Neutral Citation Number: [2026] EAT 10

Case No: EA-2024-000334-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 January 2026

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MS R PHULLAR

Appellant/Cross-Respondent

- and –

OFSTED

Respondent/Cross-Appellant

- -
- -

Nicola Newbegin (instructed by UNISON Legal Services) for the **Appellant/Cross-Respondent**
Dominic Bayne (instructed by TLT LLP) for the **Respondent/Cross-Appellant**

Hearing dates: 11 and 12 November 2025

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL; DISABILITY DISCRIMINATION

The claimant in the employment tribunal underwent an operation for cancer necessitating a number of months' absence from work. She returned on the basis of limited hours and duties. After a further period of months she was dismissed on the basis of continuing incapability to perform the full duties of her role. The employment tribunal upheld some complaints of failure to comply with the duty of reasonable adjustment but dismissed others. It also dismissed a complaint of unfair dismissal and a complaint of discrimination, by dismissal, contrary to section 15 **Equality Act 2010**.

The respondent rightly conceded that the tribunal erred in law in respect of the section 15 complaint by applying the wrong legal test.

In a number of other respects there was a paucity of fact-finding to support the tribunal's conclusions, and the tribunal failed to provide sufficient reasons to address key arguments and explain to the parties why they had won or lost, compounded by some apparently conflicting findings. In light of those features of the decision, the claimant's appeal in respect of the other complaints that failed, and the respondent's cross-appeal in respect of the complaints that were upheld, both succeeded.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. I will refer to the parties as they were in the employment tribunal, as claimant and respondent.

2. The claimant was employed by the respondent for some years as an Early Years Regulatory Inspector (EYRI). Following a diagnosis of soft-tissue cancer she began a period of sick leave in March 2021 in order to have surgery and a skin graft, followed by a period of continued absence for post-operative recovery. She returned to desk-based work part-time in October 2021. Following further developments that I will describe, ultimately in March 2022 she was given notice of dismissal. An internal appeal was unsuccessful. Her employment ended when the notice took effect in May.

3. The claimant complained of unfair dismissal, that the dismissal was an act of discrimination arising from disability (section 15 **Equality Act 2010**) and of failures to comply with the duty of reasonable adjustment. The respondent's case was that she had been fairly dismissed for a reason related to capability. It admitted that she was at the relevant times a disabled person and that it knew of her disability and its effects. It admitted that the dismissal was unfavourable treatment because of something arising in consequence of disability, but claimed that it was justified. With limited admissions of some elements, the reasonable-adjustment complaints were otherwise defended.

4. The matter came to a five-day hearing at Midlands West before Employment Judge Murdin, Mr D Faulconbridge and T Stanley. Both parties were represented by counsel. The claimant gave evidence. Melissa Cox, a fellow EYRI who had acted as her trade union representative, also gave evidence for her. The respondent called as witnesses: the claimant's line manager: James Norman; his manager: Matthew Hedges; and his manager: Andrew Cook. The tribunal reserved its decision.

Overview of the Employment Tribunal's Decision

5. A single decision document, headed "Judgment", was sent to the parties on 8 February 2024.

Paragraphs 1(i) and (ii) recorded that the complaints of unfair dismissal and of discrimination arising from disability failed and were dismissed.

6. As to the duty of reasonable adjustment, I interpose that the claimant had complained, pursuant to section 20(3) of the **2010 Act**, that the respondent had done two things that amounted to the application of a provision, criterion or practice (PCP) that put her at a relevant substantial disadvantage, in respect of which the respondent had failed to take four steps that it was reasonable for it to have taken. Those steps were numbered (i) to (iv). She had also complained, pursuant to section 20(5), that the respondent had failed to take reasonable steps to provide seven identified auxiliary aids (numbered (i) to (vii)), in the absence of which she was at a relevant disadvantage.

7. Paragraph 1(iii) of the tribunal's decision identified that the complaints pursuant to section 20(3) succeeded in respect of adjustments (ii) and (iii). Paragraph 1(iv) identified that the complaint pursuant to section 20(5) failed and was dismissed. As the decision later confirmed, the section 20(3) complaints relating to adjustments (i) and (iv) had also failed. Paragraphs 2, 3 and 4 of the decision gave case-management directions for a remedy hearing in respect of the successful complaints.

8. The remainder of the decision, although not so sub-headed, was the tribunal's reasons. Paragraph 5 identified the complaints. Under the heading "background", paragraphs 6 to 8 recorded: the claimant's role; that she TUPE-transferred to the respondent on 1 April 2017; the date of dismissal, by which time she had just over 8 years' continuous service; that it was not disputed that she was disabled, nor that the respondent knew this; and that she returned to work in October 2021 and was advised by OH that "desk-based work was fine but not to carry out physical inspections."

9. Paragraphs 9 and 10 summarised the claimant's case as being: that no workstation assessment was provided on her return, and she was told to seek her own advice on what equipment would help with desk-based duties; that she used her own pillows to support her posture, and a box file to raise

her screen to a suitable height; and that the respondent did not provide a number of reasonable adjustments and auxiliary aids, the only adjustment made being a reduced workload.

10. Paragraph 11 stated that an OH report was received on 26 January 2022 suggesting that the claimant was not fit to return to full duties and that capability might return once adjustments were made; and referred to the claimant's case that the lack of adjustments meant she could not take on a full workload. Paragraph 12 stated that following a meeting on 8 March 2022 the claimant was dismissed, and that an emphasis "is said to have been placed" on her inability to undertake inspections, which was her role. It recorded her case that no alternative roles were proposed. Paragraph 13 repeated the legal complaints, and stated that the respondent's case was that this was a fair dismissal for capability. Paragraph 14 noted that there was a previous case-management hearing.

11. The next three pages (paragraphs 15 to 33) set out the issues, as identified at a previous case-management hearing. Paragraphs 34 to 39 identified who gave evidence. They described the claimant as a "straightforward and credible" witness, whose evidence was consistent with the documents, and Ms Cox as straightforward. They commented that the respondent's witnesses were "at times defensive" and "overly concerned with the protection of their respective positions", which the tribunal said undermined the value of their evidence and detrimentally affected their credibility. Paragraph 40 noted that there were oral and written submissions which the tribunal had read carefully.

12. There was no separate section of the decision making any further narrative findings of fact and no statement of the law. The remainder of the decision set out the tribunal's conclusions. I will consider the relevant passages as I consider the various grounds of appeal and cross-appeal.

The Facts

13. The following account reflects such facts as were found by the tribunal, and other agreed facts set out in the agreed chronology put before me, or which counsel confirmed in the course of argument

before me were agreed, and/or the contents of contemporaneous documents.

14. In her role of EYRI the claimant was required to carry out on-site inspections of childcare providers, such as nurseries and childminders, to write inspection reports and to carry out other duties. The desk-based element of her role was carried out from a home office. Prior to her operation in 2021 she travelled to the sites where she carried out her inspections in her own car. The tribunal found that the inspections activity was the "heart" of the role.

15. Following a diagnosis of soft-tissue cancer in her right shoulder, the claimant began a period of sickness absence on 25 March 2021. She had major surgery in April, including a skin graft. The post-operative prognosis at the time from her clinicians was for a "recovery" in 12 to 18 months.

16. The claimant was off work until October 2021. Prior to her return she was assessed by Occupational Health (OH) on 15 September. They advised that she was fit to return to work; but they recommended that she be home based for the time being and refrain from carrying out inspections, and that a Workstation Assessment be carried out prior to her return. On 27 September the claimant self-referred to Access to Work (ATW). The respondent did not carry out an assessment of its own.

17. On 4 October 2021 the claimant resumed work, working entirely from home, and 16 hours per week by the end of four weeks, but with a view to full-time hours of 37 hours per week being phased in. The respondent provided her with Dragon software. The claimant made her own adjustments to her home work station, using pillows, and raising her screen on a box file.

18. There were two meetings during October 2021 at which the ongoing situation was discussed. From 6 December 2021 the claimant had a period of bereavement leave followed by annual leave. On 4 January 2022 the Access to Work (ATW) assessment took place. By 26 January the respondent had been provided with a full copy of the ATW report and costings for the equipment and resources that it recommended. On 2 February the DWP confirmed funding for this.

19. The ATW recommendations included provision of: an ergonomic chair, a Coccyx Cutout Wedge, inflatable lumbar support, an ergonomic keyboard, keypad and mouse, an adjustable footrest, an electronic sit-stand desk, a monitor arm, an Olympus voice recorder, travel allowance and a rolling backpack, as well as regular breaks and a reduced workload of two site visits per week. As well as these supporting the claimant when working at home, the report envisaged that the wedge and lumbar support could be taken by her to site visits, that the rolling back-pack could be used for such visits, and the travel allowance would facilitate the claimant not having to drive herself to visits, with which she struggled. The Olympus recorder could also be used to make notes on site visits. Whether any of it was ordered, none of the equipment was provided prior to the claimant's employment ending.

20. On 17 January 2022 the claimant returned to work from annual leave. She continued to work 16 hours per week and to receive full pay. The claimant's evidence was that she was told upon her return that after a further two weeks the shortfall in hours worked would have to be made up out of her annual leave entitlement. However, the tribunal made no finding about that. In the event she continued to work 16 hours per week, and to receive full pay, until her employment ended.

21. On 21 January 2022 there was a further OH assessment by telephone. The report described ongoing physical difficulties and limitations reported by the claimant. It advised that she was fit to remain in work in her current role, but, on account of her "ongoing issues", not to return to her full and normal role. In answer to whether adjustments were recommended, the author wrote:

> **"I understand that at the moment she is not going out on visits, I advise that due to the nature on her ongoing issues this would be of benefit to consider as a long term adjustment and should be reviewed in 6 months. • She informs me that Access to Work have now done an assessment and that specialist equipment has been advised, it may be possible that when this is in place she will be able to increase the work that she is doing. I advise that a risk assessment should be considered to look at this."**

22. As to whether the claimant's condition was likely to affect her performance, the author wrote:

> **"I advise that this is impacting her at the moment, I am unable to advise how this might affect her moving forwards, I therefore recommend that management have regular meetings with**

> **her in order to assess this and provide further support if required. It may be of benefit to consider a further consultation with one of our OHP if she has not made any improvement in the next 3 months."**

23. In answer to how long it would be before the claimant could fulfil her EYRI role, including full inspections, the author wrote: **"I understand that her consultant has advise 12 to 18 months."**

24. On 7 February 2022 the claimant had an informal catch-up meeting with Mr Hedges. He said that he would be convening a formal attendance meeting. On 16 February that meeting took place. The claimant was accompanied by Ms Cox. On 22 February there was a further conversation between the claimant, Mr Hedges and Ms Cox. The claimant advanced a number of criticisms of the OH report. She asked to be allowed to shadow Ms Cox on inspections and to resume carrying out some inspections locally and/or at childminders, on her own, with the benefit of the ATW equipment, in particular the Dictaphone, once provided.

25. Some follow-up questions were emailed to the OH nurse to which they emailed responses. As to whether the ATW equipment would enable the claimant to increase desk-based duties, or inspection work, they responded that a risk assessment should be carried out to identify what she could manage, and that they could not predict what type of work the equipment would enable, until she had it and had time to get used to it. They were also asked for their own timescale for a return to full inspections, but replied that as the consultant was the expert "I would give the same advice of 12 to 18 months." Asked about whether returning to inspections would pose a risk to the claimant's health and safety, the nurse referred back to the previous advice and indicated that if this was a concern then regular risk assessments should be carried out or a further OH review sought.

26. The attendance meeting was reconvened on 8 March 2022. Mr Hedges informed the claimant that she was being dismissed on grounds of ill health. That was confirmed in a letter of 15 March, which set out his reasons in some detail. In summary he had concluded on the balance of the evidence

from OH that "despite your strong desire to return to work you will be unable to return to enough of your duties to make a return to work sustainable and practical, even with reasonable adjustments." He went on to set out his conclusion that there was a significant road ahead despite the claimant's feeling that with additional equipment, travel arrangements and some adaptations, including as to type and location of inspections, she could return to full duties and "give it a go".

27. The letter went on to refer to the impact of the claimant's absence from full duties on the team and the wider business. The claimant also could not be sent out inspecting "when the risk to your health and safety is so evident." There was "no alternative role in Ofsted at an inspector B1 grade which does not include full inspection and regulation activity. There may be roles at a different grade, however this would be without protection of salary and I have not considered this to be a reasonable alternative for you." However, the claimant could be sent details of such roles during her notice period. The letter went on dismiss the claimant on the basis of incapacity with 8 weeks' notice.

28. On 28 March 2022 a report on the claimant's progress was issued by the consultant who had her care. This included, in relation to her work:

> **"I understand that this is mainly desk based with some visits to sites occasionally which she has to make notes on her laptop. I have no reason to believe that she will not be able to do this job in the long term. She will need some work space assessment and some support from occupational health which I understand she has been trying to obtain. Once these are in place, I would hope that she would be able to carry out her work."**

29. The claimant appealed the dismissal, relying in part on that consultant's letter. The appeal was heard by Helen Lane on 11 April. She dismissed the appeal, as confirmed in a letter of 22 April. On 3 May 2022 the notice of dismissal took effect and the claimant's employment ended.

The Legal Framework

30. Section 15 **Equality Act 2010** provides:

> **"(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."**

31. Section 20 **Equality Act 2010** provides, so far as relevant, in part:

> **"(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's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(4) The second requirement is a requirement, where a physical feature 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.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid."**

32. I observe that, in a given case, it may be said that the facts were such that only one of the three requirements applied, or that more than one of them applied. Section 21 provides that a failure to comply with any of the three requirements is a failure to make a reasonable adjustment. There are further provisions relating to actual or constructive knowledge that are not at issue in this appeal.

33. Section 39 prohibits employers from discriminating, including by subjecting an employee to any detriment, and that the duty to make reasonable adjustments applies to employers.

34. For the purposes of a complaint of unfair dismissal, a dismissal which is shown by the employer to be for a reason or principal reason related to the employee's capability will fall within section 98(2)(a) **Employment Rights Act 1996**. In such a case section 98(4) provides that whether the dismissal is fair or unfair (having regard to that reason):

> **"(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."**

35. While the application of that test always turns on the particular circumstances of the case, a well-established line of authorities identifies a number of generally relevant considerations in a case where the incapability to carry out some or all duties arose from long-term sickness. A basic question in every case is whether, in all the circumstances, the employer can be expected to wait any longer, and, if so, how much longer? (**Spencer v Paragon Wallpapers Ltd** [1977] ICR 301(EAT)). Unless there are wholly exceptional circumstances, the employee should first be consulted, and steps taken by the employer to establish "the true medical position" (**East Lindsey District Council v Daubney** [1977] ICR 566 (EAT)); and the employee's views should be taken into account (**BS v Dundee City Council** [2014] IRLR 131 (CS)). The tribunal should generally always consider whether the employer has reasonably considered whether there was any alternative suitable job available which the employee might be capable of carrying out (**Bugden v Royal Mail Group Ltd** [2024] EAT 80).

36. In **Meek v City of Birmingham DC** [1987] EWCA Civ 9; [1987] IRLR 250 Bingham LJ (Ralph Gibson LJ and the Master of the Rolls concurring) stated at [8] that:

> **" … the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises"**

37. In the **Meek** case itself the tribunal's decision fell short of the minimum necessary. Bingham LJ observations at [12] included that "There are various criticisms expressed without any statement of the basic underlying facts upon which those criticisms were based".

38. In **Anya v University of Oxford** [2001] EWCA Civ 405; [2001] ICR 847 Sedley LJ (giving the judgment of the Court) said at [26]:

> **"The courts have repeatedly told appellants that it is not acceptable to comb through a set of**

> **reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."**

39. Rule 62 **Employment Tribunals Rules of Procedure 2013** provided (in part):

> **"(1) The Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural (including any decision on an application for reconsideration or for orders for costs, preparation time or wasted costs).**
>
> **(2) In the case of a decision given in writing the reasons shall also be given in writing. ...**
>
> **… … …**
>
> **(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. ..."**

40. The authorities on the duty to give reasons and the provisions of Rule 62(5) and predecessors were reviewed by Cavanagh J in **Frame v The Governing Body of the Llangiwg Primary School**, UKEAT/0320/19. He encapsulated the relevant principles at [47] as follows:

> **"(1) The duty to give reasons is a duty to give sufficient reasons so that the parties can understand why they had won or lost and so that the Appellate Tribunal/Court can understand why the Judge had reached the decision which s/he had reached;**
>
> **(2) The scope of the obligation to give reasons depends on the nature of the case;**
>
> **(3) There is no duty on a Judge, in giving his or her reasons, to deal with every argument presented by counsel in support of his case:**
>
> **(4) The Judge must identify and record those matters which were critical to his decision. It is not possible to provide a template for this process. It need not involve a lengthy judgment;**
>
> **(5) The judgment must have a coherent structure. The judgment must explain how the Judge got from his or her findings of fact to his or her conclusions;**
>
> **(6) When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which s/he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question; and**
>
> **(7) It is not acceptable to use a fine-tooth comb to comb through a set of reasons for hints of error or fragments of mistake, and try to assemble them into a case for oversetting the decision. Nor is it appropriate to use a similar process to try to save a patently deficient decision."**

41. In **Yeboah v Crofton** [2002] EWCA Civ 794; [2004] ICR 257 at [93] Mummery LJ (Brooke LJ gave a concurring speech; Sir Christopher Slade agreed) said that a perversity appeal:

> **"… ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care", *British Telecommunications PLC –v- Sheridan* [1990] IRLR 27 at para 34."**

The Grounds of Appeal, the Tribunal's Decision, Discussion, Conclusions

42. There were thirteen grounds of appeal (one as amended), and four of cross-appeal before me. Ms Newbegin, who was not counsel in the tribunal, appeared for the claimant, and Mr Bayne, who also appeared in the tribunal, appeared for the respondent. I will set out relevant passages from the tribunal's conclusions, as I consider each group of grounds in turn.

Appeal grounds 5 and 6 – section 15 complaint

43. Grounds 5 and 6 relate to the tribunal's decision in respect of the complaint that the dismissal amounted to discrimination contrary to section 15 of the **2010 Act**.

44. In setting out the issues in respect of that complaint, the tribunal identified at [22] an issue as being "did [the dismissal] arise in consequence of disability". In its conclusions, at [50], it repeated that question, and answered it in the negative. The tribunal wrote that it had considered what were the operative factors in the mind of the dismissing officer, and had concluded that the disability did not have any significant influence on the decision-making. Having so found, the tribunal observed at [51] that they were not required to address their minds to the issue of justification.

45. Ground 5 contends that the tribunal erred by applying the wrong legal test, because section 15(1)(a) required it to consider whether the dismissal was because of *something arising in consequence* of the claimant's disability. Ground 6 contends that the tribunal erred by not finding that it was, and not considering the issue of justification. Both of those grounds have been conceded by the respondent. It was right to do so. The tribunal plainly did apply the wrong test, which, it appears, had also been wrongly formulated in the list of issues produced at the previous case-management hearing. These basic errors are all the more troubling, given that the respondent had

conceded in terms in its grounds of resistance, and again in submissions at the hearing, that the claimant had been dismissed because of something arising in consequence of her disability.

46. I accordingly uphold grounds 5 and 6.

Appeal grounds 7, 8, 11 and 12 – reasonable adjustments – ATW-recommended equipment

47. Grounds 7 and 8 relate to one of the two unsuccessful complaints of failure to comply with the reasonable-adjustment duty in section 20(3), relating to the adjustments recommended in the ATW report of 19 January 2022. I will take with these, grounds 11 and 12, which relate to the section 20(5) auxiliary-aids complaint. That is because it was contended that the same equipment that should reasonably have been provided as auxiliary aids should also reasonably have been provided to mitigate disadvantages at which the PCPs had placed the claimant on account of her disability.

48. For the purposes of the section 20(3) complaints the claimant asserted that two PCPs had been applied, being requiring an EYRI to carry out on-site inspections and requiring desk-based duties. At [53] the tribunal said it was "content" that both "do amount to appropriate PCPs" for the purposes of section 20(1). It appears that it found that both were indeed, in fact, applied by the respondent, as it went on to consider at [54] and [55] whether these PCPs put the claimant at a substantial disadvantage compared with non-disabled persons. As to disadvantages, the tribunal identified that the claimant asserted that she suffered an increased level of pain, cramps and stiffness due to sitting for a long time, and pain in the neck and shoulder area, due to leaning over when typing. The tribunal concluded that the claimant *was* put at a disadvantage by both these PCPs, and that this disadvantage was substantial (noting that section 212 defines that as "more than minor or trivial").

49. The tribunal went on, at [56], to note that the respondent had conceded knowledge of the disability. The tribunal also considered it "overwhelmingly likely" that the respondent knew that the claimant was likely to be placed at the disadvantage found, or certainly ought to have known. But,

as to whether it would have been reasonable for the respondent to have taken the steps set out in the ATW report to avoid the disadvantage, at [57(i)] the tribunal said this:

> **"whilst it would have been desirable for the Respondent to provide these adjustments, given the particular PCPs, and the nature of the substantial disadvantage suffered by the Claimant, provision of the adjustments outlined in the Access to Work report dated 19 January 2022 would not have avoided that disadvantage"**

50. As to the section 20(5) complaint the tribunal set out at [59] the list of auxiliary aids (*per* the ATW report) that the claimant said ought to have been provided. At [60] it simply stated:

> **"The tribunal has concluded that the Claimant was not put at any substantial disadvantage by the Respondents' failure to provide the above items."**

51. Ground 7 contends that the conclusion at [57(i)] was perverse, as there was no evidence before the tribunal to contradict the recommendations of the ATW report, nor to support the finding that the making of the adjustments that it recommended "would not have avoided that disadvantage". Ground 11 contends that the tribunal's conclusion at [60] was perverse, given that the tribunal had found earlier that the application of the PCPs *had* put the claimant at a disadvantage. Grounds 8 and 12 contend that the decision was, in respect of each of these two complaints, not *Meek*-compliant.

52. I consider that the decision on the section 20(3) complaint relating to the ATW recommendations was not *Meek*-compliant. Although the tribunal referred, at [57(i)], to having reached its conclusion, "given" the "particular PCPs" and the "nature of the substantial disadvantage" suffered, it did not elaborate on what it was about either or both of these that led it to that conclusion. The claimant had contended that both PCPs put her at disadvantages with respect to sitting for long periods and with respect to typing. The respondent conceded before the tribunal that the desk-based duties PCP put the claimant at a substantial disadvantage, and that the inspections PCP put her at such a disadvantage in so far as her inability to carry out inspections resulted in her dismissal. The tribunal appears to have accepted at [54] that both PCPs placed the claimant at both pleaded disadvantages, (it referred from that point on to "disadvantage" in the singular, but, if it intended to make a more

limited finding with regard to particular disadvantages, it did not say so). Knowledge of disability was conceded, and knowledge, or constructive knowledge, of disadvantage found.

53. However, the tribunal failed to engage with the claimant's case, relying on the ATW report, as to why at least some, if not all, of the recommended equipment would have ameliorated the disadvantages she experienced in the context of both desk-based duties and on-site inspections, or to explain why it rejected that case across the board. It is also unclear why the tribunal thought it would have been "desirable" to make the adjustments, if it also considered that they would not have helped. For these purposes, if there was any uncertainty about how effective a particular piece of equipment might prove to be, that would not necessarily be decisive, but it would be a relevant consideration when deciding whether the respondent ought to provide it. See: *per* Elias LJ in **Griffiths v Secretary of State for Work and Pensions** [2015] EWCA Civ 1265; [2017] ICR 160 at [29].

54. The conclusion at paragraph [60] in relation to the section 20(5) complaint was simply stated by the tribunal. Had the decision in relation to the section 20(3) complaint been sufficiently reasoned, in the manner I have described, the conclusion in relation to the overlapping section 20(5) complaint might have drawn upon it. But as the former was not sufficiently explained, and paragraph [60] contained no independent reasoning, so that conclusion was also not *Meek*-compliant.

55. I therefore uphold grounds 8 and 12.

56. As to whether the decisions on these complaints were perverse, as asserted by grounds 7 and 11, Mr Bayne submitted that there was evidence from which the tribunal was entitled to conclude that, from when the January OH report was delivered, through to 8 March 2022, when the dismissal decision was taken, the claimant was not fit, and would not have been fit, to carry out on-site inspections, even if the ATW recommendations had all been implemented. He referred to a passage in Mr Hedges' witness statement indicating that this was his view. He also referred to Mr Hedges'

evidence that, in October 2021 the claimant had assured him that the adjustments she had made to her work station at home pending the ATW report coming through, meant that the home-working environment was already safe. Mr Bayne submitted that there was therefore evidence from which the tribunal could have concluded that making the ATW-recommended changes during the short period of her employment that remained, would not have assisted, nor avoided the dismissal.

57. Ms Newbegin submitted that the OH report from January 2022, and OH replies to follow-up questions in February and March, nowhere advised that the claimant would *not* be fit to carry out inspections, *even* once the ATW equipment had been provided, nor that resuming inspections in some shape or form would pose a risk to her health and safety. As to the general prognosis for her continued recovery, the OH advices simply referred back to the post-operative assessment in around April 2021 of 12 – 18 months *from then*. OH had also advised that these matters would need to be reviewed once the ATW equipment had been provided, and that a risk assessment then be carried out. The most up-to-date general prognosis for recovery was the consultant's letter of 28 March 2022.

58. I have been shown these, and other, parts of the witness and documentary evidence before the tribunal. But I did not conduct the trial, hear witnesses cross-examined, nor review all of the relevant documents that the tribunal had. I am not in a position to say that the tribunal would been bound to conclude that some or all of the ATW adjustments ought reasonably to have been made, and hence that the decisions on these complaints were perverse. I do not uphold ground 7 or ground 11.

Appeal grounds 9 and 10 – reasonable-adjustments – alternative roles

59. The other reasonable-adjustment complaint that failed, was a complaint under section 20(3), relying on the same two PCPs, and asserting that the respondent should reasonably have considered alternative roles or duties that the claimant could perform prior to dismissing her. As already noted, the tribunal found that both PCPs were applied, and that they did indeed place the claimant at the requisite substantial disadvantage. Its conclusion on this complaint, at [57(iv)], was then as follows.

> **"the Tribunal accepts the Respondent's evidence in respect of this adjustment. It was evidence that was not particularly challenged, and consequently, we conclude that the Respondent did consider alternative roles and/or duties for the Claimant."**

60. Ground 9 contends that that conclusion was erroneous or perverse, because it was contrary to the finding at [44] (in the context of the discussion of the unfair-dismissal complaint, in a passage that I set out more fully below), that there was "no meaningful consideration of alternative redeployment". Ground 10 criticises the tribunal's statement that the respondent's evidence was "not particularly challenged." In particular, it (a) refers to evidence in the claimant's witness statement, that she was looking to apply for an available role in the Quality Assurance Hub (QAH) as a quality assurance EYRI for 3 months (of which she became aware in April 2022, and which (on her case) would not have required her to carry out inspections); (b) asserts that both Mr Hedges and Mr Cook were challenged in cross-examination on the question of alternative roles, the latter specifically in relation to the QAH role; and (c) refers to closing submissions by her counsel to the tribunal, that the respondent failed to consider tasks that she could have carried out as a desk-based EYRI.

61. Mr Bayne submitted that both witnesses had explained, in response to questions in cross-examination, why the QAH role was considered not suitable for the claimant (because she lacked recent experience of inspections), and that their answers were then not challenged further in follow-questions. The claimant's counsel's closing submissions also did not specifically refer to that role. In light of all of that, the "not particularly challenged" observation was fair. He also submitted that the finding at [44] that there was "no meaningful consideration" of alternative employment could not be read literally; and, given the witness evidence, the finding at [57(iv)] could not be said to be perverse.

62. I turn to my conclusions on these grounds.

63. At [44] the tribunal said that "there was no meaningful consideration of alternative redeployment." At [57(iv)] it concluded that the respondent "did consider alternative roles and duties

for the Claimant." Although these two statements were made in the context of different complaints, they are, on their face, difficult to reconcile as factual statements. Either the tribunal contradicted itself, or it did not properly explain what it meant, and how these statements were compatible.

64. From the transcript I was shown, it is clear that the respondent's witnesses *were* challenged on this substantive issue in cross-examination. I was also shown that the claimant's counsel's closing submissions included a submission that the respondent did not consider alternatives to dismissal such as redeployment, *and* that the claimant had made suggestions as to alternative jobs and tasks that she could have performed as a desk-based EYRI. Although the latter submission did not specifically refer to the QAH role, I was shown that that had been referred to in her witness statement.

65. All of that being so, I do not think that the fact that the respondent's witnesses' answers in cross-examination were not *further* challenged, nor the fact that counsel's closing submission did not specifically refer to the QAH role, means that it was a sound answer to this complaint to say that the respondent's evidence was "not particularly challenged", and that it did consider alternative roles.

66. I note that, as is well-established in the authorities, in the context of a reasonable-adjustment complaint, what matters, ultimately, is not the process which the employer did or did not follow, but whether it failed, in substance, to make an adjustment which it reasonably ought to have made. It does seem to me that the issue, in substance, in this instance was whether the respondent ought reasonably to have put the claimant into the three-month QAH role, rather than dismissing her when it did. The tribunal had conflicting evidence as to the requirements of that role, and, hence whether it would have been suitable for the claimant. It did not make a specific substantive finding about that.

67. For the foregoing reasons I uphold grounds 9 and 10.

Cross-Appeal – reasonable adjustments – shadowing inspections and phased inspections

68. It is convenient to consider next the cross-appeal. This challenges the upholding of the

complaints that the respondent failed to make reasonable adjustments by not allowing the claimant to shadow colleagues carrying out inspections, and not allowing her a phased return to conducting inspections. The tribunal's respective conclusions, at [57(ii) and (iii)], were as follows.

> **"(ii) the Tribunal agrees with the Claimant that this adjustment would have been reasonable to provide. It is an adjustment that goes to the heart of the Claimant's role, and would have allowed her to see how a Dictaphone was used, and to assess whether it would have assisted her. The Tribunal was impressed with Ms Cox's evidence in this regard, given her particular experience of the Claimant's precise job. Furthermore, it is an adjustment that would have been straightforward to provide, and consequently, would have been reasonable to provide, in order to avoid the Claimant's substantial disadvantage.**
>
> **(iii) the Tribunal also accepts that this adjustment would have been reasonable. Again, the Tribunal found that Ms Cox's evidence as to the mechanism and usefulness of phased returns was insightful, and furthermore, the Tribunal considered that the adoption of a phased return for the Claimant would have placed only a modest burden on an employer of the size and resources of the Respondent. It is an adjustment that had the potential to greatly ameliorate the Claimant's substantial disadvantage, and in the circumstances, we concluded that the provision of such an adjustment would have been reasonable."**

69. Grounds 1 and 3 of the cross-appeal contend that the conclusions on each of these complaints were erroneous, or perverse, given that OH advised that carrying out on-site inspections was a long-term adjustment that should be reviewed in six months, and the tribunal's findings elsewhere that the equipment recommended by ATW for use in on-site inspections would not have assisted the claimant. Grounds 2 and 4 contend that the conclusions on these complaints were not *Meek*-compliant, given that the tribunal did not identity to what *particular* disadvantages the inspection PCP put the claimant, and, in relation to the first of these complaints, its finding at [57(i)], that providing the ATW equipment (which included an Olympus Dictaphone) would not have been a reasonable step to take.

70. I will consider first the *Meek* grounds of cross-appeal – grounds 2 and 4.

71. Viewed in isolation, the conclusion at [57(ii)] is more fully reasoned than those on the complaints relating to the auxiliary aids recommended by the ATW report, under sections 20(3) and (5). However, there is, on the face of it, a conflict between the conclusion that it would not have been reasonable to provide *any* of the ATW equipment (including the Dictaphone) and the conclusion that it would have been reasonable to permit the claimant to shadow a colleague, in order to see how the

Dictaphone was used by her on inspections. While I have found that the conclusions on the reasonable-adjustment complaints relating to the ATW equipment, as such, cannot stand, because they were insufficiently-reasoned, nevertheless, the tribunal did make two conflicting findings, and did not explain how it had reached the conclusion at [57(iii)] *notwithstanding* the conclusion that it reached at [57(i)]. For that reason I uphold ground 2 of the cross-appeal.

72. As to a phased return to inspecting, while the tribunal referred at [57(iii)] to Ms Cox's evidence, it did not explain how it considered that this would have "greatly ameliorated the disadvantage". It did not explain how the particular disadvantage or disadvantages found would be ameliorated by *phasing in* of inspections, whether with respect to the number per week required, the nature of the establishments, or otherwise. For that reason I also uphold ground 4 of the cross-appeal.

73. As for the perversity grounds, it was contended that the tribunal could not properly have found that it would have been reasonable for the respondent to allow the claimant to shadow inspections, or resume carrying them out on a phased basis, and with or without a Dictaphone, given the evidence that the January 2022 OH report advised that carrying out inspections *at all*, was a long-term adjustment that should be reviewed in six months' time, and, once again, the tribunal's rejection of the reasonable-adjustment complaints relating to the ATW equipment generally.

74. However, as I have held, the tribunal's rejection of those general complaints was not adequately reasoned. As for the OH advice, while describing not going out on visits as "a long term adjustment that should be reviewed in 6 months", as Ms Newbegin noted, it also went on to say that when the ATW equipment was in place it "may be possible" that the claimant could increase her work. When the respondent sought clarification, OH's reply was that the author could not predict what *type* of work the ATW equipment might help facilitate, until the claimant had had the chance to try it out; and that OH deferred to the consultant's advice of a 12 – 18 month recovery period.

75. I conclude that I am not in a position to say that the tribunal *could not* properly have upheld these two particular complaints of failure to comply with the duty of reasonable adjustment, on the basis that it would have been perverse to do so. Grounds 1 and 3 of the cross-appeal therefore fail.

Appeal grounds 1, 2, 3 and 4 – Unfair Dismissal

76. These grounds of appeal all challenge the conclusion that the dismissal was not unfair.

77. The tribunal was satisfied that the reason for dismissal was capability. It continued:

> **"44. Did the Respondent follow a fair procedure?**
>
> **The Tribunal was concerned with the procedure that had been followed. In particular, that procedure was not consistent, and whilst we were not unduly concerned with the time taken, there could have been a greater consultation than was undertaken.**
>
> **However, both parties were content with the extent of contact that took place**
>
> **– the Claimant was properly informed of the process and the outcome, whilst the Respondent was genuinely concerned that it should not unduly trouble the Claimant.**
>
> **Furthermore, and whilst there was no meaningful medical investigation (the Respondent could have obtained the Claimant's medical records and/or spoken to her Consultant), it was certainly reasonable to rely upon the OH report. The rationale for dismissal was clearly conveyed, and whilst there was no meaningful consideration of alternative redeployment, it was clear that the Claimant only wished to return to her position.**
>
> **In the circumstances, and whilst improvements could have been made to the procedure that was adopted, it is clear to the Tribunal that a reasonable procedure was adopted.**
>
> **45. Did the Respondent act reasonably and within the range of reasonable responses in treating the reason as a sufficient reason for the dismissal?**
>
> **The Tribunal is content that the Respondent acted within the reasonable range. Whilst the Tribunal did have some concerns in relation to the areas set out above, it is not for the Tribunal to stand in the shoes of the Respondent, and the Tribunal has therefore concluded that the Respondent acted within the range of reasonable responses in treating the reason as a sufficient reason for the dismiss."**

78. Ground 1 contends that the tribunal erred in law and/or reached a perverse conclusion in finding that there had been a fair procedure, and that dismissal as a sanction was within the band of reasonable responses. That is said to be so, having regard to its statements (a) that it was "concerned" with the procedure that had been followed; (b) that the procedure was "not consistent"; (c) that there "could have been greater consultation"; (d) that there was "no meaningful medical investigation"; (e)

that there was "no meaningful consideration of alternative redeployment"; (f) that "improvements could have been made to the procedure"; and (g) that the claimant was straightforward and credible, whereas the tribunal was critical of the credibility of the respondent's witnesses.

79. Ground 2 contends in the alternative that, having regard to all those features, the tribunal's conclusions that it was "clear" that "a reasonable procedure was adopted" and that the sanction of dismissal was within the band of reasonable responses, were not *Meek*-compliant. The tribunal is also said to have given inadequate reasons for concluding that "both parties were content with the amount of contact that took place" and that the claimant "only wished to return to her position", given the contents of her witness evidence on these aspects.

80. Ground 3 contends that the tribunal's conclusion that the dismissal was fair was erroneous or perverse given that it had upheld two of the complaints of failure to make reasonable adjustments – by failing to allow the claimant the opportunity to shadow colleagues carrying out site inspections, and failing to allow her a phased return to conducting such inspections.

81. Ground 4 contends that the tribunal erred in law or acted perversely by failing to take into account what it says is the following relevant information: (a) the advice of treating consultants that the claimant would make a full recovery within 12 to 18 months of surgery (therefore between April and October 2022); (b) failure to provide the ATW equipment; (c) various inadequacies of the January 2022 OH report; (d) failure to undertake a risk assessment in respect of the claimant's ability to carry out inspections; (e) failure to allow her to shadow colleagues or trial a return to inspections; (f) failure to take into account the consultant's 2022 advice; (g) the claimant's repeatedly stated commitment to return to inspections; (h) the availability of temporary redeployment into a quality assurance role. The tribunal is also said to have made a perverse finding of fact that there was no timescale afforded as to when the claimant would be able to fulfil her duties as an EYRI.

82. I will take ground 3 first. A finding of failure to comply with the duty of reasonable adjustment does not mean, as a matter of law, that the dismissal *must* be unfair, as the legal tests are different. But the same factual findings may be relevant to both tests (see **Knightley v Chelsea & Westminster Hospital NHS Foundation Trust** [2022] IRLR 567 at [45] – [47]). In this case the conclusion that it was within the band of reasonable responses to dismiss the claimant at the point when the respondent did was, on the face of it, inconsistent with the findings that it would have been reasonable to allow the claimant to shadow a colleague carrying out inspections, and to embark on a phased return to carrying out inspections. Ground 3 is therefore, to that extent, well-founded. But as the latter findings, in the present decision, were not *Meek*-compliant, and were not inevitable, I cannot also say that for this reason it was perverse to conclude that the dismissal was fair.

83. There is significant overlap among grounds 1, 2 and 4, and I will consider them together. I keep in mind that, while a decision must be *Meek*-compliant, the tribunal was not obliged to address every factual feature covered in the evidence, nor every point raised in argument. However, the tribunal was obliged to address the essential issues relevant to whether a dismissal of this kind was fair or unfair, and/or which formed key planks of the claimant's case; and to make findings and reach conclusions which were holistically consistent and coherent.

84. It appears to me that, in the course of [44] the tribunal was seeking to address the issues of (a) consultation; (b) assessment of the medical position; and (c) consideration of alternative employment.

85. As to (a) the conclusion that "both parties were content with the extent of contact" was not explained, or underpinned by substantive findings of fact. The tribunal's findings in the introductory section did no more than refer to the fact that there was a meeting on 8 March 2022. I was also shown that the claimant in evidence raised concerns – at least – that the respondent had failed to engage sufficiently with her having raised, from prior to her return, that she would need a Dictaphone, and a workstation assessment – so this was not an undisputed matter. Ms Newbegin also fairly made the

point that the conclusion that the claimant was properly "informed" of the process and outcome did not address the question of whether she was sufficiently *consulted*.

86. As to (b) the tribunal's conclusion was that, notwithstanding that there was "no meaningful medical investigation" by way of any attempt to obtain relevant medical records or an opinion from the consultant, the respondent nevertheless reasonably relied upon the OH report. But, in its introductory findings, at [11], the tribunal had described the January 2022 OH report as suggesting that the claimant "was not fit to return to full duties" but *also* as suggesting that "capability might return once adjustments were made"; and it referred also there to her case that the absence of a number of adjustments "meant she could not take on full amounts of work." It was not sufficient for the tribunal then simply to state that it was "certainly reasonable to rely upon the OH report" without addressing those aspects of the claimant's case, or giving any other explanation for that conclusion.

87. As to (c) the finding that there was "no meaningful consideration of alternative employment" is, as I have discussed, at odds with the later conclusion at [57(iv)] that the respondent "did consider alternative roles and duties". If these were not simply flatly contradictory findings, the tribunal certainly failed to provide an adequately-reasoned and explained conclusion on this subject. The finding at [44] that "it was clear" that the claimant "only wished to return to her position" (which, it may be inferred, was why it did not think the lack of meaningful consideration of alternatives rendered the dismissal unfair) was also insufficiently explained, given that it was specifically part of the claimant's case that she had expressed an intention to apply for the QAH role, and *her* case (though the respondent disagreed) was that this was a suitable role for her at the point when she was dismissed.

88. The tribunal also failed, at [45], to reach an adequately-reasoned conclusion as to whether dismissal was within the band of reasonable responses. While it correctly stated that it was not for it to "stand in the shoes of the respondent", it was not sufficient simply to assert that "therefore" the respondent acted within the band of reasonable responses (and, indeed, the word "therefore" is

troubling). In particular, the tribunal did not specifically address whether any reasonable employer would have waited longer before moving to a decision to dismiss, having regard to the state of the most-recent available medical information, the fact that the ATW equipment had yet to be supplied, and/or taking account of whether any reasonable employer would have allowed the claimant to shadow a colleague on inspections, and/or to trial limited inspections, before proceeding to dismiss.

89. Ms Newbegin did not press in submissions the point raised in the grounds about whether any timescale "was afforded" as to when the claimant would be able to carry out inspections; and this appears to me to have been referred to by the tribunal as part of the respondent's case, not part of its own findings. Nevertheless, by that same token, the tribunal did not make a finding about what the state of the latest information available to the respondent on that question was, either way.

90. For all of these reasons the decision that the dismissal was not unfair was not *Meek*-compliant, and, in the respects I have discussed, I uphold grounds 2 and 4. However, I am not in a position to say that it was perverse, in the sense that the tribunal would have been bound, had it properly reasoned its decision, and addressed all relevant considerations, to conclude that the dismissal was unfair. I keep in mind the high perversity bar, and that I have only been referred to some features of the witness and documentary evidence which the tribunal had. For this reason I do not uphold ground 1.

Appeal ground 13 – rule 62

91. Finally, ground 13 of the appeal contends that the decision overall did not comply with rules 62(1) or 62(5) of the **2013 Rules of Procedure**.

92. As to rule 62(1), as I have noted, I consider that the written decision not only includes the tribunal's judgement, but also, though not separately headed, as such, its reasons, so far as they go. As to rule 62(5) **Simpson v Cantor Fitzgerald Europe** [2020] EWCA Civ 601; [2021] IRLR 238 holds (at [29]- [32] per Bean LJ, Henderson and Rose LJJ concurring) that a failure to set out even a

brief summary of the law, is a breach of what was rule 62(5); but the real issue in the given case will be whether the tribunal has, in substance, made a material error in the substantive application of the law. As to the facts, what is required is a sufficient statement of the material facts found, pertaining to each issue. Having regard to the nature of the other grounds, and my conclusions in relation to them, this strand of ground 13 adds nothing to the outcomes of this appeal and cross-appeal.

Outcome

93. In light the foregoing, I allow the appeal in respect of the decisions (a) that the claimant was not unfairly dismissed; (b) dismissing the complaint that the dismissal was an act of discrimination contrary to section 15 **Equality Act 2010**; and (c) dismissing those complaints of failure to comply with the duty of reasonable adjustment that failed. I allow the cross-appeal in respect of those complaints of failure to comply with the duty of reasonable adjustment that succeeded.

94. The decision that the dismissal was by reason of capability stands, but whether it was fair or unfair applying section 98(4) of the **1996 Act** must be remitted for fresh adjudication. The **Equality Act** complaints must also be remitted for fresh adjudication, but on the basis that the findings of knowledge of disability, and actual or constructive knowledge of substantial disadvantage, stand. The section 15 complaint should also be adjudicated on the basis that the dismissal was, as properly conceded, because of something arising in consequence of disability. Ms Newbegin invited me to substitute a decision upholding that complaint on the basis that the respondent had not properly pleaded a legitimate aim for the purposes of justification. But there was such a pleading, as far as it goes, at paragraph [34] of the response; and ground 6 only asserted that the tribunal erred, in respect of the defence, by failing to *consider* it. Whether it is shown must be decided by the tribunal.

95. I am bound to say that the tribunal's decision was so extensively flawed, and in particular, that there was such a paucity of requisite fact-finding, that the appropriate course is to remit these matters for fresh hearing and determination before a differently constituted tribunal.