# EMPLOYMENT TRIBUNALS

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| **Claimant:** | **Miss R. Jalloh** |
| **Respondent:** | **Change, Grow, Live** |
| **Heard at:** | **East London Hearing Centre** |
| **On:** | **12-15 March 2024; and<br>(in chambers) on 22 April 2024** |
| **Before:** | **Employment Judge Massarella<br>Mrs G. Forrest<br>Miss J. Isherwood** |

**Representation**

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| Claimant: | In person (assisted by her sister, Ms Jalloh) |
| Respondent: | Ms N. Gyane (Counsel) |

# RESERVED JUDGMENT

**The judgment of the Tribunal is that: -**

1. **the Respondent's application to strike out the Claimant's case for failure to comply with Tribunal orders and/or unreasonable conduct of proceedings was refused;**

2. **the Respondent's application for an unless order was refused;**

3. **the Claimant's application for the hearing to be adjourned in its entirety was refused;**

4. **the Claimant's claims of disability discrimination are not well-founded and are dismissed;**

5. **the Claimant's claim of unfair dismissal is not well-founded and is dismissed.**

# REASONS

## Procedural history

1. There are three claim forms, all presented on 18 November 2022 after an ACAS early conciliation period between 6 September and 18 October 2022. They all relate to the same matters and were consolidated.

2. The claims are of unfair dismissal and disability discrimination (failure to make reasonable adjustments, disability-arising discrimination and indirect discrimination).

3. Case management orders were made by REJ Burgher on 9 February 2023. There was some delay in finalising the bundle, both sides asked for, and agreed to, short extensions. It was completed by September 2023.

4. The parties were due to exchange statements on 30 October 2023. Again, the parties agreed extensions between themselves. By December 2023, exchange had not taken place. The Claimant stopped communicating with the Respondent.

5. On 2 January 2023, the Respondent wrote to the Tribunal, applying for the Claimant's case to be struck out, or that an unless order be made, on the grounds of the Claimant's failure to comply with Tribunal orders and unreasonable conduct. The Claimant replied, objecting, on 4 January 2024.

6. On 19 April 2023 a preliminary hearing took place before EJ Volkmer, who clarified the issues in the case.

7. The strike-out application was referred to EJ Povey who, by letter dated 20 January 2024, said that, unless the parties informed the Tribunal by 29 January 2024 that they wanted the applications to be determined at a hearing, they would be dealt with on the papers. The Judge ordered that the case be referred back to a judge after that date. Both parties said they were content for the application to be dealt with on the papers. Unfortunately - it would appear owing to an administrative error by the Tribunal - the applications were not then dealt with.

8. The Respondent pursued its strike-out application/unless order on the first day of the hearing; the Claimant made an adjournment application on the grounds that she had lost her legal representative, a direct access barrister who had taken the case out of his diary because the Claimant had not signed the proposed agreement and paid their fees.

9. At the hearing, the Claimant confirmed that she has a completed witness statement and was willing to disclose it to the Respondent. She also explained that, although she would prefer to have a full adjournment of the hearing, she was willing to proceed with the hearing, if the adjournment were not granted, provided she had some time to prepare her questions for the Respondent's witnesses. As it happened, one of the lay members had been double-booked on the second day of the hearing and the Tribunal could not sit on that day. This gave the Claimant and her sister extra time to prepare questions.

10. The Tribunal refused all three applications, for the reasons given orally at the hearing; we adjourned the hearing to what would have been Day 3. In the meantime, the panel read into the case.

## The hearing

11. The Tribunal was provided with a bundle of 464 pages.

12. We heard evidence from the Claimant and, on behalf of the Respondent from:

    12.1. Mr Matthew Rossor (national human resources and operations partnership lead);

    12.2. Ms Katheryn Lynch (HR business partner), who gave her evidence by CVP; and

    12.3. Mr Steve Smith (a director of the Respondent).

13. Both parties provided helpful written submissions, which the Tribunal has taken into consideration.

## Findings of fact

14. The Respondent provides drug and alcohol rehabilitation services to vulnerable service users in England and Scotland.

### The Claimant's role

15. The Claimant's employment with the Respondent began in 2013, when she transferred from East London NHS Foundation Trust. Over time her title changed; by the end of her employment she was as an opiate recovery worker. Her job was to manage the recovery process of service users, involving their preparation for detoxification and rehabilitation into the community. She worked in the Respondent's new rise project based in Stratford. She was an effective and respected member of the team.

16. The Claimant was a front line worker. Her job description stated that her role was to support service users 'from point of entry into the service and through their treatment/recovery journey'. The Claimant agreed that this was a fundamental aspect of her duties. She also agreed that that engagement with service users was most effective when carried out face to face. She managed a large caseload. She undertook initial assessments, facilitated group treatment and provided one-to-one key working support.

17. She worked 37.5 hours per week, Monday to Friday 9.30 a.m. to 5.30 p.m. Working from home in this role was rarely permitted.

### The Claimant's health difficulties

18. In April 2016, when she was 36, the Claimant experienced chest pains and shortness of breath. In December 2016 she was diagnosed with very serious coronary artery disease and signed off work.

19. In February 2017 she had heart bypass surgery. Initially it was successful, but after five months the bypass failed; she had a heart attack and needed emergency angioplasty to insert two stents into her arteries.

The move to part-time work

20. An OH report dated 30 May 2017 recommended a phased return to work. She returned on 8 July 2017. She soon began experiencing episodes of heart palpitations because of anxiety and stress. She struggled with the daily commute.

21. She applied for flexible hours, asking to work part-time (16.5 hours) over three days. Initially the application was refused but it was granted on appeal. She worked three days a week, 10 a.m. to 4 p.m. The arrangement allowed her to manage the stress of commuting and to recover from the working days. Her income dropped, but she was determined to continue working.

22. The normal caseload was 80 cases per employee; the Claimant's caseload was reduced to 25 (less than the *pro rata* number, which would have been 35).

23. An OH report in October 2019 advised that her heart condition was long-term; she was unlikely to be able to return to full-time work; she was unlikely to be able to carry out site visits to service-users; her health and her symptoms would probably not improve significantly in the longer term.

24. On 1 February 2020, at a meeting with her line manager Ms Mills (who left the Respondent's employment in January 2023), the Claimant explained that her reduced hours meant that she felt out of touch and that she was always rushing; she felt anxious all the time and was not enjoying work; she worried what her colleagues thought of her because they had to cover her work. Ms Mills asked her if she had ever considered doing a different, less stressful kind of work. The Claimant said that she was not ready to think about that yet but that she knew eventually she would have to consider it; the travel was stressful; she had to drop her son off at school before coming into work. The note records: 'she feels that the Company have done everything that she has asked of them; there is nothing more that they can offer.'

Light duties

25. The Covid-19 pandemic began in March 2020; the first lockdown began towards the end of that month. As with many organisations, the work had to move online. The Claimant received a letter from the NHS identifying her as clinically extremely vulnerable and requiring her to shield.

26. The Claimant was off sick between 25 March and 21 May 2020. At a one-to-one meeting in June 2020 with her manager, Ms Mills, the following discussion took place:

> 'Rugi reiterated that she is thankful that she has not had to travel into the hub stating that at the time of her return the thought of traveling was very daunting. We spoke about the role of the recovery worker and that going forward at some point depending on centrals instructions we will be based in our hubs, that the role of the recovery worker is to support clients face to face on a 1-2-1 basis and with group work, that it will be necessary for Rugi to return to working out of the office, Rugi agreed and understands that this will be the case at some point in the future.'[1]

[1] Extracts from contemporaneous documents are transcribed without amendment for errors

27. On 14 July 2020, the Claimant suffered an acute onset of chest pains; she was admitted to hospital. She was off sick until 8 September 2020.

28. Before her phased return to work on that date, her GP recommended amended hours and duties. In response to this, the Respondent assigned the Claimant light, purely administrative, duties, allowing her to avoid stressful situations with challenging clients, which might aggravate her condition. She liaised with opiate recovery workers and other professionals, regarding service users' re-engagement with treatment. Her caseload of opiate clients and her other recovery worker duties was covered by other members of the team. Inevitably, this increased the workload on colleagues, which was already high.

29. On 14 October 2020, the Claimant sent Ms Mills an email setting out what situations were stressful for her:

> 'I understand our client group is challenging and their life experiences means practitioners will need to deal with unforeseen circumstances, the unexpected at very short notice.
>
> Please find below situations I may find stressful:
>
> Situations which involves dealing with various individuals to achieve a task or action particularly when the task or action has a time limit and potential obstacles which in my case creates pressure which in turn leads to chest pain.
>
> Eg ensuring a vulnerable client is scripted at short notice this involves liaising with Dr, Clinical team, Pharmacy and the client while taking into consideration availability of professionals at this point in time, obstacles that may arise and time limit of the task.
>
> I understand currently I am working from home, however, travelling to work in the past has been stressful. My day starts off dropping Zaydn at school then my journey into work starts with a 15mins walk from Zaydn's school to the bus stop which takes me to Woolwich. From Woolwich I get the DLR train and this takes me into work. I suffer from Peripheral Vasoconstriction, this is due to my medications (blood vessels are constricted in the hands and feet when exposed to cold weather). At its worst, my feet become numb (even with warm boots) and this makes it very difficult to walk. Being able to continue to work from home will not only be of great help physically but also emotionally as it takes away the stress of commuting.
>
> It is difficult to think about various circumstances that may create a stressful situation for me at work as this is a learning curve in terms of my current health awareness. With my most recent diagnoses of Microvascular Disease I have noticed a change in terms of how I manage stressful situation and its physical impact on my health.
>
> The example above provides a range of situation that are similar that can be stressful.'

30. At a meeting on 6 October 2020, Ms Mills confirmed that light duties could continue for the time being, but not indefinitely; the situation would be reviewed in consultation with OH and the Claimant.

31. In November 2020 the issue of medical retirement was raised with the Claimant by OH and her line manager. The Claimant considered this was premature.

<u>The occupational health report of June 2021</u>

32. A further OH report was produced on 24 June 2021. The report recorded that the Claimant had continued to exhibit symptoms suggestive of cardiac chest pain from time to time; she used her pump spray at least two to three times daily in response to emotional stress and physical exertion; she had recently been

experiencing increased levels of tiredness and fatigue, as well as irregular heartbeats. The report recorded that the Claimant struggled with normal day-to-day activities: shopping was delivered to her home; her sister and partner assisted with other activities. The advice was that the Claimant should discuss her symptoms with her GP in order to get some form of support for psychological health, if diagnosed.

33. The report concluded that the Claimant was not ready to come off light duties and recommence her recovery worker role; it was difficult to see her returning to her normal role at present; working beyond three days on any other role, apart from the administrative role, appeared to be difficult; she was likely to find all aspects of her role stressful, except her current administrative tasks, working from home; dealing with complex individuals, who present in a crisis situation would make it difficult for her to fulfil the role; she was not well enough to commute to work, as travel would trigger stress.

34. The Claimant agreed in oral evidence that, as at that date, she could not carry out fundamental aspects of her role.

The meeting in August 2021

35. The Claimant met with Ms Mills on 11 August 2021 to review the content of the OH report. Ms Mills explained that the restricted duties, which the Claimant had been undertaking, were not sustainable for the service in the long term.

36. Ms Mills asked the Claimant if she would like to consider redeployment within the Respondent and suggested they meet towards the end of the month to explore the type of role which might be appropriate and manageable for her. She asked her to discuss this with her GP (as OH had recommended) before they met. She explained that, if a suitable redeployment opportunity was not identified within a four-week period of the Claimant being put on the redeployment list, a capability hearing would be arranged. Ms Mills also raised again the possibility of ill-health retirement. The Claimant spent some time considering these options. In November 2021, she informed Ms Mills that she did not wish to consider redeployment or ill-health retirement.

37. Shielding ended in September 2021. From April 2022 onwards, in line with guidance from the Office for Health Improvement in Disparities (formerly Public Health England), all recovery workers were required to be on site, apart from some limited remote working to undertake administrative tasks (one day a week for a full-time employee).

38. A further OH appointment was arranged for January 2022, but the Claimant was unable to attend because of the events described below.

The Claimant's spinal condition

39. In January 2022, the Claimant started having severe back pain. She was diagnosed with cauda aquina syndrome, a rare form of severe spinal stenosis which can lead to permanent paralysis and incontinence. She had emergency surgery on 14 January 2022, which was successful. She remained on sick leave from then until her dismissal on ill-health grounds, which took effect on 20 December 2022.

40. The spinal condition itself was not an impediment to the Claimant's return to work, once the Claimant had recuperated from surgery. However, asked by the Tribunal whether she would have been able to come back to work face to face with service uses the Claimant replied: 'no there was still the stress of travelling'.

The absence management meeting in May 2022

41. On 21 March 2022, Ms Jane Parish of HR wrote to the Claimant, noting that the Claimant had not felt well enough to engage with the Respondent in discussions about her employment. Ms Parish informed the Claimant that the Respondent proposed to proceed with a formal capability process. Ms Parish wrote that she understood that the Claimant had had a discussion about ill-health retirement with Ms Mills, which she had rejected; if she wanted to explore that route, she was asked to let Ms Parish know.

42. Ms Mills prepared a sickness absence report with appendices. Among other things, she wrote:

> 'Due to Rugi's absences the caseload held in her name was never able to be supported efficiently or consistently, this was particularly challenging through the pandemic, resulting in the clients never being managed by a consistent worker, supporting Key workers never having a true understanding of the clients personal complexities, issues and or support needs which ultimately has had a negative impact on the client base and individuals being able to achieve positive outcomes and or reaching their goals.
>
> Rugi continues to be on light duties, her caseload of approximately 25 opiate clients and other recovery worker duties (including assessments, hub duties, doctors restart and new start support, supporting with medical reviews and answering of calls, attendance of safeguarding meetings) have all been distributed amongst the team, increasing keyworkers already high caseloads and responsibilities, which adds to the services challenges to comply with minimum outcomes and processes.'

43. Asked in cross-examination whether she disagreed with anything in this assessment, the Claimant said that she did not; she confirmed that the distribution of her caseload to the other members of the team increased their workload significantly and that, in the long-term, it was not fair to them. She accepted that her absence was impacting on the Respondent's ability to provide a satisfactory service; and that all the same problems would arise if she were to recommence work in the purely administrative role.

44. Mr Rossor wrote to the Claimant on 3 May 2022, inviting her to a formal meeting (by Teams) on 10 May 2022 to discuss her continued absence. He enclosed Ms Mills' report. He warned that one possible outcome might be the termination of her employment. She was reminded of her right to be accompanied at the meeting and given the opportunity to submit a written statement.

45. The day before the meeting the Claimant provided a letter from her GP, dated 3 February 2022.

> 'During this time, Miss Jalloh was readmitted to hospital in July 2020 after which she resumed work in September doing 'light duties' to support her return to work. Since then I understand that she has maintained this at 16.5 hours a week as per her contract. There has been no admission to hospital over the last year and knowing Miss Jalloh's history since the onset of her cardiac disease in 2016, this is a significant improvement in the right direction.

> Miss Jalloh continues to settle well in her day to day activities at home with support from her family, which has helped her to continue working. Whilst Miss Jalloh does suffer from cardiovascular disease, this by no means has rendered her incapable of returning back to her role as a Recovery Worker within her contracted hours. This would be an opportunity for her to resume her duties albeit working from home as Miss Jalloh remains extremely vulnerable, in addition working from home could reduce the stress triggered by commuting.
>
> Dr Maqsood's comments on anxiety in Miss Jalloh's occupational health report is noted. Currently she states that she has not experience feelings of anxiety or associated disorder, however we will assess and continue to monitor these as part of her ongoing care, and appropriate referrals would be made if she needs any further support.
>
> In my opinion, it is important that Miss Jalloh is given the opportunity to work from home as a Recovery Worker as a reasonable adjustment in this current climate; she is young, highly capable and cardiovascularly stable and it would be a shame to see her lose a role she has had for the last 7 years.'

46. Although the letter was written some three months earlier, the Claimant confirmed that it remained an accurate summary. She told the Tribunal that she had simply forgotten to submit it earlier.

The meeting on 10 May 2022

47. The capability meeting went ahead on 10 May 2022. The Claimant was accompanied by her union representative, Mr Gordon Calliste. Ms Mills presented her report.

48. The Claimant said that in 2021 she had only had seven days of illness, five of which were for her heart condition; her heart condition was now stable; her new illness was a spinal issue, unrelated to her heart. She acknowledged that her continued absence was causing stress to her colleagues. She said that she would like to return to work, but would like to work from home, as travelling was very stressful for her and led to issues with her heart. She wished to continue working light duties, but she suggested taking on ten clients to lessen the caseload of colleagues.

49. The Claimant had been absent from work since January 2022. The Claimant told Mr Rossor that her recovery could take some months; she suggested that she might possibly be able to have a phased return to work in June 2022; she also explained that she had been told that she may have symptoms of congenital blood vessel malformation which may further impact on her health, and which was being further explored. Accordingly, the position as at the meeting was that there was no definite prospect of a return to work.

50. Mr Rossor asked Ms Mills whether, assuming the Claimant were well enough to return to work, the service could function with the Claimant's light duties (which essentially consisted of making contact with clients in dealing with related administrative duties) as its own resource; Ms Mills said that it could not.

51. Mr Rossor asked the Claimant about redeployment. The Claimant said that she would prefer to return to her own role, as there was no guarantee of a role in the redeployment process.

52. Mr Rossor asked the Claimant about ill-health retirement. The Claimant said that she had previously declined the option because she felt that, if she accepted it, it would be difficult for her to return to work again.

53. Mr Rossor asked her about the reference to anxiety in the OH report; the Claimant said that she did not suffer from anxiety. Mr Rossor asked her what the impact would be on her if she were to return to the service dealing with open access client. The Claimant replied that travelling to the service, being in the service, dealing with other people's stress, and dealing with her own stress would be stressful for her. She said that even thinking about it was stressful for her.

54. Mr Rossor asked the Claimant if she would agree to another OH referral; she said that she would. In the event, he did not make the referral. In cross-examination, he agreed that it would have been better if he had done so.

Mr Rossor's decision

55. After the meeting Mr Rossor contacted Mr Ed Shorter (one of the Respondent's directors) and Ms Lauren Mulligan (services manager) to ask if there was scope to adjust the Respondent's budgets and plans to accommodate a new role of re-engagement administrator, based on the light duties which the Claimant had been performing. Their response was that, within the business model approved by the commissioners of the service, there was no scope for this to happen.

56. Mr Rossor concluded that the Claimant should be dismissed: she was unable to identify with any degree of certainty when she might be able to return to work; if she were able to return to work, she would not be able to carry out the majority of the responsibilities of her role, including face-to-face work with service users, and was unlikely to be able to do so in the foreseeable future; there was no scope in the long term to create what was essentially a new role, consisting of limited administrative functions only. Mr Rossor spoke to the Claimant on the phone to tell her what the outcome was.

57. He then sent the Claimant a letter on 8 June 2022, confirming his decision. He told her that, should an opportunity arise for redeployment into a part-time administrator or equivalent role which could be undertaken from home, the Respondent would ensure that she was informed of this during her notice period. She was to have access to the redeployment register throughout that period. She was also told of her right to appeal.

The appeal against dismissal

58. The Claimant appealed the decision on 23 June 2022. She argued that, although reasonable adjustments had been made in the past, there was no evidence that reasonable adjustments were considered in relation to the future. She confirmed that she was asking to continue to work from home. She suggested that this 'could include' one day in the office to provide the face-to-face interaction aspect of her role. She said that the Respondent had decided to terminate her employment without consideration of her improved health; her recent spinal issue was not an ongoing health issue because she had had corrective surgery. She considered that a decision had been made which was not medically informed; there was no up-to-date occupational health report.

59. Mr Smith was asked to conduct the appeal; Ms Lynch was asked to support him.

60. Before the appeal hearing, Ms Lynch made enquiries about home working. Mr Tayib Bhatti, the Newham service's data analyst said that, from April 2022,

all sites operating in the service had resumed face-to-face appointments; all recovery workers were required to return to the office, with one day working from home being offered to full-time staff.

61. The appeal hearing took place on 14 July 2022. The Claimant was accompanied by her union representative, Yusra Ali. Mr Smith clarified that, as part of her appeal, the Claimant was suggesting that the hybrid model she proposed at the previous hearing had not been considered. The Claimant agreed; her suggestion was that she either work two days from home and one day in the office, or continue working from home or three days for a period, with a view to this being reviewed in the future. She explained that the one day a week in the office would be to have contact with clients; commuting into the service would cause her more stress and she would want to do the one day a week on a trial basis. The Claimant confirmed at the hearing that she never attempted the journey before the end of her employment.

62. Asked whether she considered it feasible to have a level of intervention with her opiate clients based on one day a week in the office, the Claimant replied 'probably not'. She confirmed in cross-examination that there were three recovery workers in the team, including her; if she were not able to carry out face to face contact with service users, they would have to do her cases for her.

63. As for other roles the Claimant might be interested in, the Claimant said that she would like something based in London with a commute no longer than an hour.

64. Mr Smith decided to adjourn the hearing to obtain an up-to-date OH report and to ensure that the Claimant could access the redeployment register, which she said she had not been able to do. New arrangements enabling her to access the register were sent to her on 15 July 2022.

65. Mr Smith also agreed at the meeting that, as the Claimant was due to be processed as a leaver on 10 August 2022, they would inform payroll not to process this pending the outcome of the appeal; she would continue to receive normal pay throughout.

<u>The September 2022 OH report</u>

66. The referral to OH was delayed. The first appointment offered to the Claimant was on 15 August 2022, but it conflicted with her holiday plans. The assessment, with Dr Susannah Kahtan, took place on 7 September 2022 and the report was produced the same day.

67. Dr Kahtan recorded the Claimant's current health situation: she took a range of medication for her heart problem, including an angina spray; she tended to develop chest pain in response to stress, rather than physical exertion; when she uses her angina spray, it did not always work and it gave her a headache; her commute to the office was not easy, consisting of a drive, a bus journey and a train journey; she found herself getting anxious if her journey went wrong and she was running late; she had not attempted this journey since 2020; she should attempt the journey several times before committing to attending the office.

68. The report recorded that the Claimant would ideally like to continue working from home, 16.5 hours a week spread over three days. However, she offered to try to work one day a week in the office. It is apparent from the report that the

Claimant did not mention the possibility of coming into the office for two days a week to OH, nor did she do so at the resumed appeal hearing.

The resumed appeal hearing

69. The resumed hearing was originally arranged for 30 September 2022; it was rescheduled as the Claimant's trade union representative was unavailable. The hearing resumed on 19 October 2022. The Claimant was accompanied by her representative.

70. Mr Smith asked the Claimant if she had any comments on the OH report; she did not. Mr Smith observed that the pattern of work the Claimant was proposing was still one day a week in the office, although she had not attempted to travel to work at all since 2020 and was unable to say with certainty whether she could make the commute. He said that this pattern had already been discussed at the previous hearing and it was agreed that it was unrealistic.

71. The discussion then turned to the question of redeployment. Mr Smith asked the Claimant if she had had any further thoughts on this; she said she did not. Ms Lynch then shared her screen with the other participants (it was a video meeting), so that she and the Claimant could look at all the redeployment opportunities together. Ms Lynch was clear that, if there was a role the Claimant was interested in, the Respondent could consider what adjustments could be made to accommodate her working in the role. They went through a number of roles on the register; the Claimant said that none of them would be suitable.

The outcome of the appeal process

72. Mr Smith gave his decision at the end of the hearing. He had decided to uphold Mr Rossor's decision to terminate the Claimant's employment on grounds of ill-health. Working only one day a week in the office was not feasible for a recovery worker in a front line role, even if (which was by no means certain) the Claimant were to trial the commute and find that she was able to attend the office at all.

73. Mr Smith explained that the dismissal was effective from that day, with a nine-week notice period during which the Claimant would have access to the redeployment register; the last day of employment would be 20 December 2022.

74. There was then a discussion about the redeployment process. Ms Lynch explained that, if the Claimant met the essential skills criteria, she would only have to undertake one interview as opposed to the usual two; the interview would be less formal; and she would take priority in that she would not have to compete against other candidates, other than candidates facing redundancy. She explained that, if the Claimant could identify a role she was interested in, she would have a four-week trial period and her continuity of service would be protected

75. On 25 October 2022, Ms Lynch wrote to the Claimant, apologising for the fact that the full outcome report would be delayed because of Mr Smith's unavailability. She summarised the outcome. Ms Lynch asked the Claimant to let them know as soon as possible if she wanted to be considered for any of the roles. On 11 November 2022, Mr Smith wrote to the Claimant, confirming the outcome.

The redeployment options

76. Ms Parrish sent the Claimant an exported list from the portal of all current vacancies on 14 November 2022 and on four further occasions through December and into January 2023. Ms Parrish repeatedly reminded the Claimant that the Respondent was willing to look at whether adjustments could be made to any role the Claimant was interested in.

77. The activity log of the redeployment register indicates that the Claimant had not accessed it since Mr Rosser's decision. At no stage did the Claimant contact anyone in HR to identify a role she wished be considered for.

78. The Claimant's access to the redeployment register was removed on 6 January 2023.

79. The Claimant confirmed in cross-examination that she did not think there were any vacancies which were suitable for her. In response to a question from the Tribunal, she stated that, even at the date of the Tribunal hearing, she did not have a specific alternative role in mind, which the Respondent should have offered her.

## The law

Failure to make reasonable adjustments: s.20-21 EqA

80. S.20 EqA provides as relevant:

> **(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.**
>
> **[…]**

81. S.21 EqA provides as relevant:

> **(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.**
>
> **…**

82. In relation to the employer's actual or constructive knowledge of the employee's disability, and of the disadvantage, sch.8, Part 3, para 20(1)(b) EqA provides that:

> **(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—**
>
> **…**

> **(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.**

83. As for knowledge of disadvantage, what is necessary is not that the employer know that the claimant was generally disadvantaged by their disability, but that it knows that they are likely to be placed at 'the disadvantage referred to in the first … requirement', which is as specified in s.20(3) 'a substantial disadvantage in relation to a relevant matter' (*Aecom Ltd v Malloon* [2023] EAT 104 at [25]).

84. The correct approach for the Tribunal in determining a reasonable adjustments claim is set out in *Environment Agency v Rowan* [2008] ICR 218 at [27] (the reference to sections is to sections of the Disability Discrimination Act 1995):

> **'In our opinion an employment tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the Act by failing to comply with the section 4A duty must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant [...] Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.'**

85. The burden is on the Claimant to show the PCP, to demonstrate substantial disadvantage, and to make out a *prima facie* case that there is some apparently reasonable adjustment which could have been made (and that, on the face of it, there has been a breach of the duty): *Project Management Institute v Latif* [2007] IRLR 579 at [45] and [54]. If the PCP contended for was not actually applied, the claim falls at the first fence: *Brangwyn v South Warwickshire NHS Foundation Trust* [2018] EWCA Civ 2235 at 40.

86. The substantial disadvantage applies in respect of the disabled person compared to persons who are not disabled. The EAT has made clear that 'the function of the provision, criterion or practice within section 20(3) is to identify what it is about the employer's operation which causes disadvantage to the employee with the disability' (see *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169 at 39). As observed by the EAT in *Sheikholeslami v Edinburgh University* [2018] IRLR 1090 at [48]:

> **'The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP.'**

87. In *Rider v Leeds City Council* EAT 0243/11 the EAT held that the carrying out of an assessment as to what reasonable adjustments might be made in respect of a disabled employee was not, of itself, capable of amounting to a reasonable adjustment. In *Smith v Salford NHS Primary Care Trust* UKEAT/0507/10, the Employment Appeal Tribunal held that:

> '**Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage … within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify.'**

88. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal: *Morse v Wiltshire County Council* [1998] IRLR 352. The focus is on practical outcomes: *per* Langstaff P in *Royal Bank of Scotland v Ashton* [2011] ICR 632 at para 24:

> **'The focus is upon the practical result of the measures which can be taken. It is not – and it is an error – for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reason.'**

89. In *Archibald v Fife* [2004] ICR 954 the House of Lords held that it may be a reasonable adjustment for a person who is incapable of fulfilling their job description, to place that person in an alternative role without competitive interview, if that was reasonable in all the circumstances.

Indirect disability discrimination

90. The concept of indirect discrimination is set out at s.19 EA 2010:

> **(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.**

91. As for the comparative exercise, s.23 EqA provides:

> **(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.**

92. The burden lies with the Claimant to establish the first, second and third elements of the statutory definition of indirect discrimination (the application of the PCP, group disadvantage, and individual disadvantage). Only then does it fall to the employer to justify the PCP as a proportionate means of achieving a legitimate aim (*Dziedziak v Future Electronics Ltd*, EAT 0271/11). It is not necessary to show why the PCP puts people sharing a protected characteristic at a disadvantage (*Essop and others v Home Office (UK Border Agency)* [2017] ICR 640).

*Group disadvantage*

93. The current definition of indirect discrimination in s.19(2)(b) EqA simply requires an examination of whether the PCP 'puts or would put' those with the protected

characteristic at a 'particular disadvantage' when compared to those who do not have that protected characteristic. That formula does not require statistical proof (although this may be used, where available).

*Individual disadvantage*

94. If the Claimant succeeds in establishing group disadvantage - whether by reference to a pool, to appropriate statistics, to judicial notice, or by a combination - she must go on to show the individual disadvantage caused to her. In *Shackletons Garden Centre Ltd v Lowe EAT 0161/10*, although the EAT held that the ET had been entitled to conclude that a PCP relating to weekend working put women at a particular disadvantage, it had the Claimant had suffered an individual disadvantage, as distinct from a 'self-inflicted detriment', and the case was remitted to a differently constituted Tribunal.

*Legitimate aim*

95. According to the EHRC Employment Code, a legitimate aim is one that is 'legal, should not be discriminatory in itself, and it must represent a real, objective consideration' (para 4.28). This broadly reflects the guidance in *R (Elias) v Secretary of State for Defence* [2006] IRLR 934:

> **'...the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end.'**

*Proportionality*

96. The proportionality test was summarized by Elias J. in *MacCulloch v ICI* [2008] IRLR 846:

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

<u>Discrimination arising from disability: s.15 EqA</u>

97. S.15 EqA provides as follows:

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

98. The correct approach to a claim of this sort was considered by the Court of Appeal in *City of York Council v Grosset* [2018] IRLR 746 *per* Sales LJ (at para 36 onwards):

> **'36. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability.**
>
> **37. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something" ...**
>
> **38. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something" ….'**

99. The 'something' that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant influence on the unfavourable treatment, and so amount to an effective reason for or cause of it (*Pnaiser v NHS England* [2016] IRLR 170 *per* Simler J at [31]).

100. The Code of Practice offers the following explanation of what is meant by 'something arising in consequence of disability' for the purposes of s.15 EqA:

> **[5.9] The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. 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.**

101. The meaning of 'unfavourable treatment' was considered by the Supreme Court in *Trustees of Swansea University Pension and Assurance Scheme v Williams* [2019] ICR 230 (at para 27):

> **'… in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.'**

102. It is then necessary to look to the employer's defence of justification. S.15(1)(b) EqA provides that the unfavourable treatment may be justified, if it is a proportionate means of achieving a legitimate aim. To be proportionate, the conduct in question must be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (*Allonby v Accrington & Rossendale College & Others* [2001] ICR 1189 CA).

103. Justification requires the Tribunal to conduct an objective balancing exercise between the discriminatory effect and the reasonable needs of the employer (*Ojutiku v Manpower Services Commission* [1982] ICR 661 CA per Stephenson LJ at 674B-C, and *Land Registry v Houghton & Others* UKEAT/0149/14 at [8-9]). It will be relevant for the Tribunal to consider whether any lesser measure might have achieved the employer's legitimate aim (*Naeem v Secretary of State for Justice* [2014] ICR 472).

<u>Unfair dismissal</u>

104. S.94 Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

105. S.98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it –**
>
> **(a) relates to the capability or qualifications of the employee for performing work of the kind for 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.**

106. A fair procedure by reason of capability would normally, depending on the circumstances, involve consultation with the employee; ascertaining the up-to-date medical position; an opportunity to improve attendance; and, where appropriate, considering the availability of alternative employment.

107. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. If the dismissal falls within that band, then the dismissal is fair; if it falls outside that band, it is unfair.

108. In a capability case, the EAT held in *Pinnington v City and County of Swansea* EAT0561/03 at [67], that the range of reasonable responses test applies equally to the way that an employer informs themselves of the true medical position, applying the Court of Appeal's decision in *Sainsbury plc v Hitt* [2003] ICR 111. The employer is not required to 'leave no stone unturned'.

109. As to the decision to dismiss, the issue is not whether, objectively speaking, the employee was or was not capable of remaining in employment, but rather whether it was within the range of reasonable responses to treat the employee's

ill-health as sufficient grounds for their dismissal. The EAT in *DB Schenker Rail (UK) Ltd v Doolan* [2010] UKEAT/0053/09 noted how easy it can be for Tribunals to fall into the substitution mindset in cases of ill-health. Tribunals must therefore guard against the temptation to test matters according to what they would have decided if they had been in the employer's shoes.

110. As to whether the employer can be expected to wait any longer for the employee to recover, in *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145, Underhill LJ made the following observations at [36]:

> **'The argument "give me a little more time and I am sure I will recover" is easy to advance, but a time comes when an employer is entitled to some finality. That is all the more so where the employee had not been as co-operative as the employer had been entitled to expect about providing an up-to-date prognosis.'**

## Conclusions: disability and knowledge

111. The Claimant relies on coronary artery disease as the disability in these proceedings; cauda equina syndrome is not relied on. The Respondent accepts that the Claimant was disabled by reason of her heart condition, and that it had knowledge of the disability, at all material times.

112. The disadvantage relied on is as set out at paragraph 6.3.1 and 6.3.2 of the list of issues. It is implicit in those disadvantages that travelling into work and working face to face with clients was stressful for the Claimant and aggravated the symptoms of her heart condition. The Respondent had knowledge of the disadvantages at all material times. Without objection from the Respondent, the Tribunal indicated that there was a third, self-evident disadvantage, which was being placed at risk of dismissal.

## Conclusions: failure to make reasonable adjustments

<u>Did the Respondent apply the following PCPs?</u>

*Failing to hold open the post of admin worker?*

113. There was no 'administrative worker' post to hold open. The Claimant had been performing those duties under a temporary arrangement, put in place as an adjustment to her substantive role while she recovered. It is correct that the Respondent declined to allow her to continue to perform a role consisting of light, administrative duties and we understand this to be the issue the Claimant is complaining about.

114. In our judgment this was a PCP; we are satisfied that the Respondent would have made the same decision in relation to any employee.

*Requiring a particular level of days in the office?*

115. The Respondent accepts it applied this PCP.

*Available vacancies being full-time?*

116. Many, but not all, the available vacancies were advertised as being full-time in the office. In practice there was flexibility. We accept Ms Lynch's explanation that, because there was so much flexible working within the Respondent, some vacancies were not advertised with a requirement of a specific number of days.

Further, Ms Lynch told the Claimant that, if she could identify a role she thought was suitable, there would then be a discussions about adjustments, which would include the possibility of working part-time.

117. We have concluded that the Respondent did not apply a PCP of all vacancies being for full-time work.

*Vacancies requiring working in the office full-time*

118. Nor is it correct that all vacancies required working full-time in the office: some were home-based but included a requirement to travel from time to time; further, there was a degree of flexibility allowing an element of homeworking. We note that the default position with the Claimant's substantive recovery worker role was that it could be performed one day a week from home by a full-time employee.

119. We have concluded that the Respondent did not apply a PCP of all vacancies requiring working in the office full-time.

The disadvantage

120. The decision not to permit the Claimant to continue working light duties (and the concomitant requirement that she resume the core duties of the recovery worker role) put her at a disadvantage, by comparison with people without her disability, in that she found face-to-face work with service users very stressful; further, her inability to carry out the core duties put her at risk of dismissal.

121. The Respondent accepts that the requirement to work a certain number of days a week in the office put the Claimant at a disadvantage, by comparison with people without her disability, in that travelling to work caused her stress and exacerbated the symptoms of her cardiac condition; further, her inability to work the required number of days a week in the office put her risk of dismissal.

What steps ought the Respondent reasonably have taken to remove the disadvantage?

*Hybrid working arrangements (2 days from home, 1 day in the office) in respect of the Recovery Worker role*

122. The starting point is that the usual ratio of office to her work in the recovery worker role was four days in the office, with one day at home, usually to carry out administrative tasks. That equates to a ratio of 80:20 in favour of office work. The adjustment sought by the Claimant equated to a ratio of 33:66 in favour of home work; it would be a very substantial adjustment indeed

123. In light of all the evidence we have heard, we have concluded that such an adjustment was not reasonable for the Respondent to have to make. The Claimant accepted on several occasions during the hearing that the role was a front-line role and that the core functions of the role involved face-to-face interactions with service users and others. While it is correct that contact was carried out remotely during the pandemic, that was a measure forced on the Respondent, as on many other organisations, and not one which was sustainable in the long-term.

124. In our judgment, the Claimant would not have been able to perform the core functions of the recovery worker role on the basis of one day a week in the

office, even if (which we doubt) she would have been able to attend the office for one day; it would not have been sufficient to enable her to maintain a reasonable caseload and to ensure continuity of support for service-users who were assigned to her. Furthermore, we accept the Respondent's submission that the proposed adjustment would continue to place pressure on other members of the team; that was unacceptable in the longer term.

125. This was not a reasonable adjustment.

*Being permitted to continue with the admin worker role that was doing*

126. There was no separate administrative worker role of the sort the Claimant had been performing on a temporary basis. These were tasks were normally performed by the recovery workers themselves as part of their role. We accept the Respondent's evidence that there was no requirement within the organisational structure to have a single employee performing these tasks on a permanent basis. Insofar as it was a role at all, it was supernumerary.

127. Allowing the Claimant to continue not to conduct face-to-face work with service-users, and to perform administrative duties from home, meant that her caseload had to be distributed among other members of the team, which (on the Claimant's own admission) had a substantial adverse impact on them; we accept that it also had a substantial adverse effect on the quality of the support provided to service-users because it affected the frequency, quality and consistency of that support.

128. Nor was it reasonable to create such a role for the Claimant. It would give rise to a considerable additional cost. It would, in our view, be unreasonable to expect the Respondent to fund a role which was not needed, when those resources were needed for the Respondent's core purposes of providing services, including the need to recruit a recovery worker who could perform the front-line duties the Claimant could no longer carry out.

129. Given that the Claimant, through no fault of her own, could no longer perform the core duties of her substantive role, the reasonable course of action was for the Respondent to assist her in identifying a possible alternative role, into which she might be redeployed. This is what it did, undertaking to prioritise her candidacy for any appropriate role in which she was interested and to consider making adjustments to it.

130. It is evident from the Claimant's own statements, both at the time and at the hearing before us, as well as the fact that she took no steps to engage with the redeployment process, that she was not interested in redeployment into an alternative role. She was only interested in performing, from home, the light duties she had been given on a temporary basis.

131. In our judgment, this was not a reasonable adjustment.

132. Accordingly, the claim of failure to make reasonable adjustments is not well-founded.

**Conclusions: indirect disability discrimination**

133. There is a crucial difference between a claim of failure to make reasonable adjustments and a claim of indirect disability discrimination: in the former, it is enough that the Claimant can prove that the application of the PCPs put her, as an individual, at a particular disadvantage by comparison with people without her disability; in the latter she must also prove that the PCPs put, or would put, people with the same disability as her, at a particular disadvantage. This is often referred to as 'group disadvantage'.

134. Having regard to the two PCPs we have found were applied by the Respondent, there was no evidence before us that they placed, or would place, people with coronary artery disease at a particular disadvantage when compared with people without that disability. For the avoidance of doubt, Tribunal does not consider that this is a question which is capable of being resolved by way of judicial notice; it is not a common-sense question which does not require further evidence, it is too complex for that; it is not within the field of knowledge of the Tribunal panel.

135. Absent any evidence of group disadvantage, the Claimant's claim of indirect disability discrimination is bound to fail.

**Conclusions: disability-arising discrimination**

Unfavourable treatment

136. It is not in dispute that the Respondent dismissed the Claimant (Issue 4.1.1) and that it did not allow her to continue in her role as a recovery worker on an adjusted basis (Issue 4.1.3). Both those acts were unfavourable treatment.

137. The Claimant also relies on 'not offering an alternative position' as the third act of unfavourable treatment (Issue 4.1.2). Although the Respondent resisted this third act, we are satisfied that, as a matter of fact, the Respondent did not offer an alternative position and that this was unfavourable treatment.

Did the following things arise in consequence of the Claimant's disability: ill-health absence; and/or incapability of working in the office at the required level.

138. Did the ill-health absence arise in consequence of the disability?

139. The Claimant had absences from work, some long, in consequence of her disability between 2016 and 2020. The next long absence through ill-health began in January 2022; this was because of cauda equina syndrome, which is not the disability relied on. That absence did not arise in consequence of the Claimant's disability.

140. The inability to work in the office at the required level did arise in consequence of the disability. The Claimant found that commuting to work and conducting face-to-face casework caused her stress, which in turn exacerbated the symptoms of her coronary heart disease.

Was the unfavourable treatment because of the 'something arising'

141. We are satisfied that the Respondent dismissed the Claimant, in part at least, because of her previous sickness absence arising out of the coronary heart disease. Her disability was not the operative cause of her absence from work in 2022, but the fact that she had already had substantial periods away from work

because of her heart condition was clearly a material factor in the Respondent's decision to dismiss. It is also clear that the Respondent dismissed the Claimant, in part at least, because she was unable to work in the office at the required level.

142. As for the decision not to allow the Claimant to continue her role as a recovery worker on an adjusted basis (i.e. performing administrative duties from home), the Respondent did not take this decision because of the Claimant's ill-health absence, or because of the Claimant's inability to work in the office at the required level; it took the decision because there was no funded administrative role and it needed employees in the recovery worker role to work primarily in the office, conducting face to face work with service-users, based on a meaningful caseload.

143. The Respondent did not fail to offer the Claimant an alternative position because of her sickness absence, current or past. They did not offer her an alternative position because the Claimant did not accept that there were alternative positions which would be acceptable to her. Had she done so, we are satisfied that the fact that she had had very substantial sickness absences would not have been a bar to her being considered for those alternatives.

144. Nor did the Respondent fail to offer an alternative position because the Claimant was incapable of working in the office at the required level. On the contrary, Ms Lynch was clear with the Claimant at the time that, if she could identify an alternative role which she was interested in, they could then have a discussion about how it might be adjusted to suit her disability, in terms of the potential for part-time hours and working from home.

145. We have concluded that the Respondent did everything it could to encourage the Claimant to be open-minded about the possibility of alternative roles. At no stage did she identify any specific alternative to her substantive role of recovery worker, other than the administrative role which he had been carrying out on a temporary basis by way of a temporary adjustment. Even at the hearing before the Tribunal, the Claimant did not identify any other alternative role which she would have considered.

<u>Was the unfavourable treatment in pursuit of the following legitimate aims: managing the effective and efficient use of its workforce; and the provision of a satisfactory service for service users?</u>

146. Consequently, the only act of unfavourable treatment because of something arising in consequence of the Claimant's disability was the decision to dismiss.

147. We are satisfied that the Respondent took that decision in pursuit of both aims relied on by the Respondent in its justification defence. In our judgment both aims were self-evidently legitimate.

<u>Was dismissal a proportionate means of achieving either or both of the legitimate aims?</u>

148. We reminded ourselves that we must balance the discriminatory impact of the treatment on the Claimant against the business needs of the Respondent.

149. The impact on the Claimant of the treatment was very substantial; dismissal is the most serious sanction that can be applied to an employee.

150. Was the treatment reasonably necessary to achieve the legitimate aims? Could something less discriminatory have been done?

151. There was a less discriminatory alternative to dismissal, which was redeployment; that is what the Respondent sought to achieve. Alternative roles were made available for the Claimant's consideration with the undertaking to prioritise her for them if she was interested, to adopt a less rigorous recruitment procedure and to explore whether the roles could be adjusted to accommodate her needs. The Claimant expressed no interest in any of the alternatives; she did not engage at all with the register, which she did not access; she did not identify an alternative role into which she should have been redeployed at the hearing before us.

152. In all the circumstances, we consider that dismissal was the only option; in our judgment, the reasonable business needs of the Respondent outweighed the discriminatory impact of the dismissal on the Claimant.

153. To be clear: there was no hint of any ulterior motive in the Respondent's actions; she was an experienced and valued employee. The Respondent had accepted long periods of absence without invoking the sickness absence procedure. It had made very substantial adjustments while the Claimant was understood to be adjusting herself to the new reality of her health conditions. There came a point at which the Respondent needed to, and in our view was entitled to, prioritise its own operational needs over the needs of the Claimant.

**Unfair dismissal**

154. We are satisfied that the sole reason for dismissal was capability: the Claimant's absence through ill-health; her inability, because of ill-health, to perform the core duties of a recovery worker; and the absence of any firm indication as to when she might be able to return to work.

155. We are satisfied that the Respondent took reasonable steps to inform themselves of the true medical position. We had some concerns about Mr Rossor's decision not to make an occupational health referral before dismissing; they were somewhat allayed by the fact that the Claimant had herself provided him, at the last minute, with a GP letter which she said still represented the current medical position. Nonetheless, we think Mr Rossor should have made the referral, if for no other reason that he had said he would.

156. We reminded ourselves that we must look at the process as a whole, including the appeal stage. There can be no question that the Respondent properly informed itself of the current medical position at that point.

157. The Respondent was entitled to conclude that the Claimant was no longer able to perform the role of recovery worker; all the medical evidence suggested that she was unlikely ever to be able to perform that role.

158. In our view, the Respondent acted reasonably by extending the Claimant's employment (on full pay) while the appeal process was on foot, indeed they extended her notice period when the process was concluded. Throughout that time they encouraged her to consider redeployment to an alternative role; she did not engage with that process.

159. We are satisfied, having regard to the band of reasonable responses, that it was reasonable for the Respondent to treat the Claimant's ill-health, and its consequences for her ability to perform her role, as sufficient grounds for dismissal. In particular, we are satisfied that it was reasonable for the Respondent to conclude that it could wait no longer before taking the decision: it had already been very flexible, and the point had come when it was entitled to finality.

160. For all these reasons, we have concluded that the Claimant's claim of unfair dismissal is not well-founded.

**Employment Judge Massarella**
**Date: 1 May 2024**

## APPENDIX: LIST OF ISSUES

1. **Unfair dismissal**

1.1 Was the Claimant dismissed? The parties agree that the Claimant was dismissed.

1.2 What was the reason or principal reason for dismissal? The Respondent says the reason was capability (ill-health).

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

1.3.1 the Respondent genuinely believed the Claimant was no longer capable of performing their duties;

1.3.2 the Respondent adequately consulted the Claimant;

1.3.3 the Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

1.3.4 the Respondent could reasonably be expected to wait longer before dismissing the Claimant; and

1.3.5 dismissal was within the range of reasonable responses.

2. **Remedy for unfair dismissal**

2.1 If there is a compensatory award, how much should it be? The Tribunal will decide the following.

2.1.1 What financial losses has the dismissal caused the Claimant?

2.1.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.1.3 If not, for what period of loss should the Claimant be compensated?

2.1.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.1.5 If so, should the Claimant's compensation be reduced? By how much?

2.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.1.7 Did the Respondent or the Claimant unreasonably fail to comply with it?

2.1.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

2.1.9 If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

2.1.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

2.1.11 Does the statutory cap of fifty-two weeks' pay or £93,878 apply?

2.2 What basic award is payable to the Claimant, if any?

2.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

3. **Disability**

3.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Claimant relies on Coronary Artery Disease. The Respondent admits that the Claimant was disabled at the relevant time by reason of Coronary Artery Disease.

4. **Discrimination arising from disability (Equality Act 2010 section 15)**

4.1 Did the Respondent treat the Claimant unfavourably by:

4.1.1 dismissing the Claimant;

4.1.2 not offering an alternative position; and/or

4.1.3 not allowing the Claimant to continue her role as a Recovery Worker on an adjusted basis.

4.2 Did the following things arise in consequence of the Claimant's disability:

4.2.1 ill-health absence; and/or

4.2.2 incapability of working in the office at the required level.

4.3 Was the unfavourable treatment because of any of those things?

4.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

4.4.1 managing the effective and efficient use of its workforce; and

4.4.2 the provision of a satisfactory service for service users.

4.5 The Tribunal will decide in particular:

4.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.5.2 could something less discriminatory have been done instead;

4.5.3 how should the needs of the Claimant and the Respondent be balanced?

4.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

5. **Indirect discrimination (Equality Act 2010 section 19)**

5.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

5.1.1 a requirement to work in the office at a particular level; and/or

5.1.2 not permitting hybrid working.

5.2 Did the Respondent apply the PCP to the Claimant?

5.3 Did the Respondent apply the PCP to persons without the Claimant's disability or would it have done so?

5.4 Did the PCP put persons with the Claimant's disability at a particular disadvantage when compared with persons without the Claimant's disability in that:

5.4.1 she was deemed not to be capable of the role of Recovery Worker; and/or

5.4.2 she could not meet the requirements of alternative vacancies.

5.5 Did the PCP put the Claimant at that disadvantage?

5.6 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

5.6.1 managing the effective and efficient use of its workforce; and/or

5.6.2 the provision of a satisfactory service for service users.

5.7 The Tribunal will decide in particular:

5.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

5.7.2 could something less discriminatory have been done instead;

5.7.3 how should the needs of the Claimant and the Respondent be balanced?

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

6.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

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

6.2.1 failing to hold open the post of Admin worker;

6.2.2 requiring a particular level of days in the office;

6.2.3 available vacancies being full-time; and/or

6.2.4 vacancies requiring working in the office full-time

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

6.3.1 she was deemed not to be capable of the role of Recovery Worker; and/or

6.3.2 she could not meet the requirements of alternative vacancies.

6.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

6.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

6.5.1 hybrid working arrangements (2 days from home, 1 day in the office) in respect of the Recovery Worker role;

6.5.2 being permitted to continue with the admin worker role that was doing

6.6 Was it reasonable for the Respondent to have to take those steps and when?

6.7 Did the Respondent fail to take those steps?

7. **Remedy for discrimination or victimisation**

7.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

7.2 What financial losses has the discrimination caused the Claimant?

7.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.4 If not, for what period of loss should the Claimant be compensated?

7.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

7.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

7.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.9 Did the Respondent or the Claimant unreasonably fail to comply with it?

7.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?

7.11 By what proportion, up to 25%?

7.12 Should interest be awarded? How much?