EMPLOYMENT TRIBUNALS

Claimant:		**Mrs J Adams**
Respondent:		**Doncaster and Bassetlaw Teaching Hospitals NHS Foundation Trust**
Heard at:	**Sheffield**	**On: 26, 27 and 28 February 2018 (deliberations 26 March 2018)**
Before:		**Employment Judge Rogerson**
Members:		**Dr P C Langman**
		Mr A J Senior

Representation

Claimant:	Mr P Wilson of Counsel
Respondent:	Mr J Boyd of Counsel

RESERVED JUDGMENT

1. The claimant's complaints of disability discrimination of a breach of the duty to make reasonable adjustments made pursuant to section 20(3) Equality Act 2010, a failure to provide axillary aids, made pursuant to section 20(5) Equality Act 2010 and unfavourable treatment because of something arising in consequence of disability made pursuant to section 15 Equality Act 2010, fail and are dismissed.
2. The complaint of victimisation made pursuant to section 27 of the Equality Act 2010 fails and is dismissed.
3. The complaint of pregnancy/maternity discrimination contrary to section 18 of the Equality Act 2010 fails and is dismissed.
4. The complaint of detriment for family reasons contrary to section 47C of the Employment Rights Act 1996 also fails and is dismissed.

Issues

The issues to be decided in this case had previously been agreed with the parties and are recorded in the case management summary of Employment Judge Jones of 8 November 2017. The issues identified are:

Disability Discrimination

Disability

(1) Was the claimant at all material times a disabled person? Were her conditions of osteoarthritis and hyperthyroidism physical impairments? If so, did they have a substantial and long-term adverse effect on the ability of the claimant to undertake normal day-to-day activities by reason of her suffering from consequential back pain?

Breach of section 20(3) EqA

(2) Did the claimant operate a provision, criterion or practice ("PCP") of requiring its service assistants to work either 5 or 7.5 hours in a shift?

(3) Additionally, or alternatively, did the respondent operate a PCP of requiring service attendants to undertake extensive walking?

(4) If so, did either PCP place the claimant at a substantial disadvantage compared with other persons who did not share her disability?

(5) If so, has the respondent taken reasonable steps to remove any such disadvantages?

Breach of section 20(5) EqA

(6) Was the claimant placed at a substantial disadvantage but for the provision of the auxiliary aid of a long-handled grabber?

(7) If so, did the respondent fail to take reasonable steps to provide one?

Breach of section 15 EqA

(8) Was the claimant treated unfavourably in being removed from her previous placement on a ward, when she returned from her maternity leave?

(9) Was that because of something, her inability to work more than six hours, because of her back pain, and if so, did that arise from her disability?

(This complaint has not yet been responded to by the respondent and may involve further issues relating to whether or not such unfavourable treatment was a proportionate means of achieving a legitimate aim).

Pregnancy/Maternity Discrimination (section 18 EqA)

(10) Was the claimant's post on the Special Care Baby Unit ("SCBU") still in existence when the claimant returned from her maternity leave (and occupied by another employee)?

(11) If so, was it unfavourable treatment (and a detriment) not to allow the claimant to return to that position?

(12) Was that because of the claimant having taken maternity leave?

Detriment for family reasons (section 47C ERA 1996)

(13) Was the claimant's post on SCBU still in existence when the claimant returned from her maternity leave (and occupied by another employee)?

(14) If so, was the claimant subjected to a detriment in not being returned to that position?

(15) If so, was that related to maternity?

Victimisation (section 27 EqA)

(16) Was the grievance submitted by the claimant on 16 May 2017 a protected act?

(17) If so, was the claimant subjected to the detriment of not being given reasonable adjustments?

(18) If so, was that a detriment?

(19) Was the claimant continuously observed by her manager/supervisor/another throughout her shift on 21 October 2017;

(20) If so, was that a detriment?

(21) If so, was that detriment because the claimant had committed the protected act?

Remedy

(22) What losses arise as a consequence of any of the above alleged acts of discrimination and/or detriment? This will include consideration of any injury to feelings. The claimant is still in the employment of the respondent.

Preliminary matters

1. Since then the respondent has accepted the claimant was a disabled person at the relevant time by reason of her conditions of osteoarthritis and hypothyroidism.
2. At the beginning of the hearing the claimant also accepted that a PCP of requiring service assistance to work five hour shifts did not place her at a substantial disadvantage because of her disability. In submissions it was also accepted, based on the evidence presented, that the maternity/pregnancy discrimination complaint was not made out.
3. Due to insufficient hearing time written submissions provided by the parties which were considered before our deliberations.

REASONS

Findings of Fact

The Tribunal heard evidence for the claimant from the claimant and for the respondent, from Mr Paul Bird (Head of Services), Ms Amanda Malone (Service Co-ordinator) and Mrs Ros Newton (Head of Facilities). We also saw documents from an agreed bundle of documents. From the evidence we saw and heard we made the following findings of fact.

1. The claimant commenced her employment with the respondent on 17 May 2004 as a service assistant. She is still employed by the respondent in that role although she has been absent due to sickness since October 2017.
2. The claimant is employed under 2 contracts. She works 12 hours a week as a 'service assistant', comprising two six hour shifts with a 30 minute unpaid break and she is employed for 13 hours per week as a 'car park assistant' comprising two six and a half hour shifts plus a 30 minute unpaid break. It is only the service assistant role contract that is relevant to this case.
3. The background to weekend shifts as a service assistant is that following her first period of maternity leave in July 2011 the claimant requested a different working pattern under the flexible working policy because she needed to organise her availability to work around her husband's rota for child care. The claimant's need to work weekends was not as a consequence of her disability.
4. Following the claimant's flexible working request she was offered and accepted a '12 hour weekend only post' from May 2014 as a service assistant. Her contract is at page 58 in the bundle and provides for the normal hours of work to be '12 hours per week' and that the claimant's principal place of work will be the Doncaster Royal Infirmary (DRI). It provides that '*exigencies of the service may demand changes in hours of work or location within the Trust*" and that any changes will be implemented with reasonable notice and consultation.
5. In January 2016, she notified the respondent that she was pregnant. On 6 May 2016, she attended a 'group walk in session', open to all service assistants. This was when she was notified about the proposed service department model the respondent wanted to implement and the impact it would have on current roles.
6. Mr Bird explained the rationale for this restructure, which was not in dispute. The aim of the cleaning and portering review was to provide a role for all of the substantive staff whilst making the service as efficient and sustainable as possible, assuring the service was kept in house and delivered the outcomes required.
7. At that time there were over 100 different shift patterns across the service assistant roles which made it very difficult to provide consistent cover within the DRI. One of the aims of the review was to reduce the number of different shift patterns and provide a consistent seven day service to match the organisational model.
8. Employees were informed of the proposals during a series of eight group meetings which began on 20 April 2016. Following these group meetings there was group consultation with the unions and then one to one meetings with the affected employees. Ros Newton (Head of Facilities) kept in regular contact with the claimant during this period.
9. It was clear that the restructure and consequential changes to shift patterns had nothing whatsoever to do with the claimant's maternity absence or her disability.
10. The claimant has quite rightly accepted in the written closing submission that "*the weekend post that she had worked on Special Care Baby Unit (SCBU) no longer*

existed after the re-organisation which was carried out whilst the claimant was on maternity leave. As a result of the restructure the service assistant cleaning shifts available on the combined unit were a 7.5 hour shift from 7.30am until 3.30pm each day and a five hour shift running from 3pm to 8pm each day".

11. It was accepted that the factual scenario places the claimant in some difficulty in relation to the maternity/pregnancy discrimination and to the family detriment complaint.

12. The claimant's second period of maternity leave began on 23 July 2016 and she returned to work on 20 May 2017.

The special care baby unit (SCUBU)

13. The special care baby unit ("SCBU") is the ward that looks after newborn babies who need to be kept in intensive care and includes temporary accommodation for parents of those babies. The SCBU is a very high risk area as the newborn premature babies cared for in that ward, are at very high risk of infection. Cleaning of the ward is carried out seven days a week and is intensive.

14. Prior to the claimant leaving for her second period of maternity leave there were some issues with resourcing the cleaning rotas for the wards and departments across the DRI. There was an inconsistency in the amount of cleaning resources allocated to wards and the amount of cleaning could fluctuate on a day to day basis due to inability to cover the quantity of non standard shift patterns. As such it was difficult for the Trust to maintain and assure a consistent level of cleanliness in any ward for an extended period of time and the Trust accepted the situation could not continue and proposed a restructure of the service delivery model. This evidence was not challenged.

15. After the restructure the service assistant roles attached to SCBU were to provide the cleaning resource to a combined unit of SCBU and the maternity delivery suite (CDS). As a result of the restructure the service assistant cleaning shifts available on the combined unit were a 7.5 hour shift from 7.30am until 3.30pm each day and a five hour shift running from 3pm to 8pm each day

16. Mr Bird had a meeting with the claimant on 17 March 2017, before her return to work, to discuss her return to work following her maternity leave. At this meeting he described the three roles that had been 'ring fenced' for the claimant.

17. The first role was working in Zones 1 and 2 of the DRI for two five hour shifts at the weekend. The claimant felt that this would be unacceptable because she was not willing to reduce her working hours for financial reasons. Additionally, working in Zones 1 and 2 would have involved moving a refreshment trolley and the claimant did not feel she would be able to do this because of her medical condition which prevented her moving heavy items, such as refreshment trolleys.

18. The second ring fenced role was in SCBU/CDU which was in part the role the claimant had carried out prior to her maternity leave. This role would have enabled the claimant to continue to work in the same area with the same duties she was used to performing but would as a result of the restructure involved her working 15 hours comprising two 7.5 hour shifts instead of two 6 hour shifts. This role did not involve providing refreshments for patients so there was no refreshment trolley to move. The claimant was not willing to accept this position as she did not feel she would be able to complete a shift as long as 7.5 hours.

19. The third role was a role in the central team but this would have involved moving patients and the claimant felt that she could not perform these duties.

20. During this meeting Mr Bird asked the claimant what her expectations were for her return to work. She said that she wanted to return to exactly the same role as she had previously had which was working in SCBU for two six hour shifts on Saturdays and Sundays. Mr Bird explained that this working pattern no longer existed within the new structure so it was not available to offer.

21. He took on board the claimant's concerns about the roles and agreed that he would refer the claimant to occupational health in order to get a better idea of her requirements and needs.

22. Promptly, the claimant was referred to occupational health on 20 March 2017 (see pages 281 to 283 of the bundle) and a report was received on 27 March 2017 (pages 284 to 285). This was the first time that the claimant had raised any issue that the length of the shift she worked may be affected by her medical conditions. It is clear that OH advice was sought in light of what the claimant was telling Mr Bird on 17 March 2017. The referral at page 282 says as follows:-

    "Since Jane has commenced her maternity leave the service department have introduced a new model for providing cleaning and portering services. Please will you review Jane and advise if she is fit to complete the full role of service assistant or does consideration need to be given to specific roles or tasks within the new model. Is Jane fit to work within the central team – moving patients, product, specimens, cadavers?

    Is Jane fit to complete routine cleaning tasks for all the shift – mopping, damp dusting, cleaning toilets etc. This includes bending, stretching, twisting?

    Is Jane fit to complete a mixture of cleaning and patient duties – beverage/rehydration service, clear away meal trays during her shift?

    Is Jane capable of working a 7.5 hour shift? If not why and ***what would be a reasonable length of shift for Jane to work?*** *Are there any other facts that need to be considered?"*

    The reply dated 27 March 2017 from the occupational health advisor, Alison Stewart informs the employer that the claimant should be able to resume work and that some adjustments will be required. She recommends the following adjustments:

    - *Unable to sustain the constant heavy and demanding work required in the central team as she would be unable to move/push/pull beds, chairs and trolleys.*
    - *Jane would struggle to complete all tasks alone on large ward, however would be able to manage with a colleague.*
    - *Unable to push/pull meal trolleys and drink trolleys alone.*
    - *Requires support from a colleague to assist with the trolleys as above.*
    - ***Unable to sustain a 7.5 hour shift at present, however this may change in the future if her back condition significantly changes, improves or if medical intervention change.***

- *I am unable to give any indication as to how long these adjustments would be required. I can only suggest that you meet with Jane regularly to review the situation.*

  *Jane **will be able to resume her contractual hours on return to work**. Jane did state that she did cope very well when working at SCBU as the work suited her condition.*

23. This is the first time the employer has knowledge that the claimant is '**unable at present to sustain a 7.5 hour shift' but can resume her contractual hours of two 6 hour shifts**. However, after this advice was received, the respondent did not offer the claimant a 7.5 hour shift and did not place any requirement on the claimant to work a 7.5 hour shift.

24. Following receipt of that advice Mr Bird wrote to the claimant on 25 April 2017 to invite her to attend a follow up meeting with him to discuss the report and her return to work. That meeting took place on 16 May 2017. At this meeting it became clear the claimant only wanted a role in SCBU working two six hour shifts at the weekends which was a role that simply did not exist within the new structure.

25. In light of this, Mr Bird arranged a temporary and bespoke set of duties for 'corridor clean' that the claimant could carry out within her '12 hour' contract as requested. He made it clear that this was a temporary role, that there was seating in the corridor area which could be used to take regular rest breaks when required. The role was not a position that was 'resourced' at the weekends but was created for the claimant to facilitate her return to work on 20 May 2017, which the respondent and the claimant could then consider as a more permanent position if it was suitable.

26. The new structure had resulted in SCBU and CDS having 12.5 hour cleaning resources allocated to it seven days a week including Saturdays and Sundays. There would be one shift of 7.30am to 3.30pm which was a 7.5 hour shift with a 30 minute break, followed by a five hour shift from 3pm to 8pm. There was therefore no shift that was six hours long in SCBU at the weekend. The claimant had been offered the 7.5 hour shift with a 30 minute break which she had rejected because of the length of the shift. She did not consider a five hour shift was suitable because of the financial loss she would suffer with a reduced hour shift. As a result of weekend premium rates she estimated this would result in a loss of earnings of approximately £130 per month.

27. On 16 May 2017, the claimant raised a grievance headed 'maternity discrimination'. She refers to the 10 and 15 hour proposed contracts which she states are "*not suitable and are less favourable*" in the context of maternity discrimination.

    "10 hours is not a suitable alternative as this gives me a financial detriment and the 15 hours as discussed would not be suitable for my disability. Secondly I'd like also to remind you that a reduction in working hours is a feasible and practical reasonable adjustment ie reducing your 7.5 hour rota down to 6 hours. Your refusal to consider this as an option for me to return within your new structure is disability discrimination under the Equality Act 2010".

28. It was accepted that the grievance letter was a 'protected act' for the purposes of the victimisation complaint because it refers to maternity and disability discrimination. Although in her witness statement the claimant suggests that she could not work a 10 hour contract because of her disability she accepted that was

not the case. It was only the 15 hour contract that she could not work because of her disability.

29. The temporary arrangement for the claimant to work cleaning the corridors was to commence on Saturday 20 May 2017. The email communication to the claimant confirming that is dated 19 May 2017 is at page 295 and states "*having not agreed at our meeting with regards to a suitable future role, this will be a short-term arrangement to enable your return to work."*

30. The claimant was allocated duties cleaning the ground floor corridor in DRI and the public toilets as this did not require the claimant to move any heavy equipment or any refreshment trolleys which were the restrictions advised by occupational health.

31. Mr Bird also viewed the corridor role as being ideal for the claimant because it was not a patient area and therefore rated at a lower category of risk for patients. The corridors do not have the very detailed high and low cleaning requirements with cleaning around beds and other obstacles that exist in an acute ward and so required a lower level of detailed cleaning input. Furthermore the work was not as demanding so the claimant could work at her own pace without any heavy machinery to move and without having to bend and stretch to clean high and low surfaces. Finally, the role in the corridor would have allowed the claimant to return to work and carry out a meaningful service. The corridor duties were completed between 6am and 9am in the morning. If it was suitable he would have made the case for the Trust to resource this additional activity to enable the claimant to have a permanent and productive position in the department.

32. From the outset the claimant was not happy having made up her mind that the corridor duties were never going to be suitable. On 20 May 2017, Mr Bird received an email from Tracey Rowe stating that the claimant had told her job was too much for her as it involved a lot of walking and bending. Mr Bird was initially surprised by this because the occupational health report had not mentioned this particularly as the service assistant role by its nature requires a degree of walking and bending.

33. On the next shift on 21 May 2017, the claimant told Tracey Rowe that she didn't feel capable of completing the allocated role in the corridor so Ms Rowe allocated her a role in the DCC (ward) which the claimant felt was acceptable. This transfer was very disruptive because Ms Rowe had to move other staff to cover the claimant's previously allocated duties in the corridor and then had to complete the work in the DCC herself as this area required a service assistant to fill the shortfall caused by the claimant's six hour shift.

34. On 22 May 2017, the claimant sent an email to Mr Bird informing him that the temporary duties that were allocated to her were unsuitable for her disability. She suggests that occupational health had advised on many occasions that "**constant walking <u>without rest</u> and repetitive bending hurts my back**". She reminds Mr Bird of the reasonable adjustments that she believes have been put in place by occupational health which were:-;

    1. To limit bending and use a telescopic long handled duster/damp mop for high and low cleaning;
    2. To be excluded from central services duties(which includes long periods of walking and patient movement)
    3. To avoid or to have help with the meals/beverage trolley;

4. To work on a smaller ward if possible or if on a larger award to have the support of a work colleague;
5. Day shifts
6. Brief rest periods if needed.

The claimant's position is clear she does not want to do the temporary duties in the corridors. She states '*I am able and willing to continue with my six hour Saturday and Sunday contract and await your instruction as to which suitable ward/area I will be allocated*

35. Mr Bird had removed some duties from the schedule and made adjustments by removing toilets and then adding toilets when requested from the allocated tasks and reducing the corridor area based on the claimant's feedback. There was no consequence imposed on the claimant if she did not complete the allocated tasks because it was expected that the next service assistant would simply pick up those tasks. He confirmed again the claimant could take rest breaks whenever she required and there were plenty of seating areas in the corridors so that she could take those breaks whenever she required.

36. The claimant's recollection at the time is recorded accurately in the minutes of her grievance meeting on 5 July 2017. She accepted that she found the role 'okay' which is contrary to how she describes it now in her statement. The relevant entry reads:

"*Return to 12 hours and on first shift given corridors to mop for three hours and three hours with 31 toilets. Put forward that it was continuous repetition not suited. On second day Tracey Rowe decided to put me on ward critical care. It was fine on there. Next weekend told couldn't go on ward and put on corridors. Seats, start and stop and take rest break. Continuous repetition is not suitable for disability. Spoken to TR and asked for proper risk assessment.* ***PB went through what would be best for me. Given sections of corridor and toilet areas and varied roles. Been doing that for last two weekends and find it okay"****.*

37. At this meeting the claimant's husband asks if the corridor cleaning job could become a permanent job. It is clear the claimant/her husband are both confirming the role with the adjustments was suitable. At this hearing in cross-examination the claimant tried to back track from that position suggesting that she was tired and stressed in the meeting to try to explain her/ her husband's response. We were satisfied the minutes are true and accurate and consistent with what had happened.

38. On Saturday 10 June 2017, the claimants second working weekend, Mr Bird agreed that a varied range of duties of 1.5 hours of corridor clean, 1.5 hours of toilet, 1.5 hours corridor clean and 1.5 hours toilet to vary the routine tasks with the claimant having breaks whenever she needed to.

39. Mr Bird modified the role the claimant was performing based on the claimant's request without any argument. With those modifications in place the role was a suitable role but was a role the claimant had decided for her own personal reasons she did not want to do.

Auxiliary aids

40. The reasonable adjustment complaint in relation to the alleged failure to provide auxiliary aids requires the Tribunal to consider whether the claimant was placed at

a substantial disadvantage but for the provision of the auxiliary aid of a long-handled grabber? The pleaded case is clear it is the long handled grabber the claimant complains was not provided.

41. At paragraph 64 of the claimant's witness she states "**I was left without** the support of axillary aid**s** such as a **telescopic duster and grabber**. Furthermore a l**ong handled dustpan and brush** were provided on an as and when basis and the continuity of its support was not upheld. **Working without the regular use of these aids worsened my back and put me at a substantial disadvantage**. To support myself I sought permission from Tracey Rowe to bringing a newly purchased grabber aid from home to support my needs. I use the support of this each weekend".

42. When the claimant returned to work she requested and was given permission to use her own 'grabber' while performing the temporary corridor role which she then used it each weekend thereafter that she worked. If she was not content to use her own 'grabber' and wanted the respondent to provide one, she could instead have asked for one to be provided and there is no reason why the respondent would not have done so, but that is not what she requested. It was clear from the facts the respondent has not failed to make a reasonable adjustment if the claimant is permitted to use as she requests, her own auxiliary aid as soon as she requests it. Furthermore subsequent occupational health advice in September 2017 only refers to providing access to a grabber which is what the claimant already had.

43. On 18 July 2017, following the grievance meeting, the respondent wanted to obtain further medical information from the claimant's GP to better inform occupational health advice and requested her consent. On 20 July 2017 the claimant provided consent.

44. On 26 July 2017, the claimant informed the respondent that she wanted to apply for an alternative weekend post within the Trust for a 15 hour receptionist post. Unfortunately, the claimant was not successful in obtaining that alternative position but she was clearly willing and able to work 15 hours in a different post.

45. On 2 September 2017, the claimant was absent from work due to sickness. On 8 September 2017, her GP assessed her and diagnosed 'acute stress reaction' and certified her as unfit to work for two weeks. On the same day she sent an email to Mrs Newton retracting her consent to the release of her medical records because she thought it was unreasonable for the employer to access her entire medical history. She did consent to the employer obtaining occupational health advice and asking specific questions within the referral. She also complained that no formal risk assessment had taken place on her return to work

46. On 14 September 2017, Mrs Newton wrote to the claimant as follows:

> "*Despite the lack of a formal risk assessment, I can see that discussions and regular checks have been carried out with you to ensure this temporary role is suitable for you and that on a number of occasions since your return, modifications to suit your specific needs have been agreed with you and accommodated. These modifications include:-*
>
> 1. *You ask not to clean the toilets on 21 May 2017 and this request was accommodated.*

2. *You subsequently asked for toilets to be returned to your role on 10 June 2017, for variety and this request was also accommodated.*
3. *You then raised concerns about the requirement to walk to maternity to clean the toilets there and a further adjustment was agreed that you would only clean the toilets in out-patients.*
4. *It was agreed that you would be able to take additional rest breaks.*

At the meeting on 5 July 2017, when discussing the risk assessment, you stated that Mr Paul Bird Head of Service department had gone through with you what tasks were best for you and you were given sections of corridor to clean, toilet areas and varied roles. You confirm that you have been doing this modified role for two weeks and found it "ok". On your behalf, your husband asked if your current temporary role could be made into a permanent role, indicating its suitability.

The letter also refers to the refusal to obtain GP's records and Miss Newton explains that the purpose of the consent was for occupational health to assess that information to better advise the respondent. However as the claimant had refused consent she would approach occupational health with specific questions.

49. Dr Giri's report was then obtained and is dated 26 September 2017. In that report he refers to the claimant's back pain and states:-

- "S*he has longstanding localised lower back pain and stiffness. It often radiates to her hips and thighs. As a result of it she has restrictions with her functional abilities such as with any major manual handling and lifting* ***prolonged standing or walking*** *any bending or awkward or twisting stretching or straining and pulling or pushing a load against resistance.*
- *In relation to adjustments you might want to consider I would suggest that you consider the whole situation and identify whether you can provide her with the necessary support in view of her ongoing back problem.*
- *You* ***may wish to offer her a job in the SCBU or in a similar smaller unit where you can support her with the restrictions with manual handling and lifting and there are fewer requirements for any bending or kneeling, sudden twisting, pulling and pushing of load and stretching and straining****.*
- *Please ensure that she has* ***access to*** *the equipment such as grabber or long handed mops.*
- *I would suggest you arrange a meeting with her to discuss these issues further with a view to taking appropriate decisions regarding her future management.*
- *Restrictions of working hours (say up to six hours a day) may be considered for a temporary three to four months period until she feels more comfortable with her work".*

Excessive walking

47. The claimant's email dated 22 May 2017, refers to problems with constant walking without rest and repetitive bending hurting the claimant's back. However the claimant was not required to walk constantly without rest in her role which is the problem she identifies. Dr Giri refers to '**prolonged walking'** which was not a requirement of the role which the claimant was being asked to perform. It appears

the suggestion of a role in SCBU or a smaller ward came from the claimant but none of the reasons for this e.g. manual handling, lifting less bending etc. applied to the corridor role.

48. On 18 September 2017, the claimant submitted her claim to the Employment Tribunal. On 26 September 2017 the occupational health report referred to above was obtained.

49. On 6 October 2017 the claimant was signed off as fit to return to work subject to adjustments.

50. On 11 October 2017, the claimant had a return to work meeting with Alexsandra Ballantyne. After that meeting Mrs Ballantyne emailed the claimant proposing a schedule of tasks for the claimant's return to work. She sates:

> "*The proposed schedule has been complied to provide activity and tasks with the least possible difficulty in terms of physical impact that the service department completes. The corridor schedule has the least possible impact in terms of manual handling. The corridors have seating arrangements as part of the fixtures which* ***enable you to take a rest where you feel you need to****. The said schedule is provided over a six hour period and as I explained clearly during our meeting on Wednesday 11 October I'm not expecting you to work 7.5 hour shifts. An operational risk assessment will be carried out on Saturday 14 October by me with support from highly experienced team leader to identify any possible difficulties or risks. During the risk assessment we could discuss the possibility of dividing the length of the corridor into four parts instead of two. Please can you specify what do you consider as prolonged walking?"*

51. The reply by the claimant on 13 October 2017 is::

> "*Again I need to emphasise that cleaning corridors involves constant repetitive walking and more than I would experience in a suitable ward or clinic or a specified zoned area. Repetitive walking doesn't allow me to change posture, position and movement which all aids and helps my back discomfort. When working on the wards my body is involved in a variety of different movements and not just one specific repetitive movement. Breaking down the corridors into four sections instead of two and taking brief rests does not reduce the total distance you are requiring me to walk. Nor satisfies the recommendations of your own occupational health doctor."*

52. The claimant has not answered the critical question asked of what she considers to be 'prolonged walking'. Her claim identifies a PCP of "requiring service attendants to undertake extensive walking" but no such requirement was placed on the claimant in the corridor role where she was able to take a rest whenever she needed to.

53. The operational risk assessment was completed based on the assessment proforma which shows the tasks involved and the comments on those tasks. The risk assessment recognises additional rest periods are provided for 'as required' and the claimant's response to that is "**yes but even after rest still have to do the same repetitive task**". Her issue appears to be the repetitive nature of the job which she does not like. The claimant has not suggested that she was in any way pressured to do all of the tasks on the list and it was made clear to her that she could only complete what she could and the next person would have to complete any tasks that were not completed. There was therefore no consequence on the claimant of not completing any of the tasks listed on the schedule. The claimant's

approach during this assessment was clear that she was not happy performing the role of corridor clean whatever adjustments were made by the respondent to that role.

54. In the email communication of 16 October 2017, the claimant informs Ross Newton the corridor clean role was not suitable for her disability needs because of the distance in walking and that the work required of her did not resemble what she had done prior to going on maternity leave which she describes as a role that did support her disability needs. She refers to "*Mrs Ballantyne's own suggestion to rectify the situation was to break down the length of the corridors into four sections instead of two. I pointed out to her that this didn't reduce the distance involved and the end result that I was still subject of* ***prolonged repetitive walking***".

55. The respondent decided to do an assessment of the claimant working in a ward environment. On 19 October 2017, Mrs Newton wrote to the claimant asking her report to Amanda Malone, Service Co-ordinator and responsible for diagnostic day unit (DDU).

56. The purpose of the assessment is made clear when Mrs Newton explains "*the unit is contained and this will enable you to demonstrate how you are able to fulfil the cleaning tasks required of the service assistant role. You will be observed undertaking these tasks. For completeness I have arranged for a* ***further assessment to be completed to ensure the most appropriate decisions are made for all parties. Following the outcome of this I may need to seek clarification from occupational health and for your information*** *I also intend to clarify with Dr Giri his opinion on physically more demanding cleaning tasks*".

57. The claimant was insisting she could carry out all the cleaning tasks required in a ward environment. The respondent was entitled to assess her capability and suitability as a service assistant in that role knowing what was required. The difference between this assessment and the risk assessment is also explained because the claimant queried the need for this, in light of Mrs Ballantyne's assessment.

58. Mrs Newton explains by email dated 20 October 2017 that "*for completeness there needs to be a reassurance of how you will complete all the cleaning tasks within a smaller unit/ward. The risk assessment for corridors did not cover the full remit of cleaning tasks that will be completed within a ward/department. Any further clarification or request for information from Dr Giri will be shared with you. At this moment I cannot confirm where your regular area of work will be*."

Victimisation

59. The assessment was carried out on 21 October 2017. The claimant's pleaded complaint is that she was subjected to a detriment by the respondent "*continuously observing her by the manager, supervisor/another throughout her shift on 21 October 2017" because of her grievance dated 16 May 2017*.

60. In her evidence she complains about the way the assessment was carried out, the way it was constructed and the length of the assessment. The assessment was planned to take part in four sections of 1.5 hours each. Ms Amanda Malone would observe the claimant for the first section, Mr Bird for the second section and two other supervisors for the remainder of the six hour shift. The intention was to see how the claimant managed the 6 hour shift to properly assess her capabilities. The unit is closed at the weekend and this assessment was arranged specifically for the

claimant and there was nothing wrong with the 6 hour shift being divided in this way to manage the assessment.

61. Ms Malone's evidence was clear and we accepted it. She wanted to assess the claimant's capability to carry out the cleaning tasks that were necessary in the diagnostic day unit whilst understanding that the Trust was attempting to find a suitable role for the claimant that took into account certain restrictions related to her ongoing medical condition. This assessment was part of that process.

62. She had no prior involvement/knowledge of the grievance. She was simply asked to observe and assess the claimant carrying out the cleaning duties in the DDU. When Ms Malone met with the claimant on 21 October 2017 she introduced herself and explained the process of assessment and that she would be assessing the claimant whilst she performed her activities and would be making notes. She also accepts that after about 30 minutes into the process the claimant got upset saying that she felt scrutinised and victimised. Ms Malone explained that she wasn't scrutinising or victimising her, she was just completing an assessment.

63. The notes of her assessment are at page 489 in the bundle. It is clear from the format of those notes that the notes are records of the observers observation of the claimant performing the tasks required. There was nothing wrong with that and it would that a note would be taken as part of the observation.

64. Similarly, Mr Bird's assessment that followed Ms Malone's assessment represents his observations of the claimant at the time which are recorded in the notes. He watched the claimant carrying out the cleaning duties and notes at paragraph 50 of his witness statement that:-

    (a) The claimant could not mop the floor to the required standards;

    (b) The claimant could not carry out damp dusting;

    (c) The claimant could not bend or reach up at all so used a cleaning cloth on the end of a litter picker. This was not an effective way to carry out the cleaning because the claimant could not apply the required pressure or direction control over the cloth to clean higher or low areas to any reasonable standard;

    (d) The claimant struggled to move chairs or tables;

    (e) The claimant could not empty bins as this required bending over;

    (f) The claimant could not use the high duster effectively that is used to dust high areas like curtain rails.

    He concluded that the claimant struggled with some of the requirements of the role and that she was becoming frustrated because of this.

65. The claimant told Mr Bird that she thought that he was there to intimidate her and he reassured her that he was not there to do that but he was present to observe the claimant and whether she could complete all of the tasks within a ward setting. His observations would be fed back to occupational health for further advice.

66. Halfway through the shift at around 10.10am the claimant asked for a break and did not return at 10.45am. He was subsequently informed by the claimant's husband who also works at the Trust that the claimant would not be back to work that day due to high blood pressure.

67. That assessment process would reasonably require continuous observation of the claimant to consider the claimant's assertion that a service assistant role in a smaller ward was a more suitable role for her to perform in a 6 hour shift. The claimant was not subjected to a detriment by the assessment. The respondent was responding to and investigating whether it was a suitable role for both parties to explore all the options which was reasonable to do.

68. The claimant did not return to work for her next shift on Sunday 22 October 2017 and still remains absent from work for reasons of ill health.

Written Submissions Discussion and Conclusions

69. Mr Boyd, reminds the Tribunal that it should focus on the pleaded case given the observations of Mr Justice Langstaff in the case of **Chandhok and Another v Tirkey** [2014] UK EAT 0190/14/19 2. The pleadings should have primacy in the identification of the issues and it would be improper for the claimant to seek to somehow re-cast or re-draft those issues to suit the evidence as she may feel it has emerged in the course of the hearing or for the Tribunal to essentially seek to re-formulate or re-plead the case now.

70. We agree. The correct position is for the Tribunal to focus on the claim as pleaded especially when the claimant has been legally represented throughout the process. Mr Boyd has correctly and helpfully set out the law in relation to the issues that the Tribunal has to decide and Mr Wilson agrees with the summary provided.

71. We applied section 15, 18, 20, 27 and section 136 (the burden of proof) of the Equality Act 2010.We also applied section 47C of the Employment Right Acts 1996. The questions identified by the applicable law are set out accurately in the list of issues. We also took into account the Equality and Human Rights Commission Code of Practice on Employment 2011.

72. The approach to reasonable adjustment claims generally has been set out authoritatively in **Environment Agency v Rowan** 2008 ICR 218 EAT and requires the Tribunal to identify the following:-

    1. What PCP(s) did R apply in relation to C?
    2. Did those PCPs place the claimant at a substantial disadvantage because of a disability? If so what was the nature and extent of that substantial disadvantage?
    3. In the circumstances what would have amounted to reasonable adjustments?

73. The first point Mr Boyd makes is that the respondent is still in the process of carrying out appraisals to determine what the claimant can and cannot do and therefore her complaint about a failure to make reasonable adjustments is a premature one. Put another way there is still some distance to run before a Tribunal would have been in any kind of position to conclude that the respondent had or hadn't made reasonable adjustments. Based on our findings of fact we agree that the Respondent has not reached that point and is still trying to get a return to work sorted out for the claimant.

74. Secondly, the operative PCP relied upon is "requiring its service assistants to work either five or seven hours in a shift". It was the respondent's case that it did not operate such a PCP. As the evidence shows a much more varied shift pattern was in existence (including six hour shifts, three hour shifts etc). It is not for the Tribunal to re-formulate the PCP to better fit the claimant's claim.

75. The second PCP is whether the respondent applied a PCP of requiring service assistants to undertake extensive walking. He submits that in cross-examination the claimant accepted there was no such PCP.

76. Mr Wilson in response (paragraph 9) challenges these points stating that it was not accepted by the claimant that no such PCP had been applied. The relevant PCP does not have to apply to all service assistants. It is sufficient if the PCP was applied to the claimant alone. It can be inferred that the PCP of having to carry out extensive walking was applied to all service assistants who were assigned to clean corridor/toilet areas.

77. We agree with Mr Wilson that it is sufficient if the PCP relied upon is applied to the claimant as a service assistant. However the PCP must put the claimant at a substantial disadvantage compared to non disabled persons and the respondent must know not only that the claimant has a disability but that she is or is likely to be placed at a substantial disadvantage as a disabled person because of that PCP.

78. Schedule 8 paragraph 20(1) (b) of the Equality Act 2010 provides that: "*the employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the person has a disability and is likely to be placed at the disadvantage referred to".*

79. Paragraph 6.10 of the EHRC Code of Practice states "the phrase 'provision criterion or practice' is not defined by the Act but should be construed widely so as to include, for example any formal informal policies, rules, practices, arrangements or qualifications including one off decisions and action.

80. Paragraph 6.19 of the EHRC Code of Practice on Employment states "*the employer must however do all they can reasonable be expected to do to find out whether this is the case. What is reasonable to do, will depend on the circumstances and is an objective assessment made by the tribunal."*

81. Our difficulty in relation to the PCP of a '7.5 hour' shift is that the claimant was not required to work this shift in practice. There was 'no decision or action' by the respondent requiring the claimant to work a 7.5 hour shift. The 'offer' made to the claimant before her return to work was one of 3 ring fenced roles which she was asked to consider. Her 12 hour contract was never varied. As soon as an issue is raised with the length of the shift offered being difficult for her because of disability, occupational health advice was sought. That advice was that she might be able to do a 7.5 hour shift in 2-3 months time, indicating a temporary restriction. As a consequence the respondent did not consider a shift of 7.5 hours again as a possibility. The only time a shift of 7.5 hours was considered again was by the claimant when she applied for a 15 hour receptionist post in July 2017.

82. As to the alleged PCP of "extensive walking" no such 'requirement' was placed on the claimant. She accepts she could have breaks whenever she wanted to in the corridor clean role which she agreed was Ok for her with the modifications made. Occupational health advice was that 'prolonged walking' was an issue. However, there were lots of seated areas in the corridors for the claimant to use as and when she required. There was no requirement placed on the claimant to carry out extensive walking as part of the service assistant role in the corridor clean role. She was not placed at any substantial disadvantage compared with other persons who did not share her disability because of the adjustments made for her as soon as she raised this as an issue. A non disabled person would be required to perform

the corridor clean with one break in the 6 hour shift but the claimant could take as many breaks as she wanted.

83. Whether the 'walking' required in the service assistant cleaning role of 6 hours duration involved an area 'around a ward' or an area 'along a corridor' 'walking' was required for the duration of the shift. The claimant's refers to 'extensive' walking but her evidence was unclear as to how it was 'extensive' if she could stop and take breaks whenever she required or how it placed her at a substantial disadvantage. We did not find it did and there was no failure to make a reasonable adjustment.

84. The final adjustment in relation to the auxiliary aid was not made out on the facts for the reasons we have stated. An auxiliary aid is something which provides support or assistance to a disabled person. If the claimant requests permission to bring her own aid and the employer agrees and the claimant uses her aid thereafter there is no 'absence' of an aid that puts the claimant at a substantial disadvantage. Objectively viewed grating permission upon request was a reasonable step for the employer to take. The complaint of a failure to make reasonable adjustments fails and is dismissed.

85. The next complaint is of discrimination arising from disability. Mr Wilson in his submissions explains the complaint is that the claimant was unfavourably treated, when she was removed from her previous placement on the SCUBU ward upon her return from maternity leave. The removal is because of something arising from her disability, which was her 'inability to work more than six hours because of her back pain.

86. He also refers to the case of **Pnaiser v NHS England and Another UK EAT/0137/15/LA**. In that case the EAT held that the *"something" that causes the unfavourable treatment need not be the main or sole reason but must have at least been* ***a significant (or more than trivial) influence on the unfavourable treatment, as to amount to an effective reason for or cause of it.***

87. Section 15 of the Equality Act 2010 provides that :-

    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;

        (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".

88. In paragraph 31 the EAT after reviewing the authorities sets out the proper approach to take a section 15 complaint which is that :

    (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

    (b) The Tribunal must determine what caused the impugned treatment, or what ***was the reason*** *for it. The focus at this stage is on* ***the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required,*** *just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in*

a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan –v- London Regional transport IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie *case of discrimination arises.*

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act, the statutory purpose which appears from the wording of section 15, namely to provide protection in cases ***where the consequence or effects of a disability lead to unfavourable treatment****, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

89. Mr Wilson's position (at paragraph 58) is that "*the something arising must have been a substantial cause of the unfavourable treatment but does not need to be the principal cause or the only cause of that treatment". The respondent has refused to permit the claimant to return to work as a service assistant on the SCBU/CDS unit subject to a six hour shift on Saturday and Sunday mornings. The failure to permit the claimant* ***to return to such a post*** *is unfavourable treatment* ***because she had previously worked those shifts prior to the commencement of her maternity leave***. He invites the Tribunal to draw an inference that the reason why the respondent has not permitted the claimant to return to work on SCBU/CDS is because of the claimant's limitations because of her disability.

90. In support he relies on the following reasons

    (a) The claimant had made it clear that she was suffering from osteoarthritis and that she needed reasonable adjustments to be made,

    (b) The fact that the claimant was offered three different posts on 17 March 2017, seems odd when the obvious match was to offer the claimant the 7.5 hour shift role on Saturdays and Sunday in SCBU/CDS;

    (c) Mr Bird places considerable emphasis on the need for a very high standard of cleanliness in SCBU;

    (d) The respondent failed to take reasonable steps to offer the claimant six hour shifts working on SCBU;

    (e) That Mr Bird's assessment of the claimant's ability was not justified by the observations noted on his risk assessment. This suggests that Paul Bird is determined that the claimant will not return to work on SCBU/CDS.

91. Mr Boyd position is that it is absolutely self evident that the unfavourable treatment was not because of the 'something arising in consequence of disability'. The

claimant's removal from her previous 'placement' was because of the departmental organisation and not because of her inability to work more than six hours because of her back pain. Her previous placement simply did not exist anymore.

92. We find Mr Wilson's arguments on the section 15 complaint difficult to reconcile with his position that for the pregnancy/maternity discrimination complaint that the SCUBU post consisting of two six hour shifts **no longer existed after the reorganisation, which was carried out whilst the claimant was on maternity leave.** If it is accepted that it is the reorganisation that is the reason why these shifts in SCUBU no longer exist for the purposes of her maternity discrimination complaint then he has the same difficulty when he argues it is unfavourable treatment arising from her disability. Mr Bird's evidence about the reorganisation was unchallenged. The reason for the changes to the shifts for the claimant and the other service assistant and porters affected was the need to provide a more efficient and effective cleaning and porter services in order to keep the work in-house. The consultation process (individual and collective) which was part of that reorganisation was genuine and supports the 'reorganisation' reason. If the motivation for that process was the claimant's disability it was a very lengthy and elaborate cover up which was not the case A number of employees were affected by the changes not only the claimant. All the evidence supports our finding that the reason was the re-organisation and had nothing whatsoever to do with the claimant's disability or her maternity leave. The complaints of 'discrimination arising from disability' and unfavourable treatment because of the claimant taking maternity leave fail and are dismissed.

93. The complaint of detriment for family reasons also fails and is dismissed because the claimant's post on SCBU was not still in existence when the claimant returned from her maternity leave because of the reorganisation.

94. Finally, the victimisation complaint. It was accepted the claimant had done a protected act, by raising a grievance on 16 May 2017. The issue was whether the claimant was 'continuously observed by her manager/supervisor/another throughout her shift on 21 October 2017'; whether that was a detriment and if it was whether the claimant was subjected to a detriment because of her protected disclosure in May 2017.

95. The two managers/supervisors who assessed and observed the claimant on the 21 October 2017 were Amanda Hodgson and Paul Bird. The purpose of the assessment was to assess her capability to perform the service assistant role in a ward in light of the claimant's view it was suitable work for her to do. The respondent was entitled to carry out the assessment to satisfy itself that the work was suitable for the claimant and suitable for the respondent

96. The observation in fact was of limited duration because the claimant left before her shift was completed and did not return. It was not detrimental treatment to continuously observe the claimant to assess her suitability for that role with the intention of feeding that information back to occupational to inform future discussions with the claimant to help her return to work. It was not victimisation of the claimant by Amanda Malone or Paul Bird as alleged and had nothing whatsoever to do with the grievance. Their motivation was the need to carry out an accurate assessment based on their observations. In those circumstances that complaint also fails and is dismissed.

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Employment Judge Rogerson

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Date 20/04/2018