanction of an employee holding the role the employee actually held.

284. A two stage test must be applied. Firstly, it is for the employer to show that SOSR is the sole or principal reason for dismissal. At this stage the employer need only to establish an SOSR reason for the dismissal which could justify the dismissal of an employee holding the job in question, however at this stage it is not necessary to show that it did justify the dismissal - ***Willow Oak Developments Ltd (trading as Windsor Recruitment) v Silverwood and others*** **[2006] ICR 1552** [15-16]; ***Mercia Rubber Mouldings v Lingwood*** **[1974] ICR 256**.

285. It is then at the second stage of the test where the employer must then show that the decision to dismiss for SOSR was reasonable in all the circumstances (including the size and administrative resources of the employer's undertaking). As set out under section 98(4) this will be determined in accordance with equity and the substantial merits of the case.

286. The loss of confidence by an employer that the employee would maintain an acceptable level of attendance could amount to some other substantial reason for dismissal. In ***Kelly*** it was held:

"Whilst absence-related dismissals can fall under the rubric of capability within the meaning of Section 98 of the ERA , there is no hard and fast distinction such that all absence- related dismissals must be so categorised. In the present case, the issue is not so much whether or not the Claimant was capable or unable to do his work as a result of ill health, but that his attendance was unreliable and unsatisfactory. That, it seems to me, is perfectly capable of falling into the residual category of some other substantial reason. The failure by the Respondent to label it as such in its pleaded case does not prevent it from relying upon that label at the hearing and nor does it preclude the Tribunal from fixing upon that label in describing the reason for the dismissal." [20]

287. However in ***Ridge v HM Land Registry*** **UKEAT/0485/12/DM** the EAT noted the difficulties of identifying or classifying the reason for dismissal as either for capability or SOSR where there have been repeated periods of sickness absence. It was held:

"It can be a difficult question whether to classify a dismissal following repeated periods of absence as a capability dismissal or a "some other substantial reason" dismissal. The Employment Rights Act 1996 contains a definition of "capability": it means "capability assessed by reference to skill, aptitude, health or any other physical or mental quality." If these considerations are to the forefront of the employer's mind when dismissing an employee, then the reason for dismissal will relate to the capability of the employee for performing work of the kind which he was employed by the employer to do: see section 98(2)(a) . But it is not unusual, particularly in cases of repeated short-term absence for a variety of reasons, for the recurring absences themselves to be the reason for dismissal, the operation of an attendance policy having been triggered: see Wilson v Post Office [2000] IRLR 834 . In that case the better label may be "some other substantial reason". [61]

Vanishing dismissal

288. *In* ***Marangakis v Iceland Foods Ltd*** **[2023] ICR 250** it was held that *"The concept of a vanishing dismissal, on an appeal succeeding, is of long standing. If a person appeals against dismissal, succeeds in the appeal and is reinstated, the original dismissal disappears, with the consequence that it cannot then found a claim of unfair dismissal."* [14]

Submissions

289. We were helpfully provided with written submissions from the Claimant of 22 pages and from the Respondent of 43 pages. The parties then delivered oral submissions on the final day of the hearing. We have found these written and oral to be very clear and of a high quality which were very helpful in our deliberations. We do not intend to recite their contents here; however we have made reference to the main arguments in our conclusions and analysis below.

Conclusions and analysis

290. We will address each of the issues separately.

Direct discrimination

291. The Claimant alleges that the decisions to dismiss her and to reject her appeal were acts of less favourable treatment because of her sex or disability. The Claimant compares herself to a hypothetical comparator.

292. In considering whether the Claimant has been subjected to direct discrimination because of sex or disability, we remind ourselves that we must first be satisfied that she has been subjected to less favourable treatment – this is not merely unfair treatment, but rather is treatment that is **less favourable** when compared to how the Respondent has treated or would treat a comparator (real or hypothetical) in the same material circumstances who does not share the claimant's sex or is not disabled. The Respondent does not have to show that its conduct was reasonable or sensible when evidencing a non-discriminatory motive for its conduct.

293. We have considered the issue of a correct hypothetical comparator. We find the correct hypothetical comparators would have been a man or a non-disabled employee with the same absence history as the Claimant.

294. In circumstances such as these, it is appropriate to apply the reason why test from ***Shamoon*** and simply ask ourselves what was the reason for the treatment in question?

295. Ms Brown accepted in her evidence that the decision to dismiss the Claimant was due to her high levels of absence and because there was no realistic prospect of her returning to work in accordance with her contracted hours in the near future, and that the level of absence would continue. Ms Brown also accepted the Claimant's inability to commit to work her hours each week was due to potential sickness absence, and that the Claimant's physical health was not likely to change in the immediate future, and that she needed a hysterectomy which would involve further absence.

296. From that the Claimant has argued that she needed sickness absence because of her disabilities (and endometriosis can be suffered by only women), therefore the Claimant's disabilities were a conscious or subconscious reason with a significant influence on the decision by Ms Brown to dismiss her. The Claimant also says that someone without endometriosis would not have been dismissed.

297. The Claimant has also submitted that the Respondent had a requirement that any missed hours were to be made up the same working week, and that it was made clear during the appeal hearing that the decision to dismiss the Claimant was based on the fact that she was not available on Mondays and Thursdays. The Claimant also submits that where she would be unable to work her contracted 15 hours in any one week, this would be because of her endometriosis and depression, and that the Respondent would not allow her to make up those hours during evenings or weekends or the following week. The Claimant also said that she was prevented from making up the hours the following week due to childcare however she took steps to rearrange those commitments during the adjournment of her second stage two meeting. Accordingly, the Claimant argues that her disability and sex were conscious or subconscious reasons with significant influence on the decision to dismiss her.

298. We reject the Claimant's submissions on direct discrimination. Whereas it is accurate that the Claimant is female and is disabled, the mere existence of those characteristics is insufficient in themselves to show causation.

299. Having applied the reason why test as set out above in ***Shamoon***, we find that the decision to dismiss was clearly due to the Claimant's sickness absence caused by her ill health which the Respondent concluded made her incapable of performing her role, and the Respondent did not feel able to wait any longer for her to be able to return. Moreover the Respondent was aware that following the Claimant's surgery she may still suffer from either endometriosis or depression with the risk of further absence.

300. We reach the same conclusion if we adopt the but for test in ***James*** and ask whether the Respondent would have treated a hypothetical man with the same level of absence in the same way – in our view the Respondent would have done so. The Claimant's gender, and the fact that she suffers from endometriosis and depression are no more than background circumstances – we do not find that they were conscious or subconscious reasons for the treatment in question.

301. We also reach the same conclusion with respect to the decision to dismiss the Claimant's appeal. We do not find that the decision was reached because the Claimant is female or because she suffers from endometriosis or depression. It was clear from the evidence we heard that Ms Barrett's focus was on the facts as they stood at the time of the decision to dismiss, and specifically the view reached by Ms Brown that the Claimant would not be able to render effective attendance in the future and that she would continue to accrue sickness absence.

302. We therefore find that the Respondent would also have dismissed a man or a non-disabled employee with the same absence history as the Claimant, and that the outcome of the appeal process would have been the same. There is no evidence or basis to make an inference that the Claimant was treated as she was because of her sex or because she suffers from the disabilities of endometriosis or depression. The burden of proof has not shifted to the Respondent. Even if it had done so, we find that the Respondent has shown a non-discriminatory reason which explains its conduct – namely the perceived inability of the Claimant to render regular attendance in the future and the likelihood of further sickness absence.

303. We therefore dismiss the complaints of direct discrimination.

Indirect sex discrimination

PCP

304. The first matter to address is whether the Respondent applied a PCP requiring that any time off was to be made up during the same working week. The Tribunal finds no evidence that any such PCP was applied by the Respondent. This is because it was clear that the Respondent did not require employees to make up time missed due to sickness absence, rather the Respondent required that it should be recorded as sickness absence. It was the Claimant's request that she be allowed to work flexibly to make up missed hours due to sickness – it was not a requirement of the Respondent. The recent

case of ***Louis*** is applicable here – what the Claimant was in fact seeking was to be treated more favourably by being allowed to work more flexibly (as and when she felt able) and for her sick leave not to be categorised as such. As was held by the EAT in ***Louis***, there is no disadvantage in not being given an advantage.

305. The Respondent did have a PCP within Social Services requiring that flexi-hours should be made up the same week, but this did not extend to missed hours due to sickness absence. However, the Claimant offered no evidence on missed hours other than for sickness absence. Ms Brown's evidence was that the reason behind the policy was to avoid employees building up deficits in their working hours – the clear implication was that this would impact service delivery. This policy was applied to all staff, including those who are not female. As the Claimant offered no evidence on any missed hours, save for those due to sickness absence, we are not in a position to make findings in this respect.

306. However, it appears that the PCP complained about, is more properly described as a requirement for employees' contracted hours to be worked within the same working week and for any disability related absence to be recorded as sickness absence. This PCP was clear from the witness evidence and the contemporaneous documents, and it appears that it had not been expressed sufficiently clearly in the list of issues, nevertheless we are able to consider this complaint rather than simply dismissing the indirect discrimination claim out of hand.

307. We find that this PCP existed and was applied by the Respondent as it was confirmed by Ms Brown in her witness evidence and was clear from the contemporaneous documents.

Particular disadvantage

308. Having identified the PCP we must then go on to consider the issue of particular disadvantage. The Claimant drew our attention to the matter of ***Dobson***, and specifically the childcare disparity which she says that we must take into consideration, and as a result more women than men are likely to work part time and as such the Claimant was unable to make up her time as she worked part time on Thursdays and Fridays.

309. The Respondent presents two arguments. Firstly the Respondent seeks to downplay the childcare disparity on the basis that following the COVID-19 Pandemic more men work from home than they did pre-pandemic, thus more men are undertaking childcare than before. Secondly the Respondent avers that the appropriate pool for comparison is the team where the Claimant worked. Ms Brown had given evidence that the team comprised fifteen women and one man.

310. The Tribunal is bound to take judicial notice of the childcare disparity as the Claimant suggests we should. Whilst the COVID-19 Pandemic undoubtedly changed many ways of working, we do not have evidence before us which would show such a seismic change in terms of childcare. We are willing to accept that more men likely work from home more often than they did prior to the pandemic, and it is possible that more men work part time than they did before, as such it is likely that more men are taking on some child care responsibilities than they did before – however we have no evidence to go any

further than that. We have nothing before us which would cause us to reject the child care disparity – and we do not think this is what the Respondent was arguing in any event. That said, it is still necessary for us to consider a pool for comparison and we accept that the pool suggested by the Respondent, namely the team where the Claimant worked, is the appropriate pool in these circumstances.

311. The Claimant says that she worked Thursdays and Fridays due to childcare, and that when she had time off due to endometriosis (which only women can suffer from) and depression, she was unable to make up missed hours at the end of the week. We have already made a finding that employees were not required to make up time off for sickness absence and further that a failure to grant an advantage cannot be made into a disadvantage.

312. The Claimant has not provided sufficient evidence that the PCP of requiring contracted hours to be worked within the same week, puts women at a particular disadvantage when compared to men. Whilst we readily accept the Claimant's arguments about the childcare disparity, however when considering the issue of particular disadvantage the Claimant then seeks to rely on matters which are disability related as opposed to gender. The Claimant has not provided the Tribunal with evidence that the PCP put all the women in her team, or all the female employees in the organisation at a disadvantage. We were presented with no evidence at all. We accept that women are far more likely than men to work part time, however the Claimant's part time hours (15 hours per week) could have been worked in any combination throughout the week. The fact that the Claimant worked part time can be attributed to the childcare disparity identified in ***Dobson***, the fact that the Claimant chose to work Thursdays and Fridays cannot. The reason the Claimant worked those two specific days was not due to her gender.

313. As such we cannot find that women were put at a particular disadvantage by that PCP, and nor can we find that the Claimant was put to a particular disadvantage either. It appears to the Tribunal that the requirement for an employee to work their contracted hours, does not put women at a particular disadvantage when compared to men.

314. We of course also note within the context of personal disadvantage, that it was the Claimant's personal circumstances which dictated that she would work on Thursdays and Fridays. We have already heard evidence that the Claimant could have worked on a Wednesday but chose not to do so due to her creative writing.

Legitimate aim

315. However, if we are wrong on the issue of particular disadvantage, we have still gone on to consider the issue of whether the PCP is a proportionate means of achieving a legitimate aim.

316. The Respondent says it had a legitimate aim in applying this practice of ensuring operational services levels are maintained for the success of the Respondent and the delivery of Social Services, and it says that was rationally connected to the legitimate aim. Ms Brown's evidence was that the reason for the practice was to avoid employees building up deficits in their hours.

317. The Respondent submits that if employees did not work within their contracted hours then it would not be able to provide a full service during core contract hours, it would need to provide appropriate management to support those employees because of its duty of care to them which would necessitate a change to management contracts, and this would have disadvantaged the same group of female workers, at least two of them would have been required to work on weekends and during evenings, and further disadvantaged them by reducing management support for (female) workers during normal working hours.

318. The Respondent refers us to the case of ***Quashie*** and argues that a requirement for an employee to provide regular attendance is essential to the wage work bargain and that without such mutuality of obligation the individual would not be an employee at all but a worker.

319. The Claimant for her part argues that the PCP was not a proportionate means of achieving a legitimate aim because it was neither appropriate, nor reasonably necessary, and because other means of achieving the aim would have imposed less detriment. The Claimant says that another means of achieving the aim would have been to allow her to make up missed time by working during the evening, at weekends, or the following week. The Claimant said that it was not unusual for employees to work outside their normal hours in the evenings or at weekends and that she had done this before she went on sick leave and that no concerns had ever been raised about her work. We have already made a finding above that it was not usual for development workers to work outside of core hours.

320. The Claimant also says that the Respondent's own policy specified that employees could work at weekends as part of the Respondent's "smarter working" policy and that employees in her role may be required to work during evenings or at weekends. The Claimant also relies on the fact that she worked during the evening once as part of a previous phased return. The Claimant reiterates that a blanket policy of this nature favours employees who work Monday and Tuesdays over those who work Thursdays and Fridays and that it was illogical and cannot be necessary or appropriate and that allowing missed hours to be made up outside the normal working week or in the following working week would have imposed less detriment upon the Claimant.

321. The Tribunal does not accept the Claimant's arguments in this regard for the following reasons. We have already found that there was no requirement for hours due to sickness to be made up. We also note that the Claimant's evening work during her phased return was limited to undertaking 1.5 hours of mandatory online training rather than her substantive role. We find it is possible that the Claimant may have previously worked longer days outside of her core hours, however that was not known to the Respondent and she would not have had access to management support out of hours had something gone wrong. We accept that the job description indicates that out of hours work may be required, however this had never been required of the Claimant and did not apply to the role she performed as she did not attend community based events.

322. As regards smarter working, the Tribunal understand that this would have necessitated a formal application from the Claimant, however no such application was made, moreover the Claimant's role did not involve working at weekends.

323. We accept the Respondent's submissions that proportionality requires a balancing of competing interests, and that Ms Brown balanced the Claimant's individual needs against the broader needs of her team (fifteen of the sixteen were female), colleagues within and external to the Respondent with whom the team worked, and also the vulnerable adults her team supported.

324. We accept the submissions of the Respondent that the Claimant's individual needs did not outweigh these broader needs. We therefore find that the practice had a legitimate aim, it was rationally connected to that team, and that it was proportionate in the circumstances. We cannot find that allowing the Claimant to have worked in the way she proposed would have been a more proportionate means of achieving the Respondent's aim as it would not have provided the Respondent with certainty as to when the Claimant would be working, and to have granted weekend working would have involved disrupting the employment of other employees in order to properly supervise the Claimant. We therefore find that the Respondent had carried out the balancing exercise referred to, and we find that the measure adopted was a proportionate means of achieving that legitimate aim.

325. We therefore dismiss the indirect discrimination complaint.

Failure to implement reasonable adjustments

326. The Respondent accepts that it applied the first two PCPs relied upon, namely the (i) Respondent's sickness absence process, and (ii) the policy of requiring any time off to be made up during the week in which it was taken. The Tribunal records that this PCP has not been adequately described as indicated above under indirect discrimination, and that the specific requirement was that employees are expected to attend work regularly in order to perform their duties. The Respondent denies that it applied the third and fourth PCPs.

First PCP - the Respondent's sickness absence policy

327. We will now go on to consider the first PCP, namely whether the Respondent's sickness absence policy placed people with the Claimant's disability at a substantial disadvantage by making them more likely to be dismissed.

328. The Respondent denies that the policy placed female employees within endometriosis at a substantial disadvantage, and it says that the policy allowed for a range of sanctions not only dismissal, and that it promoted a positive and preventative rather than a punitive approach. We note that the policy applied a stage one and stage two absence meeting process, and that managers had a discretion to set targets depending upon the employee's health issues and needs. We also note that the Respondent's sick pay provisions were generous and depended upon length of service, and that employees were notified in advance before going onto half pay.

329. Nevertheless, we find that someone with the Claimant's disability is likely to accrue sickness absence, and as such their absence will inevitably engage the sickness absence policy. There is nothing controversial in that.

330. We have noted the Claimant's concerns about the operation of that policy which define long term sickness absence as where an employee is expected to be absent for more than four weeks. The Claimant draws our attention to the provision which specified that those off sick due to depression or occurrence of a previous condition would be viewed as long term sick if they are absent or expected to be absent for more than two weeks. This is half the period for those who do not suffer from those conditions.

331. We agreed with the Claimant that this would have applied to her because she suffered from a mental health condition of depression and moreover she had a recurring health condition of endometriosis.

332. The Respondent's explanation for this shorter time frame was to allow for early intervention particularly so for those with mental health conditions who may be left at home with their conditions exacerbated by being off work. By intervening earlier for these employees, it enables the employer to offer earlier assistance.

333. As regards employees like the Claimant with recurring conditions such as endometriosis, we accept this shorter time frame would also allow earlier intervention for them and it did not automatically follow that they would be disciplined. We therefore disagree with the Claimant that she was put to a substantial disadvantage by this provision because she could only accrue half the expected absence of a person who was off sick for another reason. We of course note that the policy states that stage two **must** be initiated and that it could put the employee at risk of dismissal, but it could also allow for early intervention.

334. Nevertheless, we agree that the policy which is intended to be supplemented by sickness absence forms provided to managers which set the stage one target, placed the Claimant at a substantial disadvantage. This is because of the requirement to implement a target at the stage one meeting. The target set was a maximum of four days sickness over two occasions in the next six months. This represented the equivalent of two weeks' sickness absence based upon the Claimant's work pattern.

335. On the one hand, this was proportionately far in excess of a full time person who would only be permitted three days' sickness absence in that period, which represents just over half of a working week. On the other hand we of course note that the Claimant was only given one day more than the policy provided for a non-disabled full time employee.

336. We note the severity of the Claimant's endometriosis condition - when it flared up would cause her severe pain on occasion and she would be unable to work for quite considerable periods. As such there was no realistic prospect of the Claimant meeting a target of four days sickness absence over two periods in six months. Given the Claimant's absence history it was inconceivable that she would be able to comply and as such she was at a greater risk of dismissal. Accordingly, we find that the target set under the policy did place the Claimant at a substantial disadvantage when compared to those who did not share her disabilities. We must now consider the issue of what reasonable steps the Respondent could have taken to avoid that disadvantage.

337. It is of course not necessary for a Claimant to identify or to suggest a step the employer should take, however the Claimant has helpfully argued before us that an appropriate adjustment would have been to take account of the Claimant's return to work by moving to stage one when she went off sick for the second time rather than moving her to stage two.

338. The Respondent disagrees that this would have been reasonable and it goes on to remind the Tribunal of all the steps it had taken including meeting with the Claimant on 7 January 2021, the previous phased return, the previous reduced hours and amended duties, the provision of a headset and ergonomic chair, reduced contact with colleagues and mini-breaks throughout the day, the offer of a DSE assessment and mental health support.

339. We agree with the Respondent that it provided a considerable amount of support to the Claimant, but many of the steps identified do not directly address the crux of this complaint which is whether it would have been reasonable to have gone back to stage one of the process rather than stage two, and thus essentially tolerated this level of sickness absence. This appears to the Tribunal to be the crux of this complaint. Our focus is on what step could have been taken in these specific circumstances to have avoided that substantial disadvantage to the Claimant – that must be our focus here.

340. The adjustment which the Claimant says ought to have been made for her, to go back to stage one, would have been to effectively ignore or to tolerate the level of sickness absence she had incurred since her stage one meeting. Ms Brown gave evidence that this level of sickness absence was not tolerable, and that it would have required the Respondent to have accepted an attendance rate of circa 32%.

341. We find that this is what the Claimant is in effect seeking under this complaint. Whereas we find that step would have made a difference and avoided the disadvantage of the Claimant being dismissed at the time she was, it would not have addressed the overarching requirement for the Claimant to have provided regular attendance in the future. In any event, we do not consider that would have been a reasonable step for the Respondent to have taken as it would have involved disregarding sickness absence and accepting such a low level of attendance and output from the Claimant. Having considered all of the evidence before us, we do not find that there was any other step which would have assisted in this regard because of the level of the Claimant’s sickness absence.

342. We therefore do not agree that this would have been a reasonable step for the Claimant to have taken and we dismiss this complaint.

Second PCP – requirement that any time off to be made up during the week it is taken

343. We have already spent a considerable amount of time in this judgment clarifying this particular PCP which was not articulated fully at the previous preliminary hearing. We have already found that there was no requirement to make up time off due to sickness absence. Rather than simply dismissing that complaint out of hand we have gone on to explore what the real requirement was.

344. We have found that there was a requirement for staff to attend work regularly and to complete their contractual hours each week. Given the Claimant's disabilities, specifically the sickness absence caused by the Claimant's pain from her endometriosis, we accept that this requirement would have placed her at a substantial disadvantage when compared with others not sharing that disability as she was likely to accrue sickness absence and therefore she would have been unable to attend work each week to complete her contractual hours.

345. Again, as above, there is no requirement for the Claimant to have set out which step she says ought to have been taken, however she has helpfully argued before us that she says that the Respondent ought to have permitted her to work flexibly (when she was unwell) and for her to work evenings and weekends, and potentially the following week. The Claimant's argument is essentially that if she could have worked flexibly in this way, she would not have accrued sickness absence, thus she would not have been dismissed.

346. The Claimant gave quite thoughtful evidence on how she thought that this may work in practice and how she might be able to combine her work with the side effects of her conditions, specifically the pain from endometriosis which had kept her away from work for long periods of time when it had been severe.

347. We have already found that there was a limited amount of work that the Claimant could do unsupervised, and that her research work was likely more in the region of 10% of the job. It was also entirely possible that safeguarding issues could have arisen if the Claimant was in contact with a vulnerable service user, however there would have been no one available from management for the Claimant to speak with for support. The Claimant suggested that she would telephone the out of hours service, but this would have involved her making the call as a member of the public.

348. The Respondent again disagrees that this proposed way of working would have been reasonable and says that it would have involved working almost entirely flexibly outside of her and her team's contract and service hours including on weekends and evenings and potentially the following week.

349. The Respondent says that it would have required additional management support and required the alteration of other employees' contracts to match the Claimant's hours thus reducing support for other staff during the working week. Moreover, this would have resulted in unpredictable attendance from the Claimant whereas the Respondent was entitled to require regular attendance to deliver its service. This could also have denied the Claimant proper time off at weekends and disrupted her social and family life with potential implications upon her own health and safety.

350. We note how much thought the Claimant had put into how this arrangement may have worked, however we do not agree that it would have been a reasonable step for the Respondent to have taken for the reasons below.

351. Firstly, as a general principle, we find that the Respondent is entitled to know when its staff are working in order that it can probably manage its work allocation and so that it has some assurance and confidence that it will be able to meet the needs of its vulnerable service users. This applies to the proposals

to work evenings, weekends and to carry over working hours until the following week.

352. Secondly, we do not agree that it would have been reasonable for the Claimant to have worked unsupervised in the manner proposed. We note that there would have been some minor aspects of her role she could have completed without difficulty and without the need to interact with a manager, however given that the area of work involved dealing with vulnerable service users, there was a risk that an urgent safeguarding issue may arise in which case she would need access to a manager or a colleague. We do not consider that telephoning an out of hours helpline as a member of the public would have been an appropriate way for a member of Social Services staff to deal with safeguarding matters.

353. Following on from this we accept the Respondent's arguments that it would not have been reasonable to have then required managers to change their own working patterns to ensure that they were available at weekends, especially as this might reduce their presence during the week. This could have impacted service delivery and the support offered to other staff.

354. Thirdly, we are mindful of the impact upon the Claimant of working at weekends or long hours in the week given her disabilities. The Respondent has an obligation to ensure a safe working environment, and we do not consider that the Respondent would have been able to assure itself that the Claimant was having proper breaks and rest if she was working unsupervised at weekends and evenings.

355. We therefore do not agree that this would have been a reasonable step for the Claimant to have taken and we dismiss this complaint.

Third PCP – working within set hours

356. As regards the third alleged PCP, namely a requirement for employees to work within their set hours without any flexibility, we do not find that there was any such PCP applied by the Respondent.

357. The Respondent operates a flexible working policy. It was clear that requests may be granted in full or in part or they may be refused. The policy clearly envisages some degree of flexibility in relation to how long, where and when an employee works. It is therefore inaccurate to state that the Respondent required employees to work within their set hours without any flexibility.

358. What the Claimant was seeking was to be permitted to work at evenings, weekends and the following week but only on those occasions she was too ill to work. The Claimant was not seeking total flexibility, but it would nevertheless have amounted to a high degree of flexibility on those days where she felt unwell.

359. The fact that the Respondent declined that request does not of itself mean that the Respondent had a requirement for employees to work within their set hours without any flexibility at all. The Respondent correctly points out that regular attendance for receipt of a regular wage is essential to the wage work bargain and without mutuality of obligation the employee is not an employee

but a worker. We agree with that proposition. In any event we do not find that there was any such PCP applied and that there was some degree of flexibility permitted by the respondent.

360. As we do not find that the PCP existed, we therefore dismiss this complaint.

Fourth PCP – requirement for full attendance

361. As regards the fourth alleged PCP of requiring full attendance following a period of long-term sickness absence, we again do not find that any such PCP existed.

362. The Respondent operates a sickness policy which envisages that employees may be sick for short or long periods for variety of reasons, and the policy allows for a degree of management discretion. We also note that the Claimant referred to the Respondents' sickness absence policy as generous. Following the Claimant's earlier return to work, she undertook a phased return where she worked half days for a number of weeks on altered duties at home. Following that phased return on 5 February 2021 the Claimant was issued with the target of a maximum of four days sickness absence over two occasions in the next six months. It is not the case therefore that the Respondent required full attendance following a period of long term sickness absence. Therefore we do not find that this PCP existed.

363. As we do not find that the PCP existed we therefore dismiss this complaint.

364. We therefore dismiss the claim of a failure to implement reasonable adjustments.

Discrimination arising from disability

365. The Claimant asserts that she was treated unfavourably by the Respondent by dismissing her and rejecting her appeal against dismissal. It is clear that the something arising from the Claimant's disabilities was her absences and the possibility of future absences. It is not disputed that the Claimant was dismissed and that her appeal was rejected. The Tribunal must consider whether that this amounts to unfavourable treatment.

366. We find that the act of dismissing an employee and then rejecting their appeal against dismissal quite clearly falls within the definition of unfavourable treatment. We consider that finding to be uncontroversial.

367. We must then determine whether the something arising operated on the mind of the Respondent whether consciously or unconsciously to such a significant extent so that it amounted to an effective cause of the unfavourable treatment.

368. We note that the Respondent argues that the Claimant's past absences and the possibility of future absences did not significantly influence Ms Brown, and rather it was a combination of factors which led to the dismissal. These factors are said to be that the Claimant's GP had assessed her as not fit for work; the second Occupational Health report stated that the Claimant was not able to return to work; that the Claimant's operation had continued to be postponed

and would not in any event necessarily cure the Claimant's condition; and that Respondent had ongoing operational needs.

369. The Respondent in the alternative says that the dismissal could not have been caused by something arising because the chain of causation was broken by an external event outside of the Respondent or the Claimant's control, namely the NHS delaying the Claimant's hysterectomy operation, or failing to provide a reliable timeframe in which it would be performed.

370. We do not agree with all of the Respondents' submissions on this point. We cannot find that the GP had assessed the Claimant as not fit for work at the time of dismissal. That is because at the time of dismissal there was no live fit note. The Claimant's fit noted expired on 30 August 2021 and we were not provided with any evidence that she had been asked to provide one confirming her fitness to work before her return.

371. There is no mention of this requirement in the sickness absence policy we were provided with, and we note that the Claimant was previously asked to provide such a fit note on 26 November 2020 by Ms Brown following her return from that period of sickness absence, however we saw no evidence that the Claimant was asked to do so during her second period of absence, or specifically during the meeting of 20 August 2021.

372. It is therefore not accurate to say that at the time of her dismissal the Claimant had been assessed by her GP as not fit for work. Nevertheless, we of course note there is nothing which stated that the Claimant was fit to return to work either. The Respondent had formed the view that the Claimant was not fit to return to work at that time and that was a conclusion it was entitled to reach based upon the material in front of it.

373. We accept the Respondent's submissions regarding the contents of the Occupational Health report, and we also note that the Claimant's operation had been continued to be delayed. However, it was clear from Ms Brown's witness evidence that it was the Claimant's sickness absence and possibility of future absences which caused her to dismiss the Claimant. Ms Barrett dismissed the Claimant's appeal and upheld the decision to dismiss based upon Ms Brown's findings.

374. Accordingly, we find that the unfavourable treatment (both the decision to dismiss and also rejecting her appeal) was because of something arising from the Claimant's disability – namely the potential for future sickness absences leading to unacceptable attendance. We do not accept that the chain of causation was broken by an external event namely the NHS delaying the Claimant's hysterectomy or failing to provide a reliable time frame in which it would be performed. We accept that this was a factor in Ms Brown's decision, however it went hand in hand with the Claimant's likely ongoing sickness absence. We record that the burden of proof has now shifted to the Respondent.

375. We must go on to consider whether the treatment was an appropriate and reasonably necessary means of achieving a legitimate aim, and if so, we will also consider whether a different or a lesser measure could have achieved the Respondent's legitimate aim.

376. The aim relied upon by the Respondent is to achieve decent levels of staff attendance. The Respondent submits that dismissing an employee who was unable to attend work more than 32% of the year due to ill health, was a proportionate means of achieving that aim. We find that the Respondent had a real need for staff to attend work and to deliver their Social Services function to the public, including to vulnerable members of the local community. We find that requiring staff to achieve a decent level of attendance is necessary and quite clearly a legitimate aim.

377. As regards whether the means adopted by the Respondent was proportionate, we have examined the attendance management process applied to the Claimant. We have looked closely at the Claimant's attendance which was in the region of 32%.

378. We have considered whether there were other more proportionate means of achieving the Respondent's legitimate aim. The Claimant has raised the issue of working more flexibly including working in the evenings, weekends, or carrying over her working hours to the following week. We have already found (with respect to the reasonable adjustments claim above) this would not have been reasonable for the reasons set out above.

379. The Tribunal has carefully considered whether there would have been other measures that would have been more proportionate to achieve that legitimate aim. With respect to the decision to dismiss the Claimant, we have considered the issue of whether it would have been more proportionate for the Respondent to have waited longer than it did before dismissing. However, upon examination we do not find that this would have been a more proportionate means of achieving that stated aim because in this case there was no realistic timescale of when the Claimant would have her operation.

380. The most which could be said at the time of dismissal is that the operation had been postponed previously and that it would be scheduled to be carried out either by the end of that year, or early in the new year. This was many months away and there was no guarantee at that time it would happen then, having previously been postponed. The Claimant had informed Ms Brown that *"I cannot guarantee to be available / cannot commit to being able to work those hours each week"* and this was something Ms Brown was bound to take into consideration. With respect to waiting longer before dismissal, this would not have achieved the Respondent's legitimate aim of ensuring that staff provide decent levels of attendance.

381. We bear in mind that whilst the hysterectomy was eventually carried out before the end of the year, the Respondent did not know at the time that it would be. We also note that under the Respondent's sickness absence management policy it could have invited the Claimant to a stage two meeting during the course of her first period of long-term sickness absence, however it did not do so and instead started to manage her absence at stage one instead. We found that the manner in which the Respondent proceeded was measured.

382. We have conducted a balancing exercise of weighing the discriminatory effect of the Claimant as against the Respondent's reasons for that treatment. We have balanced the impact upon the Claimant of being dismissed which is of course the most serious step an employer can take. We have balanced this against the Respondent's need to have staff with decent levels of attendance

in order to get the work done and to deliver its Social Services function to vulnerable people.

383. In the absence of any more proportionate means of achieving that aim, having discounted waiting longer to an unspecified date in the future, or accommodating the Claimant's request to work evenings and weekends, we find that the Respondent's treatment of the Claimant was the only remaining option and thus it was a proportionate means of achieving the Respondent's legitimate aim. We note that this had a considerable detrimental impact upon the Claimant to have her employment terminated, however we have not identified a more proportionate response, and having conducted that balancing exercise we find that the treatment was justified.

384. As regards the appeal, we note that this was a review of the decision to dismiss and not a rehearing and as such we make the same findings as we have done in respect to the decision to dismiss the Claimant.

385. We therefore dismiss the claim for discrimination arising from disability.

Unfair dismissal

Reason for dismissal

386. The burden is upon the Respondent to show the reason for dismissal and this is on the basis of the facts and beliefs known to the Respondent at the time of dismissal. The Respondent relies upon capability (ill-health) or some other substantial reason ("SOSR") namely the Respondent's need for employees to be capable of regular attendance in order to provide operational service levels.

387. Ms Brown was clear in her evidence that the reason for dismissing the Claimant was due to the Claimant's ill health and concerns about her ability to provide regular attendance in the future. Significant weight was placed upon the contents of the latest Occupational Health report concerning the Claimant's inability to provide a date when she might be able to return to work, together with the Claimant's comments in the stage two meeting about her inability to guarantee her attendance. The Claimant's past absences were due to the two conditions of endometriosis and depression which went hand in hand. This was not a case of frequent sickness absence for a number of different reasons.

388. We find that the reason for dismissal was capability, based upon the Claimant's ill health likely to cause recurrent sickness absence until her hysterectomy at an unspecified date in the future.

389. We must now go on to consider the second limb of the fairness test under s. 98(4) which is whether the Respondent acted reasonably in all the circumstances in treating ill health as a sufficient reason for dismissal.

390. We have considered whether the Respondent had a genuine belief in the Claimant's ill health based upon reasonable grounds and having followed a reasonable investigation.

391. We note that the Claimant had two long periods of sickness absence due to pain from endometriosis and also depression, and she was on the waiting list

for a hysterectomy which may have helped with her pain symptoms. The reason for the absences were confirmed by fit notes from the Claimant's GP.

392. The Claimant attended a stage one meeting where her conditions were explored fully, Occupational Health advice was obtained and it confirmed the conditions and their impact upon the Claimant. This was followed by a second report on 23 July 2021 and a stage two meeting on 20 August, and then on 2 September 2021 where the conditions were explored and the Claimant's attendance was discussed.

393. The Claimant during the stage two meeting had informed the Respondent that she could not guarantee that she would be well enough to work each week. The Occupational Health report confirmed the symptoms and the potential for them to recur, which would have supported the view that the absences were likely to continue at least up until the hysterectomy.

394. We have found that it was not agreed that the Claimant would return to work on 2 September, and neither party had behaved in a manner that would suggest that agreement had been reached that the Claimant to return on that date. There was a clear difference in how the Claimant's return from the first period of long-term sickness absence was handled, as compared to the discussions in August during her second period of long term sickness absence. Moreover, we note that the Claimant's purported desire to return to work on that date was not due to any improvement in her underlying conditions, it was motivated by the Claimant appreciating that she was at risk of a dismissal, and secondly it was partially and to a lesser degree motivated by financial factors – specifically her desire to build up some sick pay entitlement.

395. We have already set out above that there was no fit note at the time of the Claimant's dismissal. The last fit note deeming the Claimant unfit to work expired on 30 August 2021. The Claimant was not asked to provide one to confirm she was fit to return. The Respondent's policy within the hearing bundle does not state that this is a requirement. There was no mention of this in the record of the meeting on 20 August 2021, and it has not been suggested to us that it was said but not recorded. The most we can say is that there was no fit note stating that the Claimant was unfit to work, nor one stating that she was fit to return.

396. We have looked to see what had changed in the period between the first part of the stage two meeting on 20 August and the second part on 2 September 2021. All that had changed was that the Claimant's hysterectomy had been postponed to an unspecified date in the future. Nothing had happened which could have led anyone to form the view that there had been an improvement in the Claimant's health, rather It appeared that the operation which might improve the Claimant's physical symptoms had been put back further.

397. It was clear that the Claimant was consulted prior to the decision to dismiss. A stage one meeting had been conducted on 5 February 2021, a stage two meeting took place on 20 August 2021 and was reconvened on 2 September 2021. We have carefully reviewed the notes of those meetings and find that they demonstrate a thorough discussion with the Claimant and the reasons for her absence were clearly identified and discussed. We also find that Occupational Health advice was obtained on 18 December 2020 and on 23 July 2021. The Claimant has argued that this was not medical evidence and

she appeared to question the experience or qualifications of the authors, and she has also argued that it was out of date. We do not agree that Occupational Health is not medical advice, it was prepared by a qualified practitioner, and we had no reason to question their competence or experience.

398. We have considered the Claimant's argument that the advice was out of date. The report was produced on 23 July 2021, the first part of the stage two meeting was on 20 August and the second part was on 2 September. We saw no evidence of any particular change in the Claimant's conditions occurring in the period from the second report at the end of July 2021 which would have justified a new report either at the end of August or the beginning of September 2021. All that had changed was that the Claimant's hysterectomy had been postponed, there had been no improvement in her condition. We do not consider that the advice was out of date at the time of dismissal.

399. We note that Ms Brown gave evidence that she had considered the Claimant's fit notes, however we note that they were not expressly referenced anywhere in the decision. The contents of those fit notes generally state the reasons for the Claimant's sickness absence which were due to endometriosis and depression. The reasons for these absences were well known to Ms Brown and we find that they would have been in her mind at the time of making the decision to dismiss the Claimant. We do not find that the failure to make reference to the fit notes in her decision making or the decision letter, in the specific circumstances of this case, means that the investigation was unreasonable in some way.

400. We therefore find that Ms Brown had a genuine belief that the Claimant was incapable of performing her role on grounds of her ill health, and that this belief was based upon reasonable grounds having followed a reasonable investigation.

401. We also note that the Claimant was given notice of the meetings, the purpose of the meetings was explained to the Claimant in the invitation letters, and the Claimant was aware that dismissal was a potential consequence as it had been set out in the letters, and the Claimant was advised of the right to be accompanied.

402. We are satisfied that the process undertaken by Ms Brown was fair and that it was compliant with the Respondent's own sickness absence policy, and moreover it was reasonable in all the specific circumstances of this case.

403. We have gone on to consider whether the Respondent could reasonably have been expected to wait any longer before dismissing the Claimant. Several considerations flow from this. We must of course remind ourselves not to fall into a substitution mindset and consider this question on the basis of how much longer the Tribunal would have waited. That is not the test.

404. As regards the specific question of how much longer the Respondent could be expected to wait, the Tribunal notes that the Claimant had two lengthy periods of sickness absence. The first period was for almost five months (30 July to 24 December 2020), and the second was for almost four months (13 May to 2 September 2021). Whilst the Claimant was on a waiting list for a hysterectomy which may assist her symptoms (but not cure her condition) that was an unspecified date in the future having been repeatedly postponed. The

Claimant also advised Ms Brown that she could not guarantee to be available and could not commit to being able to work those hours each week.

405. We note that the Claimant's priority had been raised by the NHS, but we also note that the operation could have taken place at the end of 2021 or early 2022 which was a number of months away, together with some recovery time. We heard no evidence on the recovery time however it is clear that some time would have been needed.

406. We of course note the size of the Respondent was large as it employed in the region of 8,000 employees, and therefore it had access to far more resources than a typical employer. We note the impact upon the service by the Claimant's historic absences and the evidence given by Ms Brown that the Claimant's work had to be reallocated and other work had to be reorganised, and that there was great stress in the team trying to deal with all the calls coming in whilst having one person off on long term sickness absence. We have already made a finding the Respondent appeared to have coped without the Claimant for the two previous periods of sickness, but this had come at a cost of increasing the workload for the Claimant's colleagues in a busy area delivering an important service to vulnerable members of the local community.

407. As to the issue of whether the Respondent could have been expected to cope a little longer, we must ask the question of until when? There was clearly no specific date when the Claimant might be better, at the most there was an intention that she would have her operation by the end of the year or the beginning of the following one. We find that in these specific circumstances a reasonable employer could not have been expected to wait any longer before dismissing the Claimant given that recurring absences could be expected up to the hysterectomy operation on an unspecified date in the future. Had there been a specific date then our conclusion may have been different, however in this case the end date remained open ended and moreover this was in the context that the operation could not cure the underlying condition.

408. We note that Ms Brown did not consider the possibility of alternative employment prior to dismissal. In normal circumstances that could potentially render a capability dismissal unfair. However, we have noted that previously following a long period of sickness absence, both the Claimant and Ms Brown had agreed that temporary alternative duties would not assist. We consider that remained the case as of 2 September 2021. The difficulties experienced by the Claimant were not difficulties in performing her specific role, but they were difficulties in attending work, irrespective of the role. We do not consider that Ms Brown's decision not to address the issue of alternative duties impacted the fairness of the dismissal.

409. We also note that the Claimant's length of service did not appear to have been directly taken into account, save for calculating the Claimant's attendance rate of 32% in the past year. Again, in the circumstances of this case we do not find that this would have negatively impacted the fairness of the dismissal as the critical question was to ask how much longer the Respondent might reasonably have been expected to wait before dismissing the Claimant.

410. Accordingly, the Tribunal is satisfied that the Respondent conducted a reasonable investigation, that it adequately consulted the Claimant, and that it had up to date medical advice.

411. It therefore follows that we also find that in these specific circumstances, that dismissal was within the range of reasonable responses open to a reasonable employer. We have put aside any feelings of sympathy the Tribunal may have for the Claimant arising out of the sometimes excruciating and debilitating pain she experienced, and we have focused instead on what a reasonable employer would have done. The Tribunal considers that the decision to dismiss falls within the band of reasonable responses.

412. We therefore find that the Claimant's dismissal was fair and accordingly we dismiss the complaint of unfair dismissal.

Mitigation

413. We were provided with some evidence on the Claimant's mitigation solely with respect to her decision to reject the offer of reinstatement and entry into the Respondent's redeployment pool. Having dismissed the Claimant's complaint of unfair dismissal it is unnecessary for us to deal with the issue of mitigation, nevertheless having heard some of evidence on this issue we would make the following observations.

414. As regards reinstatement, we do not consider that the Respondent acted in such a way that would preclude consideration of reinstatement and we note that at the time of her appeal the Claimant was actively seeking reinstatement.

415. We of course noted that the Claimant alleges that the Respondent (specifically Ms Brown, Ms Mitchell and HR) said things in the management case which offended her, however having read those comments we do not find that they were offensive or so critical of the Claimant that it would have precluded serious consideration of reinstatement. Many of those comments were a difference of recollection. We did not read the Respondent's comments about the Claimant's decision to return to work being influenced by financial reasons to be critical of her.

416. We also noted that by this time Ms Brown had moved teams. We also find that whilst Ms Mitchell was still in post, there was no evidence that she had done or said anything which would have caused the Claimant to feel the way she now describes. It appeared to the Tribunal that both Ms Brown had been very supportive of the Claimant up to the point of dismissal.

417. Had the Claimant been reinstated then her salary would have been backdated and her losses wiped out. As such we would likely have found that this was a failure to mitigate her losses, although we note that the Respondent did not appear to have told the Claimant at the time that her pay would have been backdated.

418. As regards the offer of entry into the redeployment pool, we of course note that this was not a guarantee of a role and it would have been unpaid, but the Claimant would have had dedicated support in finding a role. The Respondent was a large employer of 8,000 people and it is likely but not guaranteed that a suitable role might have been found for her, including away from Ms Brown and Ms Mitchell if that was what she required. The Claimant appears to have criticised this offer as it would have involved her leaving her chosen profession,

however we found that suggestion to be weak as the Claimant had already been offered reinstatement which she had rejected.

419. We note that the Claimant said that if she entered the redeployment pool there would still be the same HR people, however we have found no reason to criticise Mr Everitt's conduct. Moreover, we note that it was Mr Wardle who, according to the hearing notes had sought to engage with the Claimant during the hearing on desired outcomes and possibly reinstating her.

420. We have also considered the Claimant's argument that she refused reinstatement and redeployment as she would still be subject to the Respondent's policies. This appeared to be a reference to the Social Service's policy that flexi-time should be made up within the same week. We have already found that time off for sickness absence did not need to be made up within the same week. In addition, the Claimant could potentially have been found a role outside of Social Services where she would not have been subject to that local policy.

421. We also note that the Claimant's evidence was that she thought that Respondent's sickness absence policy was generous. We note that the Claimant provided no evidence on any other of the Respondent's polices that she took issue with, we therefore conclude that it was only the Social Service's policy regarding missing hours that was the issue.

422. Given the above, had we found that the Claimant had been unfairly dismissed then we would likely have found that the Claimant's refusal to accept reinstatement or entry into the redeployment pool was unreasonable and a failure to mitigate her losses. We do not need to consider this issue further given that the unfair dismissal claim did not succeed.

423. All the claims fail and are dismissed.

Employment Judge Graham
Date: 17 January 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 25 January 2024

FOR EMPLOYMENT TRIBUNALS