



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Miss V Charalambous**

**v**

**Haringey Citizens Advice Bureau**

**Heard at:** Watford

**On:** 6 to 9 November 2017

**Before:** Employment Judge Manley  
Mr A Scott  
Mrs I Sood

**Appearances:**

**For the Claimant:** In person with the assistance of Mr Misciali, friend  
**For the Respondent:** Mr Peter Maratos, consultant

## RESERVED JUDGMENT

1. The claimant was discriminated against when she was treated unfavourably because of something arising in consequence of her disability.
2. The respondent failed in its duty to make reasonable adjustments.
3. There was indirect disability discrimination.
4. There was no direct disability discrimination
5. The dismissal was for a reason relating to capability and that dismissal was unfair.
6. The matter is listed for a remedy hearing on **19 January 2018** with the tribunal meeting in chambers on 22 January 2018 if necessary to complete their deliberations. Orders appear at the end of this judgment so that that hearing can be effective.

## REASONS

### Introduction and Issues

6. This is a matter in which there was a preliminary hearing on 24 April 2017. A list of the complaints and issues was agreed at that time and it appears

below as amended at this hearing in line with the further information supplied by the claimant:-

**Unfair Dismissal**

1. *What was the reason for dismissal?*

*(The Respondent will say that the Claimant was dismissed on medical capability grounds). (The Claimant argues that she may have been dismissed by reason of redundancy)*

2. *Did the Respondent act reasonably or unreasonably in treating it as a sufficient reason to dismiss in all the circumstances including the size and administrative resources of the Respondent's undertaking and having regard to equity and the substantial merits of the case?*

3. *Did the Respondent follow a fair procedure?*

4. *If the dismissal was unfair, should any compensation be reduced by reference to the likelihood of achieving a fair dismissal had a fair procedure been followed, and/or be reduced by the likelihood that the Claimant caused or contributed to her dismissal?*

**Direct Disability Discrimination**

5. *The Respondent accepts that the Claimant is a disabled person for the purposes of schedule 1 and section 6 Equality Act 2010 as identified at paragraph 2 of the Claimant's particulars of claim ("POC").*

6. *Did the Respondent treat the Claimant less favourably than it treats or would treat an employee who does not share the Claimant's disability in any of the following ways as alleged?*

6.1. *By not fully consulting the Claimant during a consultation process from March 2016, prior to the change in the Claimant's job role? In this respect:*

6.1.1. *It is requested that the Claimant state what difference(s) in treatment is being alleged to have caused her a disadvantage when compared to the comparators identified below, or a hypothetical comparator.*

*The claimant relies upon three matters:- i) that she received no redundancy breakdown; ii) that she had no one to one meetings; iii) that she did not attend the initial staff meeting*

6.1.2. *It is also requested that the Claimant state what fact is being relied on to establish a causal link between her disability and the difference(s) in treatment.*

*The claimant relies upon what she was told by the trade union representative as set out at page 342 of the bundle.*

6.2. By putting pressure on the Claimant to return to work? In this regard:

6.2.1. It is requested that the Claimant state what event (including the date of the event, names of witnesses etc.) is being relied on.

The claimant says that she was asked to pop into the office with a sick note and it then turned into a meeting with Ms Hannah for which she was unprepared and which was in the presence of others.

6.3. By not engaging in a fair and impartial disciplinary process as identified at paragraphs 8b to 13 of the POC.

6.4. By dismissing the Claimant. The Claimant will say that the dismissal officer held a prejudice towards her because of her disability as stated at paragraph 13 of the POC. In this regard:

6.4.1. It is requested that the Claimant or her witnesses state the events (including the dates of the events, witnesses etc) being relied on to state that the dismissal officer held a prejudice towards the Claimant for being a disabled person.

The claimant repeats what she was told by the trade union representative

7. The Claimant will rely on a hypothetical comparator. The Claimant will also rely on the following individuals as her comparator:

7.1. ED (Outreach Worker, Benefits and Advice Project). In this regard:

7.1.1. It is requested that the Claimant clarifies how she says ED is an appropriate comparator.

The claimant will say that adjustments were made for ED when she returned from sick leave, especially in relation to the outreach work which she was not required to do for a time.

7.2. Staff member Ms S who replaced the Claimant after her dismissal. In this regard:

7.2.1. It is requested that the Claimant clarifies how she says Ms S is an appropriate comparator, details to include Ms S's role.

The claimant will say that adjustments were made to a role because of lack of field work experience for this former volunteer.

### **Discrimination arising from Disability**

8. Did the Respondent treat the Claimant unfavourably because of something arising as a consequence of her disability?

(The Claimant will say that she suffered less favourable treatment identified above at paragraph 6 because she was absent from work due to ill-health

from January 2016. She will say that her ill health was caused by her disability.)

9. If the Tribunal finds that the Claimant has been treated less favourably, was that treatment a proportionate means of achieving a legitimate aim?

**Failure to Make Reasonable Adjustments**

10. Did the Respondent fail to comply with the duty to make reasonable adjustments, in light of the Claimant's disability, contrary to sections 20 and 21 Equality Act 2010?

11. The Claimant will rely on the following alleged provision, criterion or practice:

11.1. the Respondent's requirement that the Claimant worked from the office full time;

11.2. the Respondent's requirement that the Claimant's role could not be performed from her home either on a part-time or fulltime basis;

11.3. the Respondent's requirement that outreach centre visits be shared equally between the relevant employees;

11.4. the Respondent's refusal to allow access to reference materials from the Claimant's home;

11.5. the Respondent's insistence that the Claimant's disabilities required her to be supported in the office (not at home);

11.6. the Respondent's refusal to allow access to service users information from the Claimant's home, based on data protection reasons, despite such access having been permitted for others.

In this regard:

- 11.6.1. It is requested that the Claimant state when and to whom the Respondent had permitted access to confidential client information from home.

The claimant will say that immigration advisers and other advisers, between approximately 2007-2013 would work from home on client files and Ms Dorrington also worked for home for one week in 2016.

12. It is noted that the Claimant records the following as the substantial disadvantage suffered:

12.1. Ill-health

12.2. Stress

12.3. mobility related restrictions?

13. It is noted that the Claimant states the following as steps the Respondent ought to have taken to prevent the PCP from having the above effect:

- 13.1. *phased return to work;*
- 13.2. *support from Access to Work?;*
- 13.3. *some comparisons with circumstances related to ED?*
- 13.4. *a home working arrangement?;*
- 13.5. *workstation adjustments at home; and*
- 13.6. *reconfiguration of the Claimant's responsibilities within the Respondent's new structure (whereby colleagues could cover outreach related duties and the Claimant could undertake advice, advice line supervision/ case checking and volunteer supervision duties from home in combination with office.*

14. *Did the Respondent know or reasonable ought to have known that the Claimant is likely to be placed at the disadvantage referred to at paragraph 13 above, by not making the adjustments identified at paragraph 14 above?*

15. *If so, when might the Respondent reasonably have been expected to make the adjustments?*

16. *Did the Respondent fail to make the adjustments?*

**Indirect Disability Discrimination**

17. *Did the Respondent discriminate against the Claimant by applying to the Claimant the above alleged provision, criterion or practice which is discriminatory in relation to her disability?*

18. *Did the Respondent apply the alleged provision, criterion or practice to persons whom do not share the Claimant's disability?*

19. *Does/did the provision, criterion or practice put, or would put persons with whom the Claimant shares her disability at a particular disadvantage when compared with persons with whom the Claimant does not share it?*

20. *Did the Claimant suffer the disadvantage identified at paragraph 12 above?*

21. *Can the Respondent justify the provision, criterion or practice by showing it to be a proportionate means of achieving a legitimate aim?*

**Limitation Period**

22. *It is noted that some of the Claimant's complaints, in particular, those relating to events in March 2016 appear on the face to have been brought out of time.*

23. *Does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?*

24. *If not, were the complaints presented within such period, as the Employment Tribunal considers just and equitable?*

**Remedy**

25. *What, if any, should be awarded to the Claimant in respect of pecuniary losses?*

26. *What, if any, should be awarded to the Claimant in respect of injury to feelings?*

7 In summary, the tribunal was concerned to determine, the respondent having conceded that the claimant was a person with disabilities under the Equality Act 2010, whether there had been any of the following:- direct discrimination; discrimination arising from something in consequence of a disability; failure to make reasonable adjustments; indirect disability discrimination and/or unfair dismissal. This requires, as is usual, the tribunal to consider all the oral and written evidence before it and, applying the tests that will be set out later, to determine those issues.

8 At the commencement of the hearing an issue arose about a witness statement from a private investigator, which had been handed in by the respondent and the contents of which led to some concern on the part of the claimant. The respondent indicated that it did not need to rely on the evidence contained in that statement and the tribunal put it to one side, although we had glanced at it. Nothing further was said about it after that and the tribunal hoped that the claimant was reassured. Although the witnesses and some relevant individuals are named in this judgment, other people are referred to by initials where it is not necessary for them to be identified in this document which will be a public document.

9 The tribunal heard from the claimant and from three witnesses for the respondent as follows:-

Ms L Hannah, CEO of the respondent  
Ms K Dorrington, Operations and Development Manager  
Mr D Bates, Finance Manager

10 There were some problems with the bundle of documents at the outset of the hearing. The claimant was concerned that not all documents were in the bundle and there were problems with legibility. The tribunal therefore spent the first day reading the witness statements and managed with the documents before it and the bundle was re-done with better copies and new documents all agreed by the second day of the hearing. The claimant has several health issues and asked for adjustments with respect to the seating arrangements and so on and we did our best to accommodate her in that respect. We also had regular breaks so that both the claimant and the respondent's representative could take instructions and consider various matters.

**Facts**

- 11 The claimant commenced employment with the respondent in 2002. She had previously worked there as a volunteer. Her first post was as a trainee advice officer and she held several roles throughout her time there. She became a generalist advisor and was then appointed as an outreach worker in HIV and she also covered other project work. By 2011 there was a restructure with some redundancies. At this point the claimant competed for a post and was appointed to the post of "Advisor with expertise in welfare benefits". Her base was Tottenham CAB and she worked a four day week.
- 12 As the name suggests the respondent is a Citizens Advice Bureau (CAB) working in Haringey. It depends for its funding on a number of different bodies including the council, London Borough of Haringey. The claimant had experience in advising clients and she also had some responsibility for training staff and volunteers.
- 13 In July 2011, the claimant found that she could not get out of bed and was in extreme pain. She was referred for tests and was diagnosed at different times over the next couple of years with various conditions. These included cervical spine canal stenosis, primary degenerative disc disease, disc desiccation with nerve root compression and fibromyalgia. Over time this has led to other health conditions which may arise from the physical discomfort and possibly from the medication. These include depression and anxiety, as well as short term memory difficulties. She has a loss of motor control with respect to her upper limbs and in 2016 a bone density scan showed that she had very low bone density. The respondent accepts and the tribunal agrees that the claimant is a person with a disability under Equality Act 2010.
- 14 In any event, the claimant continued to work although it seems that she had some time away from work. In January 2013, the claimant's then manager received a report from the occupational health service which anticipated significant symptoms continuing for months or years. It also suggested several adjustments such as a particular chair, a perching stool, an adjustable height desk, a right hand evolutent mouse, forearm support, a work station assessment and a voice activated computer system. As we understand it, not much progress was made with respect to those adjustments before the claimant had a cervical spine operation in May 2013. When Ms Hannah took up her appointment as CEO on 2 December 2013, the claimant spoke to her and she realised that little or no progress had been made with respect to the adjustments. It was suggested that Access to Work through the DWP were approached for an assessment and to see what financial assistance it could give. We have seen a detailed report and, as we understand it, all adjustments were put in place and the costs covered by Access to Work either in late 2013 or early 2014.
- 15 Later that year, a further occupational health report was requested and we have seen one dated 19 December 2014. This makes reference to:-

*“constant fatigue, widespread pain, low mood, anxiety, poor concentration and short term memory and weakness in the upper limbs.”*

The report advises that the claimant has *“fibromyalgia, depression and anxiety”* and the fact that *“a combination of medications, psychological support, work place adjustments and sympathetic practice support from management will allow her to resume her full contractual commitment in due course.”*

It seems that a suggestion there about a phased return was acted upon.

- 16 As the tribunal understands it the claimant worked throughout 2015, but her work was adjusted so that she saw clients in the morning and was then supervising in the afternoon on the telephone advice line which volunteers operated. She was there to check and support their advice giving.
- 17 In January 2015, the claimant had an accident at home and broke her wrist. She went to Accident and Emergency and the wrist was put in a cast. She was hoping to return to work, but it seems that an injury to her shoulder went undiagnosed and she was not able to return to work as soon as she hoped.
- 18 During 2015 the respondent had been bidding for a new tender with respect to Haringey Council’s Information Advice and Guidance contract. The claimant was aware of this and that the tendering commenced in May or June 2015. A colleague of the claimant “ED” was apparently on sick leave during this period. As we understand it she was away with stress related absence, but she then broke her ankle. On her return adjustments were made with respect to the volume of outreach work that she needed to do.
- 19 The respondent said that staff were aware that the new contract with Haringey might lead to redundancies, but this was not put to the claimant and we are unaware as to whether or when she knew about that possibility. She did know of course that the respondent was preparing a tender bid. She expressed relief in December 2015 when she was told that a recommendation had been made by Haringey Council’s Cabinet that the CAB be awarded the tender. Ms Hannah sent a Briefing Note to staff on 4 January 2016. In that she stated that there would be a *“consultation process with staff with the intention of implementing the new contract 1 April”*. She also said *“This is both an exciting opportunity and also will be a challenging time, there will be a few changes ahead and we will discuss in more detail over the next few months”*.
- 20 As stated the claimant had injured her wrist as well as her shoulder and the spinal issues continued. She set out in her witness statement, and this was not challenged, the difficulty she had about bathing, cooking and travelling. Shortly before 8 March the claimant, who was



still on sick leave, was told by Ms Hannah by telephone that there was to be a consultation about possible redundancies. She then received a consultation document, which was sent to all members of staff and we see that document between pages 182 and 212 of the bundle. She also received a letter advising her that there was a risk of redundancy and how people would be selected for redundancy. The consultation document set out how the posts were affected and the possible redundancies. We heard that overall there was to be a reduction from 28 staff to 16. With respect to the claimant's post of "Advisor with Expertise", these posts were to become "Community Advice Workers". There was to be a reduction in those posts from 6.7 to 3.5 making a reduction of 3.2.

- 21 The consultation document then set out the timetable for consultations, with the aim of having offers of redeployment and so on by 11 April 2016. It also contained the redundancy policy, which had been approved in 2010 and also contained some draft job descriptions. It referred to voluntary redundancies being sought. It included the following:-

*"The new objectives of the service are:*

*To increase access to information, advice and guidance by delivering the offer within a range of community based hubs across Haringey as well as through different channels including digital and telephony"*

- 22 With respect to the claimant's new post of Community Advice Worker the job description has this information:-

*"the Community Advice Workers (CAW) will be required to work from multiple locations with a base from either our partner base location, CAH Tottenham office or CAH Turnpike Lane office, covering both the outreach and office based services. Outreach services are based within the local community of Haringey to provide advice and assistance to clients who are marginalised and face potential exclusion of access to advice to tackle the problems they face in a variety of subject areas."*

That document goes on to talk about which areas of advice will be given; about the need for equality standards and the mentoring and coaching of volunteers.

- 23 We have seen an email from Ms Hannah which appears to be to the claimant which includes a brief redundancy calculation. The claimant says that she did not receive this email and we accept that it was not received. However, we also accept that it appears that Ms Hannah did mean to send it and we are not sure why it was not received by the claimant.

- 24 The claimant was aware there was to be a staff consultation meeting on 8 March. She told Ms Hannah she would like to be there, but she was unable to attend because of a hospital appointment. That meeting did take place with other staff and minutes were produced. It is

recorded in those minutes that Ms Hannah told the meeting that she was to speak by phone to those staff who could not attend. Ms Hannah rang the claimant after the staff meeting and said that she would send the consultation document to her, which she did perhaps around 9pm that night and she arranged to speak to the claimant the next day around 10am. Ms Hannah believes that she had around five to ten telephone discussions with the claimant, although the claimant believes there was something around three. It seems from the information before us that it is likely to be closer to three, although there maybe one or two other short telephone conversations. Ms Hannah did not make a note of those conversations and the claimant's case is that she was not given the detail of the outreach sessions which would be needed for the new posts. The tribunal accepts that there was some reference to new duties.

25 On around 19 March the claimant was sent the minutes from the consultation meeting of 8 March and she also prepared an alternative proposal which we see in the bundle. Her suggestions seem to be more general than specifically relating to the Community Advice Worker posts. The claimant remained on sick leave whilst matters progressed.

26 Within the bundle we saw a further job description for Community Advice Workers, but it is not clear when that was produced. Mr Hannah's evidence was that it was a second draft after discussions with members of staff. It is dated April 2016 and there is some difference to the role purpose as compared to the previous one. This job description contains no specific reference here to outreach sessions as the version quoted at paragraph 22 above does. It does say that Community Advice Workers "*are based within the local community of Haringey*".

27 It would appear that there was a further staff consultation meeting on or around 13 April and in the meantime, there was some shifting in the arrangements and some people apparently were made voluntarily redundant. Mr Bates' evidence was that there were 4 voluntary and one compulsory redundancies. By email of 18 April Ms Hannah said to the claimant:-

*"it is good news!! Yes the one redundant advice session supervisor will be offered the Volunteer Co-ordinator, once this is confirmed I will inform. No later than Wednesday, I will keep updated as we go along. I will send out the no longer at risk letter tomorrow."*

28 The claimant did then get a letter which informed her that her post was "*no longer at risk of redundancy*." This indicated there had been voluntary redundancy and one resignation and they had considered a new option, which meant they did not need to make any compulsory redundancies. The letter goes on:-

*"Although I wish to give you my best assurances at this time, I do feel it is only fair to add that outside of this present period of consultation, this letter cannot be taken as a permanent guarantee of your position."*

*However as far as it is reasonably possible to foresee, you have no current cause for concern.”*

The claimant replied by the same day and wrote:-

*“Many thanks received and acknowledged and very grateful. The part where it says my post is still not guaranteed is permanent does this mean more redundancies again? Thank you I will await to speak with you and remain positive.”*

- 29 The claimant remained on sick leave. She sent an email to Ms Hannah on 20 May about seeing the consultant neurosurgeon. She said *“I would like to try and return to work with support as I am becoming anxious and depressed if possible.”* She said she would phone on Monday and indeed she did so after she had the sick note from the GP. This sick note of 23 May refers to the claimant’s conditions of cervical spine stenosis, disc prolapse and fibromyalgia and says in the comment section:-

*“The patient needs to have an occupational therapy assessment before she starts work in order to get a professional opinion on her abilities and duties she could perform. In my opinion she will need to be offered the option of home work, frequent breaks at work, flexible working hours, suitable adjustments of her chair and office, alternative duties, calm environment as she suffers from panic attacks and also the freedom to get up and move around when she needs.”*

- 30 When the claimant collected that sick note, she rang Ms Hannah and asked if she should pop in with it. Ms Hannah said that she could and she went to the office and showed Ms Hannah that sick note and they had a discussion. As we understand it, and there are no notes of this discussion, but to the best of both people’s recollection, Ms Hannah expressed some concern about that note and asked the claimant if she could ring her GP and the claimant agreed that she could. There was a meeting which apparently took place in the kitchen and it is possible that other people at work might have been aware that a discussion was taking place, although whether they knew the content or not, we cannot say. The claimant says that she was unprepared for such a meeting and it does seem that she did not appreciate that Ms Hannah would use the opportunity to have a relatively formal discussion with her. In any event Ms Hannah later sent a note dated 23 May which said it was a *“sickness follow-up meeting”*. It is largely agreed what happened at the meeting. The note says, for instance, *“Vass would like to return as soon as possible and is prepared to work from home, reduced hours and phased return to work etc as per her GP note”*. Ms Hannah also records *“Lynn also pointed out that she cannot at this stage agree to working at home until after an OHR has been completed. Lynn is concerned that Vass does not have the equipment and facilities at home e.g. dragon adapted equipment at this stage to work from home and is concerned that by doing this it may exacerbate her problems without a full assessment. Lynn also pointed out that a full risk assessment will need to be carried out to determine if this was a possibility.”* It was agreed that an occupational health report

would be arranged.

- 31 There was a delay before 14 June when Ms Hannah wrote to the claimant asking for permission to refer her to occupational health. That letter concludes:-

*"I trust you understand the reasons behind this letter, as we do have sympathy with your situation and I have no wish to worry you at this difficult time. However, we do need to consider the operational needs of the organisation and consider what decisions need to be made.*

*Consequently, I feel it is only fair to forewarn you that if the evidence indicates you are unlikely to return to work in the reasonably near future, we may, unfortunately, have to consider terminating your employment. I do hope this does not turn out to be the case."*

- 32 The occupational health report was duly received dated 13 July, although it does seem neither the respondent nor the claimant received it until somewhat later in that month, maybe around or later than 23 July. The report is a detailed one and outlines the claimant's medical history specifically with relation to spinal difficulties and fibromyalgia. It also makes reference to insomnia and depression and anxiety; sets out the current situation.

- 33 Under the heading "*Capacity for work*" it reads:-

*"Ms Charalambous says she loves her job and wants to return to work if appropriate adjustments can be accommodated"*

There are then a number of suggestions under the "*Adjustments and Rehabilitation*" heading. This sets out adjustments already made and says this:-

*"Ms Charalambous is not able to drive at present and therefore could not undertake any outreach activities i.e. those that require driving to different venues. She suggested, if this could be accommodated, that she could do case checking from home using dragon dictate (the office version would need to be provided at home), it may be possible for Access to Work to assist with the full dragon software and an appropriate desk and chair."*

It goes on to say that the claimant suggested she carry out telephone advice consultations and she would need a headset for these and that she could supervise volunteers either over the phone or face to face in the office. It goes on to say that the claimant needed to be able to get up and down and walk around and stretch and she can start work in office :-

*"as soon as the arrangements can be made, working from 8am to 2pm starting with two days per week for two weeks, then three days a week for two weeks, then four days a weeks for two weeks; after this, subject review with her line manager, she may be able to gradually increase her hours in the office. Subject to liaising with her line manager she*

*could reduce her hours in the office if she is undertaking casework from home or telephone advice calls.”*

34 Under “*Future Outlook*” the doctor says this:-

*“Ms Charalambous’ condition is severe but she is determined to try and stay in work with the appropriate support.”*

As far as the specific questions are concerned the doctor says this:-

*“Ms Charalambous is not fit for normal hours and duties required of her post.*

*It is not possible to say when she will be able to return to work to normal hours and duties and above are recommended for adjusted duties.”*

35 The doctor refers to the underlying conditions as set out above and with respect to the questions about the outreach venues, the doctor says:-

*“Ms Charalambous is unable to drive at the present. If her shoulder problem is successfully treated, she may be able to drive herself to the office. She is unlikely to improve sufficiently to enable her to visit outreach venues either by driving herself or travelling by public transport; she would be unable to carry a laptop or other similar equipment to these venues.”*

36 The tribunal understands that this report arrived close to the time of Ms Dorrington taking her post of Operations and Development Manager on 26 July 2016. She had not met the claimant. Ms Dorrington and Ms Hannah discussed the occupational health report and what sort of roles and adjustments might be made. There are no notes of these meetings, so it is not entirely clear what was discussed. The tribunal accepts that there were fairly wide-ranging discussions about the possibilities. Ms Dorrington told the tribunal that she was concerned about what the claimant had called “brain fog” and issues about anxiety and depression. Ms Hannah expressed those concerns and pressure on staff because of the reductions to a “streamlined” staff group. As we understand it, at some point, there were also discussions with the chair of the trustees.

37 By letter from Ms Hannah of the 9 August the claimant was invited to a ‘medical capability meeting’. She was told that this would be chaired by “*an impartial HR face to face consultant from Peninsula. I will also be the note taker present at the meeting*”. The claimant was told that the purpose was to discuss:-

- *“your absence from work due to ill health;*
- *the enclosed copy of a medical report from an occupational health practitioner;*

- *whether any reasonable adjustments can be made to your job in the workplace that could facilitate a return to work;*
- *whether there is any alternative employment available that could be suitable for you.”*

The claimant was also told that *“if the meeting indicates that there is little likelihood of a return to work within a reasonable timescale and there are no reasonable adjustments that can be made or alternative employment available, then the outcome may be notice of termination of your employment on the grounds of ill health.”*

The claimant was told she had the right to be accompanied. The claimant was not able to attend on 16 August and the meeting was therefore re-arranged for 18 August.

38 The meeting on 18 August was indeed held by a Ms Smith from HR Face to Face Peninsula. The claimant was present as was her Unison staff representative. Ms Hannah said that she attended as a note taker. We have had some difficulty about the notes of this meeting. The typed notes appear between page 266 and 272. It is also true that those notes indicate that Ms Smith asked the claimant if she would allow a recording of the meeting for reference and she agreed. That recording has not been transcribed and, as we understand it, nobody who we have heard from has listened to that recording. Ms Hannah believes that she may still have the notes she made at that hearing, but they were not at the tribunal. There is another set of notes which Ms Hannah’s witness statement indicated were made by Ms Smith and they appear at pages 273 to 277. However, very late in this hearing the tribunal was informed that they are actually the Unison representative’s notes.

39 One of the difficulties is that the claimant later said that she believed that the notes were inaccurate. Some of those alleged inaccuracies are relatively minor or are not particularly important for this case, but one or two are a little more significant. Some were clarified during cross-examination of Ms Hannah. In particular, at page 266 there is a comment attributed to the claimant *“cannot use public transport and can’t travel before 11am”*. The claimant says, and we accept, that that was a reference to her not being able to use the London Underground when she travelled to hospital appointments before 11am. She did not say and it appears Ms Hannah accepts that she did not say that she could not use any public transport at all. She told us that she could not use buses but that she could use trains when they were not too busy.

40 A further comment which appears in the minutes reads:- *“goes to GP regularly but can do out of work hours. Start work early after 2pm not alert enough to work, couldn’t do appointments after 2pm will forget client information”*. That was clarified as meaning that the claimant could start work early, but would not be alert enough to see clients after 2pm.

41 In any event, what was discussed at that meeting were the various

health difficulties which the claimant was facing, how it affected her and the treatment and medication. The claimant said a couple of times that she could not do the outreach work, but also made it clear that she wanted to return with adjustments. She said she could have returned quicker if the adjustments had been carried out.

- 42 Although Ms Hannah had said she was only present as a note taker, on cross-examination she accepted that she had answered some questions put to her by Ms Smith at the meeting and these are not recorded in the minutes. We were not told what she did say at that meeting. A very short reference was made to *"calm environment"* which appears to relate to the GP note of 23 May. The claimant is recorded as then saying, *"working on it, get anxious, too many questions, can't cope with"* and there then seems to be a discussion about what colleagues should know about that and the claimant said *"should be ok. Get on with everyone – don't want lots of questions"*.
- 43 The meeting concluded with the claimant making it clear that she would like to return to work; that she could not do the outreach job but that she was *"willing to give it a go"*. The trade union representative's note indicates that the claimant offered to do case checking from home and also records that she *"asked for practical ways which would contribute to return to work"*.
- 44 After that meeting, Ms Hannah completed a form entitled *"Home Working Viability Checklist"*, which we understand she found from her own research. We have also seen the guidance note which she found on home working, although we were not taken to any specific part of it. She said that she consulted the (National) Citizens Advice Bureau guidance on home working although that seems to have very little detail in it. It does state *"There may be occasions where, when it is properly assessed and planned, home working may form part of a package of reasonable adjustments put in place to support a disabled employee or someone to returning to work after a period of sickness."*
- 45 When Ms Hannah filled in the Home Working Viability Checklist form, she did so without discussing matters with the claimant. The tribunal is unclear as to what Ms Hannah thought was the status of this document. In her witness statement, she says that *"a risk assessment was considered on 19 August"* (the date she signed this document). In the tribunal hearing she referred to it as *"my guide to myself"*. What is rather striking about this document is the emphasis that Ms Hannah put on to such as whether the workplace was a *"stress free environment"*. She commented *"potential increase of anxiety level"*. Whilst the form has a section *"Decision"* for deletion of one of *"Home Working is Viable"* and *"Home working is not Viable"*, there is no recorded decision. Ms Hannah also commented on the fact that the home assessment could not be done until the claimant was ready to come back. The form is dated as having been completed on 19 August but was not discussed with anyone else or shown to the claimant at any time before these proceedings.
- 46 As far as home working is concerned, we accept that there had

been occasions between 2007-2013 when immigration and other advisors had worked from home. There was also a week in 2016 when Ms Dorrington informed staff she would be working from home although not on client files.

47 Ms Hannah also told us that she referred to the respondent's capability procedure when considering the claimant's position and that appears at 416 of the bundle. It does not seem that this was handed to the claimant until after dismissal. That document does not say anything particularly important with respect to this matter. Under a heading "*Personal circumstances/health issues*", which seems to be the most relevant, there is a reference to personal circumstances which prevent employees from attending work and says that there would be a request for a medical report. It concludes "*When we have obtained as much information as possible regarding your condition and after consultation with you, a decision will be made about your future employment with us in your current role or, where circumstances permit, in a more suitable role.*"

48 Ms Smith prepared a report which is dated 6 September. Ms Hannah received it around 7 September. That document sets out the background to the meeting and goes through some of the things that were said. It makes it clear that the claimant did want to return to work. Ms Smith then made a number of findings the most important of which read as follows:-

*"51. Employers are only required to make adjustments that are reasonable. Factors such as cost and practicability of making an adjustment on the resources available to the employer may be relevant in deciding what is reasonable.*

*52. The adjustments suggested in the OHR such as a phased return and regular breaks to walk around and stretch could be accommodated by the employer. A further work station assessment by Access to Work could also be arranged.*

*53. I note that VC is prohibited from keyboard use due to a wrist injury and although she can use dragon dictate, I understand that this will just get the majority of typing into a document, but would then involve sense checking, possibly manual amendments and then transferring (via copy and paste) into a HCAB's system (Petra).*

*54. A fundamental element of the role is travelling to outreach centres within the community and currently VC is unable to do this both because of her driving restriction and also the requirement to carry equipment. Working from home cannot be accommodated by the employer as the purpose of the role is to carry out an outreach facility within the local community and clearly this cannot be achieved from VC's home.*

*55. In addition, although workstation amendments could be actioned within HCAB's offices, the other premises that are attended are not HCAB offices and therefore they would not be able to implement*



*significant changes or control the work environment, i.e. where a hot desk situation applies.”*

49 She goes on to say that alternative employment should be considered but that there were no other vacancies. She comments that the claimant cannot work from home *“as this would contravene Data Protection rules”* and refers to the capability policy and states that the HCAB have followed the policy.

50 She then makes this Recommendation at paragraph 62:-

*“As there do not seem to be any reasonable adjustments that would serve to accommodate VC’s needs and there are no alternative roles, the business may have to consider the termination of her employment on the grounds of capability. VC had previously been advised at that meeting on 18 August 2016 and by letter that this may be a possible outcome.”*

51 Ms Hannah’s evidence with respect to the report was that she had already discussed this possible recommendation and continued to discuss it with Ms Dorrington and with the chair of trustees. A decision was taken that the claimant would need to be dismissed. We are not entirely certain when that decision was made, but it seems that it was made somewhere around 8 September and certainly before the meeting on 12 September, which we will come to. When Ms Hannah was asked about long term sickness amongst the staff, she said there were some in that position but none had been dismissed. She believed the longest (apart from the claimant) was less than six months and that, to her knowledge, those individuals did not have a disability. Mr Bates told the tribunal that they covered some sick leave with staff working extra and using a temporary advisor.

52 On 8 September an email was sent to the claimant by Ms Hannah, which reads as follows:-

*“I would like to meet directly with you to discuss the medical capability, can you please attend my office (address) on Monday, if you require me to organise transport for you then I am more than happy. Please confirm to me that you will be attending.”*

The claimant replied:- *“Thank you for your email. Monday should be ok. However I would like a decision in writing. Slightly anxious.”*

53 The claimant received the minutes of the meeting with Ms Smith around 7 or 8 September. She was not sent a copy of the report. She then attended the meeting on 12 September with Ms Hannah and Ms Dorrington in attendance. She was not accompanied by anyone, although the notes record that she stated that *“she would prefer to have someone with her, but did not want to delay the meeting.”* Ms Hannah is recorded as saying, *“LH understood this and thanked VC for attending.”*

54 The notes record that the claimant was told that she was to be

dismissed. She was informed that that is what the medical capability report recommended and this is recorded, *"LH explained that her decision to dismiss had not been taken lightly and was a very hard decision to make. LH pointed out the decision is based on her medical health and not her work performance"*. Ms Hannah went on to tell the claimant that they had taken medical reports into account and that she wanted to go through a summary of the report with the claimant. This then was done and the claimant made comments of the report.

55 The claimant asked if dismissal *"means retiring on medical grounds"* and Ms Hannah said it was a dismissal on grounds of medical capability and not retirement. *"It was re-iterated that it was not about her performance, but about her health"*. The claimant said that she was concerned that she had not taken any notes and was very upset at what she had been told. The claimant mentioned the occupational health report and there was further discussion about suitable alternatives. She also said that she needed to talk to the union. She asked how long before the appeal could be lodged and the notes record that Ms Hannah *"confirmed that VC will need to submit by Monday 19 September to LH, email is acceptable. LH outline the rest of the procedure that the appeal should be sent to LH who will pass it to the trustees to undertake and that she would not have any part of the procedure. The trustees would take the decision independently based on this information available."* The claimant referred to Access to Work and things that might need to be returned to them and asked some questions about payment and her P45 and so on.

56 She was then handed a letter of dismissal and a copy of the report as well as a copy of the employee handbook. This was the first time that she had any of these documents. She asked about personal possessions and so on and said at the end that she had loved her job and she was going to consider appealing.

57 The letter of dismissal was dated the same day. It is a short letter which refers to the medical capability report and says this, *"I would like to draw your attention to the outcome of the meeting (point 62 of the report) which reflects my decision. I have pasted below for your convenience."* The letter goes on to say that it will take effect immediately and the claimant will be paid 12 weeks pay in lieu of her notice.

58 The claimant did indeed appeal by letter of 19 September. She gave six grounds for that appeal. The first was that there was no consideration given to her when the new posts were generated, specifically with respect to her disabilities and refers to the fact that she ran the telephone advice line over four days for the last 18 months before this period of sickness. Secondly, she said that she did not think reasonable adjustments had been properly considered. She said, *"nothing has been said about looking into ways in which responsibilities could be shared amongst colleagues to aid making such adjustments"* and goes on about adjustments to the outreach work, possibility of making it to telephone advice and so on. Her third ground of appeal was that nobody had considered Access to Work or consulted her

colleagues or her rights under the Equality Act. Fourthly, she said that she saw no evidence that redeployment had been properly considered. Fifthly, she said that telephone advice and case checking could take place from home and that CAB encourages home working and sixthly she refers again to the OH report, which suggested adjustments.

59 By letter of 28 September the claimant received a letter to say that the appeal hearing would be before an “*impartial HR face to face consultant*” from Peninsula. Ms Hannah set out the grounds of appeal largely as summarised above. The claimant was told of her right to be accompanied and so on. In the meantime, the claimant had heard from the branch organiser of Unison that they believed her post might have been redundant. The claimant was concerned about the appeal being heard by a Peninsula consultant when she had been told at the dismissal meeting that it would be by a trustee.

60 The claimant attended the appeal before a Mr Chehal on 5 October. She was accompanied by a Unison representative. Mr O’Donovan, who is a trustee, was present and said that he was to be only the minute taker. It appears that a concern was raised about the appeal not being heard by trustees and the claimant’s belief that previous appeals by other members of staff had been with up to three trustees at the appeal hearing. In any event the appeal hearing progressed with consideration of the claimant’s grounds of appeal.

61 The claimant raised a number of issues at the meeting. One of the things she raised is that the respondent had produced a new handbook, which she did not have before. She had been given a copy on the day she was dismissed. She reiterated that no one had been asked about sharing out the outreach work and reminded Mr Chehal of the employer’s duty to make reasonable adjustments. There was quite a lot of discussion about the possible adjustments suggested and the claimant argued strongly about the fact that previous adjustments had been made and that she had been good at her job and was able to return. The fact that the post might have been redundant was raised and the claimant said that it was a redundancy situation as the work she was doing was no longer available to her. She suggested that redundancy was still an option. For some reason Mr Chehal sent notes of that meeting to Ms Hannah which caused concern to the claimant, although Ms Hannah said that she did not open the attachment.

62 After the meeting, Mr Chehal produced a report which is dated 19 October. It is clear from that report and it is accepted by Ms Hannah that Mr Chehal had spoken to her after his meeting with the claimant. Her evidence is that what he records in the report as having been said by her is largely accurate. However, there are no notes of any such conversation(s) and Mr Chehal did not go back to the claimant for any comments she might have on what Ms Hannah had said to him. In any event, Mr Chehal sets out there, in some detail, the claimant’s case and Ms Hannah’s response to it. For instance, with respect to the lack of consultation around the redundancies, Ms Hannah set out the consultation process that was followed and particularly the telephone

discussions that she had with the claimant. Mr Chehal accepted that the claimant had had the new role explained to her. Indeed, it appears that Mr Chehal accepted what Ms Hannah said on all points.

63 Ms Hannah expressed concerns about effects of work on the claimant's mental health. Mr Chehal recorded this at item 5 (iv):-

*"LH advised me that there is a myriad of information assurance and risk assessments that are required when considering someone with ill health issues to work from home and she considered her duty of care to VC given the medication, anxiety and stress levels that were raised with both report and at the hearing".*

64 He goes on to record that Ms Hannah *"had considered this point under Home Working - physical issues remain, levels of stress and anxiety could be exacerbated due to lack of peer support and isolation."* He also reported that she said that reference to materials would need to be accessible and talked about the need for face to face involvement.

65 He came to this conclusion at item 6 (vii):-

*"Based on LH's evidence on the balance of probability, I agree with LH that working from home can be counter productive and exacerbate VC's health problems as VC suffers from anxiety and depression and there is a risk of raised stress levels in particular when dealing with clients and VC would prefer support from her colleagues. Furthermore, the equipment required at the office would need to be transported to her home and if this was appropriate the CAB would need to consider a further risk assessment, insurance and cost".*

66 In summary Mr Chehal recommended the appeal was not upheld and that it should be dismissed. He said in conclusion *"it is for the HCAB to decide if it wishes to accept my recommendation."*

67 By letter of 21 October the claimant received a short letter from Mr O'Donovan which reads as follows:-

*"You appealed against the decision of the medical dismissal which was confirmed to you by way of letter on 19 September 2016.*

*Your appeal hearing was held on 5 October 2016 by an impartial consultant engaged for this purpose.*

*Please find attached the report of the consultation which represents my decision.*

*You have now exercised your right to appeal under our procedures and this decision is final."*

68 We did not hear from Mr O'Donovan, so we have no evidence with respect to what thought processes he went through, if any, when he decided to accept the report in full as he did.

69 The claimant was told by a trade union officer some two days later that he believed Ms Hannah had made a decision that the claimant should not return to work “*a long time ago*”. He went on “*I know that Lynn despises having to make concessions and amendments within the work place to cater for disability.*” Again, the tribunal has not heard from this individual and cannot therefore make any findings based on the views expressed in that letter.

### The law

70 The legislative provisions which relate to unfair dismissal are contained in Employment Rights Act 1996. Section 98 (1) and (2) set out the potentially fair reasons for dismissal, one of which is “*capability*” which is further defined at section 98 (3) (a) - “*capability*”, *in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality*. The burden of proving a potentially fair reason for the dismissal rests on the respondent.

71 If the tribunal is satisfied that there was a fair reason, it must then consider, the burden of proof being neutral, whether the dismissal was fair or unfair under section 98 (4) ERA which reads:-

*“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”*

72 The tribunal will usually need to consider several factors. These will include whether the procedure used by the respondent was a fair one, what investigation was undertaken, including medical or other specialist advice obtained, what meetings were held with the claimant and what opportunity she had to put forward her case, her right to accompaniment and any rights of appeal.

73 If there is a fair procedure, we also consider whether, in all the circumstances, the dismissal for the reason found, fell within or outside the band of reasonable responses. This was set out in Iceland Frozen Foods v Jones [1982] IRLR 439 and affirmed in Foley v Post Office [2000] ICR 1283. We must take into account the facts at the time of dismissal and we must not substitute our view for that of the Respondent. In broad terms, we must assess whether the dismissal of this employee for capability was outside the range of reasonable responses.

74 The ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015) ("The ACAS Code") is a statutory code of practice which provides basic practical guidance and sets out principles for disciplinary matters. It does not apply to redundancy situations. It is admissible in tribunal proceedings and we must take any relevant provisions into account in determining fairness. By s207A of Trade Union and Labour Relations (Consolidation) Act 1992 the tribunal has power to increase awards to a claimant in circumstances where it is just and equitable to do so where there has been an unreasonable failure by the employer to comply with the ACAS Code. That increase can be no more than 25%.

75 The disability discrimination complaints fall to be determined under various sections of Equality Act 2010 (EQA). The relevant parts of the sections are as follows:

**13 Direct discrimination**

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

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

**15 Discrimination arising from disability**

1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

**19 Indirect discrimination**

(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.

**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.

## **21 Failure to comply with duty**

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

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

(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

77 The burden of proof provisions as set out in s136 EQA apply to all discrimination complaints. In essence, it is for the claimant to prove the primary facts from which the tribunal could conclude there has been discrimination. If there are such facts, the burden shifts to the respondent to demonstrate that any such treatment is without discrimination. Those sections of EQA which provide for the respondent to justify any otherwise discriminatory treatment require the tribunal to consider proportionality and, in particular, to balance the discriminatory effect with business needs. Hardys & Hansons plc v Lax [2005] IRLR 726 makes it clear that the more serious the adverse impact the more cogent the business reasons should be.

78 S23 EQA provides that in comparisons for sections 13, 14 and 19 “*there must be no material difference between the circumstances relating to each case*”. It goes on at s23 (2) “*The circumstances relating to a case include a person’s abilities if – (a) on a comparison for the purposes of section 13, the protected characteristic is disability*”.

79 The tests for each section under EQA and ERA are as set out in the issues and will therefore be clear from our conclusions. Both parties made oral submissions which were helpful to us in our deliberations. There is no dispute about the legal tests to be applied as set out above.

## **Conclusions**

80 We start first with the disability discrimination matters. As far as possible, we answer the questions posed within the agreed list of issues.

Direct disability discrimination

81 It is agreed that the claimant was a disabled person at the material time (issue 5). Issue 6 asks whether the respondent treated the claimant less favourably than it would treat an employee who did not share her disability. The claimant relies on three matters under 6.1 - that she received no redundancy breakdown; that she had no one to one meetings and that she did not attend the initial staff meeting. The tribunal accepts that she did not receive the redundancy breakdown, but finds that was unintentional and was not less favourable treatment. As far as the one to one meetings are concerned, we accept that could amount to less favourable treatment to conduct meetings by phone. Not being able to attend the initial staff meeting could also amount to less favourable treatment. We come later to the question of the comparator. The claimant cannot succeed in relation to 6.1.2 as it is based entirely on hearsay evidence from a trade union representative that contains no specific factual allegations.

82 At issue 6.2, the claimant also claims that it was less favourable treatment that she was pressured to return to work. Although we can accept that the impromptu meeting held on 23 May may have been unsettling for the claimant, we do not accept that pressure was put on her at that meeting to return to work. We then take issues 6.3 and 6.4 together as they concern the process from the medical capability hearing to the dismissal. Again, we are not making any finding about any allegation of "prejudice" of the dismissing officer connected to the claimant's disability. We do however find that the process from the medical capability hearing through to dismissal was not one which was fair and impartial for a number of reasons. This leads us to conclude that those matters could amount to less favourable treatment. The respondent did not take the advice contained in the occupational health report with respect to adjustments that could be made. With respect to the possibility of home working, Ms Hannah and indeed Ms Dorrington expressed concerns about stress and anxiety, which they did not properly explore with the claimant and did not have further medical advice on. The occupational health report did not deal with that matter at all and it is not something those individuals at the respondent could properly conclude on without discussing it properly with the claimant. As far as the difficulties with the outreach sessions were concerned, the tribunal is surprised by how little detail was given with respect to these sessions. It does seem to the tribunal that opportunities were not explored with respect to the outreach sessions, like those which emerged over the course of the claimant's evidence when she referred to the possibility of taxis through Access to Work. The respondent also failed to speak to other Community Advice Workers to see whether they would be able assist the claimant by carrying out more outreach sessions. All these matters did amount to less favourable treatment.

83 We then considered the actual comparators named by the claimant



for the direct discrimination complaint. As for Ms S, the tribunal finds that she was not an appropriate comparator. The evidence we heard about her circumstances was that they were completely different from the claimant's. There were no ill health or absence concerns and any amendments to duties were to do with lack of experience. We also find that ED is not an appropriate comparator. Her circumstances were different in that her absence was for a shorter time with no ongoing long term health condition, her post was different to the claimant and she returned for a six week phased return.

- 84 We do however think that we can take into account steps taken with respect to ED and also the steps taken with respect to the claimant earlier as helpful in relation to a hypothetical comparator. It seems to the tribunal that the hypothetical comparator for the direct discrimination complaint is a person who had been on long term sick, with an ongoing long term health condition but was ready to return with adjustments and adjustments having been made previously, but who cannot carry out an important part of their role because of health issues. Although the claimant did suffer less favourable treatment, the tribunal does not accept, on the evidence before it, that that hypothetical comparator would have been treated any differently. The claimant does not succeed in her complaint of direct disability discrimination.

#### Discrimination arising from disability

- 85 At issue 8 we are asked to consider whether the respondent treated the claimant unfavourably because of something arising as a consequence of her disability. We find that the respondent did so treat the claimant. These findings relate to all the matters from the commencement of the capability process through to her dismissal under issues 6.3 and 6.4. We have said that could amount to less favourable treatment. We accept that it is also unfavourable treatment. The respondent's witnesses said, several times, that going through the medical capability process and the decision to dismiss related to her ill health. The claimant's absence arose in consequence of her disability as did her difficulties in fulfilling all aspects of her role without adjustments. The less favourable treatment was having no one to one meetings and not being able to attend the staff meetings but, perhaps more seriously, following the medical capability process and dismissing the claimant.

- 86 Turning therefore to issue 9, we ask whether the respondent has shown us that treatment in question amounted to a proportionate means of achieving a legitimate aim. We accept that there was a legitimate aim for the respondent which was to provide an advice service to vulnerable and marginalised people in Haringey. However, we do not agree that the treatment of the claimant was a proportionate means of achieving that legitimate aim. That legitimate aim could have been achieved by making adjustments as suggested by the occupational health report and the claimant. In this case the claimant ultimately lost a job that she said she loved after many years of service. Given the findings we come to on reasonable adjustments, the

respondent cannot show that its response was proportionate. The claimant succeeds in her claim for discrimination arising from disability.

Failure to make reasonable adjustments

87 Issue 10 asks whether the respondent failed in its duty to make reasonable adjustments. The proposed provisions criteria or practices (PCPs) are set out between issues 11.1 and 11.6. It seems to the tribunal that 11.1, 11.2, 11.4, 11.5 and 11.6 are all connected to the request to work some of the time from home and the respondent's apparent decision that the claimant work from the office for the full amount of her working hours rather than from any home time working either part or full time. We find that those PCPs are made out as the respondent did refuse to allow the claimant to work from home.

88 There is a bit more difficulty with issue 11.3 which suggests that the respondent required that the outreach centre visits should be shared equally between relevant employees. We heard very little evidence as to how this outreach work was to be shared. Indeed, until we asked, we had very little information about how many outreach sessions there were, where they were based and what facilities would or would not be available. Although we do not have evidence which indicates equal sharing of outreach visits, it is clear that the claimant was expected to do a share of the outreach sessions and we accept that was therefore a PCP.

89 Turning to the question of substantial disadvantage for the claimant, there is no question that those PCPs did cause substantial disadvantage. It meant that she could not attend work because the adjustments suggested by OH were not implemented, because no home working was allowed and outreach work was required. We accept that led to continued ill health and stress and related directly to her mobility related restrictions. Ultimately, it led to her dismissal. It was a clear and substantial disadvantage.

90 Turning then to the question as to whether or not adjustments should have been made. These are set out in between 13.1 and 13.6. As far as 13.1 (phased return to work) is concerned, we find that would have been a reasonable adjustment and it appears that the respondent accepted it would have been, if the claimant could have returned.

91 Issue 13.2 (support from Access to Work). This is also something the respondent agreed could have been followed up if there had been a return. We find it was a reasonable adjustment. The issue at 13.3 (some comparisons related to ED) is not one we can find as a reasonable adjustment. It is simply too vague as suggested adjustment and cannot be reasonable.

92 We take issues 13.4 and 13.5 together as they relate to a home working arrangement. The tribunal does believe that limited home working would have been a reasonable adjustment. It is clear to the tribunal that there were some tasks which were not directly client related and/or did not require direct client interface, which could have

taken place at the claimant's home as long as a risk assessment could have been carried out.

93 As far as issue 13.6 is concerned (reconfiguration of the claimant's responsibilities), the tribunal is satisfied that some reconfiguration would have been a reasonable adjustment. We were not satisfied that these adjustments could not have been made.

94 There is no question that the respondent knew or ought to have known about the disadvantages as it was clearly discussed at all the meetings under issue 14. We find that the respondent should have begun to make the adjustments when they were embarking on the medical capability and dismissal process and the medical evidence was that the claimant could return then with adjustments. Finally, under issue 16 we find that the respondent failed to make the adjustments.

#### Indirect disability discrimination

95 As far as indirect disability discrimination (between issues 17-19) is concerned, the claimant is relying on the same PCPs as above. We are satisfied that the respondent would have applied them to other people who did not share her disability. We are also satisfied that it would have put people with the claimant's disability at a particular disadvantage. For the reasons set out above for the discrimination arising complaint, the respondent has not justified the application of the PCPs. The claimant must also succeed in this complaint.

#### Limitation period

96 As far as the question of the limitation period is concerned (issues 22-24), the tribunal has no difficulty at all with finding that the conduct about which the claimant complains, from the beginning of the consultation process in March through to her dismissal, is conduct extending over a period. It begins as a redundancy process where the claimant's post changed but is also connected to her ill health absence and the possibilities of a return to work. Ms Hannah was the central individual dealing with the claimant's situation. The claim was brought within time.

#### Unfair dismissal

97 Turning then to the unfair dismissal between issues 1 to 4. The first question is what was the reason for dismissal? The tribunal did consider whether there was a redundancy situation and although the tribunal is of the view that there may well have been one in March and early April, because of the reduction in Advice Worker posts, this was not the case by the time of the claimant's dismissal when she was no longer at risk. Given our findings on dismissal the reason for the claimant's dismissal was her ill health and we therefore find that that was the reason for the dismissal.

98 We then turn to whether the dismissal was fair or unfair. Of course, having found it was a discriminatory dismissal, it would be unusual, if

not impossible, for the respondent to be able to justify it.

99 However, we have decided that we will look at it without the discriminatory aspect as it is our finding that, even without the disability discrimination, this would have been an unfair dismissal. We deal first with the question of fair procedure (issue 3). We find that the procedure used by the respondent was not fair. Specifically, there are a number of particular concerns which taken together these make it an unfair procedure. These are as follows:-

- The claimant was not given the report from the medical capability meeting until after she had been told she was dismissed.
- She was not told that the meeting on 12 September would consider dismissal and was not told of the right to accompaniment.
- The decision to dismiss had already been taken before the claimant attended.
- The respondent did not get a further medical or occupational health report on matters which had clearly caused them concern around the mental health issues.
- Ms Hannah was present at the medical capability meeting on 18 August, ostensibly to take notes but was asked questions which are not recorded in the notes before us.
- The respondent did not fully consider alternatives to dismissal
- During the appeal process, Ms Hannah was spoken to, but what she said was not relayed to the claimant and there are no notes of those discussions.
- The decision maker, Mr O'Donovan, has not explained the basis of his decision and he adopted that of the external person.
- There was no proper trustee involvement.

100 The respondent did not act reasonably in dismissing this employee. She had long service and had carried out several roles, later with some adjustments which, on the evidence before us, had caused the respondent no difficulties. There was some evidence about some difficulties that sickness absence can cause, but this was not put to the claimant and we had evidence that the respondent had managed other sickness absence difficulties. Even if this dismissal had not been discriminatory, we would have been bound to find that it was an unfair dismissal.

101 We are asked to consider at issues 4, whether there should be any reduction to compensation because a fair procedure would have would

have led to the same result. We reject that proposition. There is no evidence that if the respondent followed a fair procedure, the claimant would have still been dismissed. This is because we cannot know, for sure, what the further medical or occupational health guidance would have been. The tribunal cannot say that there is a chance that dismissal would still have occurred because there is too much uncertainty about what might have happened in a fair procedure. In any event, it cannot be appropriate to consider reduction on these grounds where there has been a discriminatory dismissal.

102 The matter is listed for remedy. Question arose about the ACAS Code. These were, in particular, about the requirement to write to the employee when inviting them to a meeting with “sufficient information” and to provide copies of any written evidence. We think it is right for the parties to be able to address us on this issue at the remedy hearing if necessary. The question is whether the ACAS Code applies to this situation and, if it does, whether there was an unreasonable failure to follow the Code. This particularly relates to the procedure for dismissal.

## **ORDERS**

### **Made pursuant to the Employment Tribunal Rules 2013**

1. The claimant will send an updated schedule of loss, including any pension loss claims, to the respondent and the tribunal by **5 January 2018**.
2. The parties will seek to agree gross and net weekly pay, sums around pension loss, the basic award and any other elements capable of being agreed by **12 January 2018**.
3. The parties will seek to agree what is disputed and what is agreed in relation to remedy and have this available at the commencement of the remedy hearing.

### **CONSEQUENCES OF NON-COMPLIANCE**

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Manley

Date: 21/12/2017

Judgment sent to the parties on  
21/12/2017

For the Tribunal office

.....