Appeal No. EA-2020-000460-AT (Previously UKEAT/0253/20/AT)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 8 July 2021
Judgment handed down on 29 July 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

MRS A MARTIN — APPELLANT

CITY AND COUNTY OF SWANSEA — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MATT JACKSON (Of Counsel) Instructed by: Newport Citizens Advice 8 Corn Street Newport NP20 1DJ
For the Respondent	JULIAN ALLSOP (Of Counsel) Instructed by: Hugh James Solicitors Two Central Square Central Square Cardiff CF10 1FS

SUMMARY

DISABILITY DISCRIMINATION

The employment tribunal erred in law in concluding that the PCP asserted by the claimant in a reasonable adjustments claim was only the terms of a Management of Absence Policy and/or that because the policy included discretion that could allow, amongst other things, the claimant to be moved into an alternative role, the application of the policy to the claimant did not constitute the application of a PCP that placed her at a substantial disadvantage in comparison with non-disabled persons. The employment tribunal did not err in its alternative analysis that the respondent had made such adjustments as were reasonable. The appeal was dismissed.

HIS HONOUR JUDGE JAMES TAYLER

1. This is an appeal against the judgment of the employment tribunal sitting in Cardiff on 26, 27, 28 February and 2, 3 March 2020, with a day in chambers on 4 March 2020; Employment Judge S Davies sitting with lay members. The employment tribunal dismissed the claimant's claims of unfair dismissal, failure to make reasonable adjustments, discrimination because of something arising in consequence of disability and detriment done on the ground that the claimant had made protected disclosures. The judgment was sent to the parties on 14 April 2020. There is no appeal against the dismissal of the protected disclosure detriment claim. The appeal relates to the reasonable adjustments claim, including whether the claim was in time and, contingently, to the discrimination because of something arising in consequence of disability and unfair dismissal claims.

2. The outline facts are taken from the clear and concise reasons of the Tribunal. The claimant commenced employment with the respondent on 7 January 2014 as an Equality Engagement Officer. Her post was made redundant and she was redeployed as a Senior Renewals and Adaptation Support Officer in the Housing Department from 1 April 2015. The claimant was absent due to stress related ill health from 10 March 2016, and did not return to the housing team. The claimant went through the redeployment process for 19 weeks in 2016, during which she worked in a supernumerary placement in Employee Services from 28 July 2016. The claimant undertook a trial as a Contract Monitoring Officer from 1 July 2016 but went off sick to avoid contact with one of the managers with whom she had been in conflict.

3. On 5 September 2016 the claimant was redeployed for a work trial as a Mentor on the European funded 'Workways + Project'. The claimant was confirmed in the post on 17 October

2016. The role was at a lower grade than her previous role as a result of which the claimant received salary protection. The claimant applied for more senior roles in the project and was shortlisted for the role of External Funding Programme Officer but decided not to attend the interview without giving a reason. On 22 January 2017, the claimant commenced a period of sickness absence from which she did not return. During her absence the claimant's salary was paid from the project budget and, as a result, her role could not be covered.

4. The claimant was referred to Occupational Health on 13 February 2017. A report was produced on 14 March 2017 in which it was stated that the claimant had a "chronic medical condition" and that she had experienced work-related stress as a result of "members of the team not getting on creating a very negative working environment". The claimant attended an absence review meeting on 23 March 2017 at which she stated that there was a "toxic" environment in the Workways+ Project.

5. The claimant was placed on the redeployment list again. The claimant was sent on a "Selling You" course to assist her to seek redeployment. The claimant was provided with external stress counselling. The claimant was placed in a supernumerary position within Employee Services from 10 April 2017. The Tribunal made findings of fact about the period during which the claimant went through the redeployment process:

> **58. A summary of the outcome in respect of posts, the Claimant expressed an interest in or were referred to her for consideration, during redeployment was included in the appeal outcome letter … . The Claimant agreed with the accuracy of this summary, which indicated that: the Claimant did not meet the essential criteria for six posts, one post was removed due to restructure, the Claimant lacked relevant recent experience for one post, the Claimant declined two offers, the Claimant felt that she did not meet the criteria for three posts, the Claimant was unsuccessful at interview for one post, two posts were already filled by the time she expressed an interest and two posts were declined due to the costs of 'bumping'.**
>
> **59. The Claimant expressed interest in the role of Management Support Officer but was informed via Ms Fulcher of the manager's feedback which was that she did not meet the criteria: "a good educational background including either higher or further education qualifications". The Claimant raised this as an issue**

with Mr Nicholls who in turn spoke with Mr Matthews, who took up the matter with the manager concerned. Consequently the manager reviewed her decision and agreed to offer the Claimant an interview for the post but the Claimant withdrew her application.

60. The Claimant also raised concerns with regard to the length of time it took to inform her of the outcome of a competitive interview for Domestic Abuse Advocate role, which fell outside her expectation terms of timeliness (feedback came within a few days, via a call from her trade union representative, rather than direct immediately following the interview).

61. The Claimant complained that the redeployment list was inaccurate as it included vacancies which were no longer available. This resulted in wasted effort making applications for roles that were unavailable. The Respondent concedes the list was not always up to date, which arose as a feature of the list being a 'live' document which was updated as positions on it were filled by others on redeployment. The Tribunal notes that whilst it would be frustrating to apply for a job only to find it was no longer available, the Claimant's supernumerary position in Employee Services meant she was well placed to check availability of posts prior to expressing interest. Employee Services maintained the redeployment list.

62. The Claimant had not secured redeployment at the end of the 12 week redeployment period and a follow-up absence management meeting was held on 19 June 2017 with Mr Williams, HR and trade union representative. Mr Williams made a further referral to Occupational Health and it was agreed that the Claimant remain on the redeployment list.

63. Occupational Health recommended, due to the complex nature of the Claimant's condition, that she should be reviewed by a physician (report of 11 July 2017 [585]). The report of the Occupational Health physician dated 20 July 2017 [590] dealt with the Claimant's work-related stress, which was not considered to be a disability under the Equality Act 2010. Occupational Health recommended that the Claimant was medically fit to return to work immediately if provided with support and her long-term prognosis was excellent. The physician's view was that there was not a medical solution to the situation and was optimistic that if provided with support into a new role that the Claimant's competence would restore, further psychological symptoms would be minimised and this would likely have a beneficial effect on her gastrointestinal symptoms [591].

64. A further welfare meeting was held on 16 August 2017. The Claimant agreed with the contents of the Occupational Health report of 20 July 2017 and that she was unfit to return to her role in Workways +. The Claimant was informed that she would be referred to final absence review meeting.

65. The Claimant was informed on 18 August 2017 that her supernumerary role would come to an end the following week. The Claimant provided a sicknote on 21 August 2017 … to certify absence from work. The redeployment period was extended to 29 weeks (from 12 weeks). The Claimant accepts that towards the end of the extended redeployment period she stopped applying for jobs as she had in effect given up on the process as she felt 'knocked back'.

6. During the redeployment process Martin Nicholls, Director of Place, suggested that the claimant could identify any roles she was interested in directly to him or Karen Fulcher in HR.

A On 9 September 2017, the claimant told Mr Nichols that she expected to be dismissed at the forthcoming final absence review meeting and requested that her departure was not delayed.

B 7. In June 2017 the claimant had contacted Mr Mathews, Principal HR Officer, and suggested that there should be an "exit strategy".

C 8. The claimant was invited to a final absence review meeting on 17 October 2017. The "responsible officer" was Jamie Rewbridge, Strategic Manager for Leisure, Partnerships, Health and Well-being. Mr Rewbridge had not previously been involved in managing the claimant. The Tribunal described the final absence review meeting:

D > **84. The Claimant was asked about bespoke training during the final absence review meeting and confirmed that she had not asked HR or her line manager for bespoke training … .**
>
> **85. Mr Rewbridge communicated the reasons for dismissal in a three-page letter dated 23 October 2017 … citing health capability. The Claimant did not dispute the content of the Occupational Health reports and that she was unable to return to work in her previous role as a Workways+ Mentor, she had been unsuccessful in an extended redeployment period and had ceased to engage in the process in circumstances where she accepted there were vacancies on the redeployment list which she could have applied for. Mr Rewbridge concluded that the issues the Claimant raised with regard to the redeployment vacancy list being out of date did not prevent her from viewing all available vacancies (it was accepted there was an issue with some unavailable vacancies still appearing on the list). Mr Rewbridge concluded that training had been offered ('Selling you' course), appropriate support had been provided and that the Claimant's absence was dealt with properly under the Management of Absence Policy.**

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F 9. The claimant appealed her dismissal by letter of 26 October 2017. An appeal hearing was held before Lee Wenham, Head of Communications and Marketing, who had no knowledge of the claimant prior to hearing the appeal. The appeal was dismissed by Mr Wenham who considered that the claimant had been supported appropriately in accordance with the respondent's Management of Absence Policy.

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10. The Tribunal analysed the facts further in its conclusion sections. In considering the claim of unfair dismissal, the Tribunal held:

> **132. There was no evidence before Mr Rewbridge to suggest that a further extension to the redeployment period would have had a real prospect of resulting in successful redeployment. The Claimant accepted that she had disengaged from the redeployment process as she felt 'knocked back' … . The period of redeployment had been extended from the usual 12 weeks to 29 weeks. By the end of that period the Claimant expressed a desire to depart from her employment 'it's pointless prolonging my departure… please ask Steve Rees do not delay procedures in view of me leaving' … .**
>
> **133. In the circumstances there would have been little point in the Respondent waiting longer before dismissal; there was no basis on which to find that a further period of time would have avoided dismissal. The extended redeployment period had not been successful despite the Claimant working in a supernumerary position for most of that period within the Employment Services team, where she was well placed to access HR support. The Claimant sought an 'exit strategy' and expressed a wish to leave; she gave no indication as to when she might be able to return to work.**

11. In considering the claim of discrimination because of something arising in consequence of disability, the Tribunal held:

> **154. We also take into account that the Claimant attended the 'Selling you' course to boost her changes of successful redeployment and was referred for assistance in completing her redeployment form … . The Claimant did not request specific training during the 2017 redeployment period (save for GIS, which was deemed too specialist to be a reasonable step).**
>
> **155. The Claimant accepts that by the end of the redeployment process, around the end of August 2017, she had disengaged and had not applied for some suitable roles.**
>
> **156. It is self-evident that a supernumerary post was a temporary measure. There were undisputed and valid reasons for the Claimant's failure to attain redeployment. There was no real prospect of the Claimant reverting to her substantive role on medical grounds, due to her stress reaction. Nor could she be redeployed into an alternative role within a reasonable time, particularly since she had disengaged.**

12. In considering the claim of failure to make reasonable adjustments, the Tribunal concluded that the PCP asserted by the claimant could not place her at a substantial disadvantage in comparison with non-disabled persons because the Management of Absence Policy allowed exercise of discretion, and so the claim necessarily failed:

> **161. We note that there is flexibility and discretion built into the drafting of the Management of Absence Policy to accommodate disadvantages that might be faced by employees with disabilities:**
>
> **a. Disability Related Absence - paragraph 9.2.5 [135] provides:**

> **"The act places a duty on employees to make reasonable adjustments the staff to help them overcome disadvantage resulting from an impairment… As part of the absence review process, managers should consider whether any adjustments can be made to enable employees to attend and carry out their work. Where appropriate, guidance should be sought from Occupational Health and well-being unit"**
>
> **b. Long-term absence protocol – paragraph 29.10 [155] provides:**
>
> **"The purpose of absence review meetings is to: … Discuss any reasonable adjustments in light of advice from Occupational Health consider any alternative work or other options of the service may be able to offer"**
>
> **162. Following Griffiths we conclude that the application of the Management of Absence Policy, as a PCP, does not place the Claimant at a substantial disadvantage in comparison with non-disabled persons. As such no duty to make adjustments in respect of its application arises and the complaints of failure to make adjustment are not well founded and are dismissed.**

13. The Tribunal then stated "We touch briefly on the remaining issues and what our conclusions would have been in any event." I asked Mr Jackson, for the claimant, whether he contended that what followed was only a brief reference the conclusions that would have been reached by the Tribunal, but he stated that, insofar as there was sufficient reasoning to be **Meek** compliant, he accepted there were alternative determinations on these additional issues. I consider he was right to make that concession.

14. The Tribunal concluded that the respondent did not have the requisite knowledge of the disability relied upon by the claimant, Barrett's Oesophagus, as a result of Gastroesophageal Reflux Disease, which was exacerbated by stress, until 27 March 2017. That decision is not challenged in the appeal.

15. The Tribunal held under a section with the title "Role" which, in context, must include consideration of the claimant moving to an alternative role as a reasonable adjustment:

> **170. In accordance with our finding on knowledge, the complaints of failure to place the Claimant into roles arising prior to 14 March 2017 would fail (roles in further and better particulars … .**

> **171. As for the remaining complaints of failure to place in 6 roles in the period from 19 June 2017 to 3 August 2017 … ; considering the reasonableness of any adjustment is an objective test to be judged against the Respondent's circumstances. The Tribunal may consider whether the steps taken as a whole by the Respondent have discharged the duty placed upon it.**
>
> **172. The Claimant was supported financially with protected pay, at grade 8, in her redeployed position as a Workways+ Mentor role until the end of her employment. The redeployment period was extended from 12 weeks to 29 weeks. The Claimant was placed in a supernumerary position in Employee Services where she had access to assistance in identifying alternative roles and applying for them. The Claimant attending the 'Selling You' course to assist in securing an alternative role in the redeployment period. The Claimant was afforded an additional point of contact in HR and support from Mr Nicholls.**
>
> **173. Finally the Claimant did not dispute the reasons put forward by the Respondent for her being unsuccessful in obtaining the roles in question. Notably the reasons included roles no longer being available [96], the Claimant withdrawing her interest … and declining to attend selection process … .**

16. The claimant contends that the Tribunal applied the wrong legal test to the reasonable adjustments claim. The Tribunal's primary, and most fully analysed, reason for dismissing the reasonable adjustment claim was that the PCP asserted by the claimant had not placed her at a substantial disadvantage in comparison with not disabled persons. As a starting point it is surprising that a claimant who was unfit for her role and asserted that, with appropriate assistance such as any necessary training, she could be placed into an alternative role, should fail even to get to the stage of assessing whether the respondent was required to make a reasonable adjustment because no workable PCP was asserted. Providing an alternative role for an employee unfit to undertake the duties of their current role is a paradigm example of a reasonable adjustment: **Archibald v Fife Council** [2004] ICR 954.

17. The duty to make reasonable adjustments is provided for in section 20 Equality Act 2010:

> **20 Duty to make adjustments**
>
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**

> **(3) The first requirement is a requirement, where a provision, criterion or practice of A'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. [emphasis added]**

18. Unlike claims about adjustments to physical features or the provision of auxiliary aids a "first requirement" reasonable adjustments claim must start with the identification of the appropriate PCP: **Environment Agency v Rowan** [2008] ICR 218 at paragraph 27. Litigants in person often struggle with discussions about PCPs at preliminary hearings for case management, seeing it as a jargon term that is difficult to decipher. Even lawyers can falter when identifying the correct PCP. However, it is clear that PCPs are not designed to be traps for the unwary and a practical and realistic approach should be adopted at the case management stage to identify a workable PCP which should not thereafter be over-fastidiously interpreted with the result that a properly arguable reasonable adjustments claim cannot be advanced, particularly when dealing with litigants in person. HHJ Eady QC held in **Carreras v United First Partners Research** UKEAT/0266/15/RN:

> **[30] As noted by Laing J, when putting this matter through to a Full Hearing, the ET essentially dismissed the disability discrimination claim because it found that an expectation or assumption that the Claimant should work late was not the pleaded PCP.**
>
> **[31] The identification of the PCP was an important aspect of the ET's task; the starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments (see Environment Agency v Rowan [2008] IRLR 20 EAT, para 27). In approaching the statutory definition in this regard, the protective nature of the legislation means a liberal rather than an overly technical or narrow approach is to be adopted (Langstaff J, para 18 of Harvey); that is consistent with the Code, which states (para 6.10) that the phrase "provision, criterion or practice" is to be widely construed.**
>
> **[32] It is important to be clear, however, as to how the PCP is to be described in any particular case (and I note the observations of Lewison LJ and Underhill LJ on this issue in Paulley). And there has to be a causative link between the PCP and the disadvantage; it is this that will inform the determination of what adjustments a Respondent was obliged to make.**

19. Where a party is represented the employment tribunal can expect the PCP to be properly identified and so representatives should always consider how the PCP is pleaded with great care. A preliminary hearing for case management will often be a good opportunity to review whether the PCP as pleaded is workable and, if not, to consider whether an amendment might be required

to rephrase the PCP. But whatever PCP is finalised it should be given a reasonably generous reading when determining the claim.

20. In this case the PCP was originally pleaded by solicitors instructed by the claimant. By the time of the hearing the claimant was acting in person. It is necessary to consider in a little detail how the pleadings, identification of the PCP and proposed reasonable adjustments developed.

21. In the claim form it was stated:

> **20. The Claimant claims the Respondent has unlawfully discriminated against her contrary to their duty under S.20 Equality Act 2010. The Claimant believes that the Respondent applied of the following Provision/s Criterion/Criteria or Practices ("PCPs"):**
>
> **a) An attendance management practice and/or policy that dismisses employees who are not capable of their role.**
>
> **21. The Respondent failed in its duty to take reasonable steps available to It to avoid the Claimant being dismissed. In particular the following steps were reasonable adjustments that the Respondent was under a duty to make, but which It failed to make:**
>
> **a) To provide the Claimant with alterative employment**
>
> **b) To ensure that the Claimant was provided with appropriate support and training in order to undertake a new role**
>
> **c) To take positive steps to find the Claimant new employment, rather than to have the Claimant identify alternative roles on the re-deployment list**
>
> **d) To allow the Claimant to continue in the role that she was performing until a suitable more permanent role, became available**
>
> **e) Not put obstacles in place and make unreasonable objections as to why the Claimant could not undertake certain roles**

22. The pleading was reasonably clear, even if some matters pleaded as proposed adjustments might have been better seen as relating to the process rather than the specific adjustment that should have been made at the end of that process, e.g. not placing obstacles or making objections to the claimant undertaking roles.

23. The claim was considered at a preliminary hearing for case management before Employment Judge P Davies on 6 June 2018 who directed, it would seem to me unnecessarily, that the claimant put the allegations of discrimination into a "Scott Schedule".

24. In the row "Provision, Criterion or Practice (PCP)" it was recorded:

> **Requirement for Claimant to be fully fit fill her substantive role - attendance management policy**

25. This appeared to add a new PCP of a requirement to be fully fit for the substantive role and could be read as suggesting that the second PCP was merely the attendance management policy, rather than including the fact that the application of the policy could result in the dismissal of an employee who was not longer capable of her role, as was pleaded in the claim form.

26. In the row "Adjustment sought" it was recorded:

> **Identifying and/ or appointing the Claimant to alternative roles to those causing the Claimant stress and anxiety and worsening of her disability**
>
> **To provide appropriate support and training for such roles, including future roles arising in departments**
>
> **To allow the claimant to continue in the role she was performing as Senior Renewals and Adaptation Housing Officer until a more suitable role became available**

27. As was clear from the claim form the adjustments contended for were placing the claimant into a suitable alternative role with any necessary training and her remaining in her existing role until that could be done.

28. At the hearing a list of issues was agreed based on the skeleton argument produced by Mr Allsop, Counsel for the respondent, the claimant by then being in person. There was another slightly different identification of the PCPs:

> **i) Did the Respondent apply a provision, criterion or practice (PCP) of:**

> **a. 'Requirement for Claimant to be fully fit for her substantive role – attendance management policy'?; or**
>
> **b. the Management of Absence Policy**
>
> **j) If so, did it place the Claimant at a substantial disadvantage in comparison to persons who are not disabled? The Claimant asserted this was her increased risk of dismissal, once her absence was being managed under the Management of Absence Policy.**

29. The second PCP identified was potentially very narrow being merely the Management of Absence Policy, not the fact that its application could result in dismissal as pleaded in the claim form. However, the list of issues made it explicit that the claimant was contending that the disadvantage that she suffered by the application of the Management of Absence Policy in comparison with a non-disabled person was the increased risk of dismissal.

30. When it came to analyse the reasonable adjustment claim the employment tribunal decided that a PCP of a requirement for claimant to be fully fit for her substantive role had not been applied. The Tribunal did not limit itself to the PCP in respect of the Management of Absence Policy as identified in the list of issues, but went back to the pleading in the claim form, stating at paragraph 158:

> **The Respondent acknowledged that it applied its Management of Absence Policy and that its application is a PCP. The Tribunal considered the Claimant's claim on that basis, as it was originally pleaded in paragraph 20a of the particulars of claim**

31. I have set out the other iterations of the PCP as it may explain the Tribunal's analysis of the PCP and the issue of disadvantage.

32. In relation to the PCP as pleaded in the claim form, the Tribunal stated at paragraph 159:

> **The Claimant did not plead the "substantial disadvantage" she experienced arising from the PCP in either the particulars of claim or the further and better particulars. Following questions from the Tribunal, based on the original pleading at paragraph 20 a [20] , the Claimant confirmed that she relied upon the increased risk of dismissal once the PCP was applied to her.**

33. It is therefore clear that the Tribunal appreciated that the asserted PCP was the application of the Management of Absence Policy and the asserted substantial disadvantage was increased risk of dismissal.

34. The Tribunal went on to consider the respondent's submissions about the PCP and substantial disadvantage. In his skeleton argument Mr Allsop contended:

> **56. However, the Respondent accepts that its Management of Absence Policy is a PCP and understands that that is what the Claimant is referring to by way of a PCP. If so, did it place the Claimant at a substantial disadvantage in comparison to persons who are not disabled?**
>
> **57. It is submitted that the Claimant was not placed at a substantial disadvantage by the application of this policy. There is flexibility and discretion inherent in the policy to accommodate the disadvantages that might be faced by disabled employees, see for instance paragraphs 9.2.5 [135] and 29.10 [155].**
>
> **58. As such, by analogy with the position described in paragraph 46 of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, it is submitted that the Management of Absence Policy as a PCP cannot place the Claimant at a substantial disadvantage in comparison with non-disabled persons.**

35. The respondent's contention was the PCP asserted by the claimant was the Management of Absence Policy itself which could not put the claimant, or other disabled persons, at a substantial disadvantage. The Tribunal accepted the respondent's analysis of the law:

> **The Respondent referred us to *Griffiths v Secretary of State for Work and Pensions* [2016] IRLR 216 (paragraph 46) on the question of substantial disadvantage where the PCP is the application of an absence management policy. Griffiths is authority for the position that no substantial disadvantage arises where the policy allows for discretion in its application.**

36. In its conclusion the Tribunal stated:

> **Following Griffiths we conclude that the application of the Management of Absence Policy, as a PCP, does not place the Claimant at a substantial disadvantage in comparison with non-disabled persons. As such no duty to make adjustments in respect of its application arises and the complaints of failure to make adjustment are not well founded and are dismissed.**

37. The first ground of appeal is that the Tribunal erred in law in accepting the respondent's submission as to the correct approach to the law as set out in **Griffiths**.

38. In **Griffiths** the claimant was dismissed on the application of an attendance management policy pursuant to which an employee could be subject to warning and eventual dismissal if absence exceeded specified levels. However, there was discretion in the policy that could have permitted the employer to discount a period of disability related absence and vary trigger points in the manner the claimant asserted should have been done by way of reasonable adjustments. The discretion had not been exercised in the claimant's favour. The employment tribunal had determined that the duty to make reasonable adjustments had not arisen because a non-disabled person with a similar level of absence would have been treated in the same way. That decision was upheld in the EAT.

39. Mr Recorder Luba QC considered the approach that should be adopted to the PCP:

> **15. The Employment Tribunal's written reasons indicate, at paragraph [20], that it was common ground before them that the provision, criterion or practice (PCP) in this case was "the operation of the attendance management policy" and that this "was a requirement to attend work at a certain level in order to avoid receiving warnings and a possible dismissal".**
>
> **16. With reference back to what had been recorded following the Pre-Hearing Review (see above at paragraph 8) the Tribunal noted, at paragraph [24], that Ms Griffiths' case was that "it is the application of the policy that is discriminatory and not the policy itself."**
>
> **17. The importance of the distinction between the terms of the Attendance Policy itself and the operation of it in any particular case is important. This is not a claim of indirect discrimination. It is not said that the Policy necessarily works to the disadvantage of disabled employees. That proposition could not be realistically advanced given the explicit references in the Policy to the modifications that may be made in the case of any particular employee(s) with disabilities.**
>
> **18. The Employment Tribunal was accordingly right in the instant case to focus on the application or operation of the Policy to this particular employee and the question of whether it put her at a substantial disadvantage so as to trigger the duty to make a reasonable adjustment.**
>
> **20. The correct focus was accordingly not on the Policy in the abstract and the way in which it may or may not impact on the employer's workforce as a whole, or upon disabled employees in particular. It was, as the Tribunal had correctly held, on the application or operation of the Policy in the instant case and whether this claimant had been owed a duty to make a reasonable adjustment which duty had not been complied with by her employer. [emphasis added]**

40. Mr Recorder Luba QC distinguished between the terms of the policy and the application of the policy that could result in the claimant being put at a substantial disadvantage.

41. The decision of the EAT was overturned in the Court of Appeal as it was held that it was incorrect in a reasonable adjustments case to compare the treatment of the claimant with a non-disabled employee with a similar level of absence, but the matter should have been analysed on the basis that a disabled employee whose disability increased the likelihood of absence from work on ill-health grounds, was disadvantaged by the operation of the policy in comparison with people who are not disabled in a more than minor way.

42. Elias LJ considered the relevant PCP and the substantial disadvantage to which it could put the claimant:

> **41 In order to engage the duty, there must be a PCP which substantially disadvantages the claimant when compared with a non-disabled person. In this case the PCP was, in the words of the employment tribunal, "a requirement to attend work at a certain level in order to avoid receiving warnings and a possible dismissal."**
>
> **42 Both the employment tribunal and the appeal tribunal considered that the attendance management policy applied equally to all in circumstances which gave rise to no disadvantage. Indeed, to the extent that the policy permitted a more lenient application of the principles to disabled employees by permitting them longer periods of absence before the imposition of sanctions is considered, the policy was potentially more favourable to disabled employees.**
>
> **43 Central to the analysis of both the employment tribunal and the appeal tribunal was the authority of *Royal Bank of Scotland v Ashton* [2011] ICR 632.**
> **…**
>
> **46 Mr Leach, counsel for the employer, relies heavily on this analysis. There are in my view two assumptions behind the appeal tribunal's reasoning, both of which I respectfully consider to be incorrect. The first is that the relevant PCP was the general policy itself. If that is indeed the correct formulation of the PCP, then the conclusion that the disabled are not disadvantaged by the policy itself is inevitable given the fact that special allowances can be made for them. It may be that this was the PCP relied upon in the Ashton case. But in my view formulating the PCP in that way fails to encapsulate why a sickness absence policy may in certain circumstances adversely affect disabled workers - or at least those whose disability leads to absences from work. Moreover, logically it means that there will be no discrimination even where an employer fails to modify the policy in any particular case. The mere existence of a discretion to modify the policy in the disabled worker's favour would prevent discrimination arising even though the discretion is not in fact exercised and the failure to exercise it has placed the disabled person at a substantial disadvantage.**

> **47 In my judgment, the appropriate formulation of the relevant PCP in a case of this kind was in essence how the employment tribunal framed it in this case: the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That is the provision breach of which may end in warnings and ultimately dismissal. Once the relevant PCP is formulated in that way, in my judgment it is clear that the minority member was right to say that a disabled employee whose disability increases the likelihood of absence from work on ill-health grounds is disadvantaged in more than a minor or trivial way. Whilst it is no doubt true that both disabled and able bodied alike will, to a greater or lesser extent, suffer stress and anxiety if they are ill in circumstances which may lead to disciplinary sanctions, the risk of this occurring is obviously greater for that group of disabled workers whose disability results in more frequent, and perhaps longer, absences. They will find it more difficult to comply with the requirement relating to absenteeism and therefore will be disadvantaged by it. [emphasis added]**

43. Accordingly, it is necessary to distinguish between the terms of an absence management policy and its application. A policy can result in a disabled person being put at a substantial disadvantage because the policy is more likely to be applied to a disabled person in comparison with people who are not disabled because of the greater likelihood of sickness absences, even if there is a discretion in the policy that could be exercised that would avoid the disadvantage.

44. In this case I consider that it is clear that the claimant did not merely assert that the PCP was the terms of the Management of Absence Policy, but contended it resulted from the application of the policy to her resulting in her dismissal because she was absent from work and was not fit to undertake the duties of her role, even though the employer had a discretion to find her an alternative role. As a disabled person, the claimant was at increased risk of absence that could result in dismissal. The tribunal erred in law in holding that because there was a discretion in the policy to move the claimant to an alternative role, that could avoid the substantial disadvantage, the consequence was that the PCP did not put her at a substantial disadvantage. The application of the policy put the claimant at a disadvantage because she was at a greater risk of absence than people who are not disabled and so, because the discretion to find an alternative role might not be exercised in her favour, was at a greater risk of dismissal. The real question in

this case was whether the respondent had taken such steps as were reasonable to avoid the disadvantage

45. I consider that on a fair reading of the judgment it is clear that the Tribunal concluded that, in the alternative, the respondent had taken all steps that could reasonably have been expected of it. On a proper reading of the claim form and Scott Schedule the claimant was contending that the respondent should have provided her with an alternative role, including support and training relevant to any appropriate roles. While it can be a reasonable adjustment to appoint a disabled person to a suitable vacancy without making an application or being subject to assessment, whether such an adjustment is reasonable will depend on the facts of the case. While the analysis under the heading "Roles" was brief it is also necessary to consider the findings of fact and analysis of the facts even where it is set out in sections related to other claims, provided that care is taken to ensure that the analysis is not invalidated because it was in the context of applying a different legal test.

46. In this case the Tribunal had concluded that:

(1) The respondent only had the necessary knowledge to require it to make reasonable adjustments from 14 March 2017;

(2) The claimant was placed in a supernumerary position within Employee Services from 10 April 2017 which gave her a good opportunity to seek redeployment;

(3) The redeployment period was extended to 29 weeks;

(4) Placing the claimant into the specific roles that she identified would not have been reasonable. The claimant had accepted the reasons given as to why this was the case for each role during the internal proceedings;

(5) The claimant did not request specific training during the redeployment period (save for GIS, which was deemed too specialist to be a reasonable step).

(6) In June 2017 the claimant had contacted Mr Mathews, Principal HR Officer, and suggested that there should be an "exit strategy";

(7) Around the end of August 2017, she the claimant had disengaged and had not applied for some suitable roles;

(8) There was no real prospect of the claimant reverting to her substantive role on medical grounds, due to her stress reaction.

(9) A further extension to the redeployment period would have had no real prospect of resulting in successful redeployment.

47. I do not consider there is any error of law in the Tribunal's alternative analysis that the respondent had made all adjustments that were reasonable.

48. As I have concluded that the Tribunal did not err in law in rejecting the claim of failure to make reasonable adjustments the appeal must fail and so it is not necessary to determine whether the Tribunal erred in its determination in respect of limitation (grounds 2 and 3) or the contingent appeals in respect of discrimination because of something arising in consequence of disability and/or unfair dismissal (ground 4). The appeal is dismissed.