EMPLOYMENT TRIBUNALS

Claimant: Mrs A Iqbal

Respondent: Lancashire County Council

Heard at: Manchester **On:** 9-12 October 2018, and in chambers on 4 December 2018

Before: Employment Judge Franey
Mrs MA Gill
Mr ST Anslow

REPRESENTATION:

Claimant: Ms B Anwar (claimant's friend)
Respondent: Mr D Tinkler (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of direct race discrimination fails and is dismissed.

2. The complaint of direct disability discrimination fails and is dismissed.

3. The complaint of discrimination arising from disability fails and is dismissed.

4. The complaint of a breach of the duty to make reasonable adjustments fails and is dismissed.

5. The complaint of unfair dismissal fails and is dismissed.

REASONS

Introduction

1. By a claim form presented on 16 July 2017 the claimant complained of race discrimination arising out of her dismissal by the respondent in February 2017 due to long term sickness absence. She also made reference to being disabled by reason of fibromyalgia.

2. By its response form of 6 September 2017 the respondent resisted the complaints on their merits. It conceded that the claimant was a disabled person by reason of fibromyalgia, and that this had been apparent since October 2015, but denied any unlawful conduct.

3. At a preliminary hearing before Regional Employment Judge Parkin on 23 October 2017 the claimant was granted permission to amend her claim to complain of unfair dismissal and disability discrimination. She was ordered to provide further particulars.

4. Those further particulars were provided by the claimant on 10 November 2017. The complaints brought were of direct race and disability discrimination, discrimination arising from disability, a breach of the duty to make reasonable adjustments, and unfair dismissal. The respondent amended its response form on 4 December 2017.

5. On 3 January 2018 Employment Judge Porter ordered that the case be listed to deal with liability only. Case Management Orders were made.

6. In August 2018 it was determined that the first day of the hearing would be a reading day for the Tribunal because the claimant's representative was unavailable.

Issues

7. During its reading day the Tribunal drew up a proposed list of complaints and issues based on the amended claim and response. That was provided to the parties by email, and at the commencement of the second day of the hearing the List of Issues was agreed. The issues to be determined by the Tribunal were therefore as follows:

Direct race discrimination – section 13 Equality Act 2010

1. Are the facts such that the Tribunal could conclude that because of race the respondent treated the claimant less favourably than it treated the comparators identified (or than it would have treated a hypothetical comparator of a different race) in any or all of the following alleged respects:

(a) In Joan Bill insisting in October or November 2015 that the claimant had to cover Preston area cases until they were concluded, meaning that her driving was not in practice reduced;

(b) In Mel Adam excluding the claimant from online legal training in or around September 2015;

(c) In the failure of colleagues to prepare cards and gifts for the claimant when it was Eid;

(d) In Sarah Jones on 23 March 2016 telling the claimant she had to deal with Preston cases and minimise her working from home and visit the office regularly, unlike the comparators Kevin Maher, Joan Bill and Alison [*surname not specified*];

(e) In failing in February 2017 to grant the claimant's application for Voluntary Redundancy, unlike her comparators Joan Bill, Janet Brennand, Russell Hartley and Brenda Corlett;

(f) In failing to invite the claimant to Joan Bill's leaving party, unlike her comparators Peter Livesey, Brenda Corlett, Diane Hartley, Russell Hartley and Janet Brennand;

(g) In dismissing the claimant on 23 February 2017;

(h) In failing to arrange any leaving party or present for the claimant, unlike her comparators Peter Livesey, Brenda Corlett, Diane Hartley, Russell Hartley and Janet Brennand, and

(i) In the practical arrangements made upon the dismissal of the claimant, namely denying her the chance to explain her departure to colleagues and others, blocking her access to the IT system, and failing to return personal belongings?

2. If so, can the respondent nevertheless show that it did not contravene section 13?

<u>Direct disability discrimination – section 13 Equality Act 2010</u>

3. Are the facts such that the Tribunal could conclude that because of her disability (fibromyalgia) the respondent treated the claimant less favourably than it treated the comparators identified (or than it would have treated a hypothetical comparator who was not disabled) in any or all of the alleged respects set out in paragraph 1 above, excluding allegation (c)?

4. If so, can the respondent nevertheless show that it did not contravene section 13?

<u>Discrimination arising from disability – section 15 Equality Act 2010</u>

5. In any or all of the alleged respects set out in paragraph 1 above, excluding allegation (c), can the claimant prove facts from which the Tribunal could conclude that:

(a) The respondent subjected her to unfavourable treatment;

(b) Because of "something" which arose in consequence of her disability?

6. If so, can the respondent nevertheless show that there was no contravention of section 15, whether because the treatment was a proportionate means of achieving a legitimate aim, or otherwise? In relation to dismissal the respondent accepts it was unfavourable treatment arising in consequence of disability but relies on the legitimate aim of ensuring provision of a prompt and

effective information, advice and support service for children with special educational needs and disabilities.

Breach of duty to make reasonable adjustments – sections 20 and 21 Equality Act 2010

7. Did the respondent apply any of the following provisions, criteria or practices ("PCPs"):

(a) Requiring Parent Partnership Officers to undertake regular driving as part of their role;

(b) Requiring staff returning from a period of sick leave to go back to full duties without any phased return or amendment to duties;

(c) Requiring Parent Partnership Officers to attend the office rather than work from home?

8. If so, did any of those PCPs which were applied place the claimant at a substantial disadvantage because of her disability compared to a person without that disability?

9. If so, can the respondent nevertheless show that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at that disadvantage?

10. If not, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage? The adjustments for which the claimant contends are:

(a) Taking steps to reduce the amount of driving required of her;

(b) Allowing her to return to work on a phased basis with amendments to her duties, and/or

(c) Allowing her to work from home when appropriate.

Time Limits Section 123 Equality Act 2010

11. If any of the matters for which the claimant seeks a remedy occurred more than three months prior to the presentation of her claim form, allowing for the effect of early conciliation (i.e. before 18 February 2017), can the claimant show that it formed part of conduct extending over a period ending after that date? If not, can the claimant show that it would be just and equitable to allow a longer time for presenting a claim?

Unfair Dismissal – Part X Employment Rights Act 1996

12. Can the respondent show a potentially fair reason for dismissing the claimant, being a reason relating to her capability?

13. If so, was her dismissal fair or unfair under section 98(4)? The claimant will argue that:

(a) It was unfair not to adjourn the hearing on 23 February 2017 when the claimant was unable to respond;

(b) The respondent relied on out of date medical advice;

(c) The respondent declined to delay its decision to see if the claimant's medical position improved;

(d) The possibility of an adjournment was avoided because Ms Peake wanted to ensure her friend, Joan Bill, was given preference in any application for Voluntary Redundancy;

(e) Insufficient consideration was given to the possibility of alternative employment for the claimant, and

(f) It was outside the band of reasonable responses to dismiss the claimant in these circumstances.

Evidence

8. The parties had agreed a bundle of documents which ran to over 300 pages, and any reference to page numbers in these Reasons is a reference to that bundle of documents.

9. We heard evidence from four witnesses in person. The respondent called Sarah Jones, the Strategy Development Officer who acted as line manager for the claimant's team between September 2015 and October 2016; Wendy Sumner, the Human Resources ("HR") Business Partner who dealt with applications for voluntary redundancy ("VR") and attended the appeal hearing; and Debbie Ormerod, the County Pupil Access Manager who decided to dismiss the claimant. The claimant gave evidence herself but did not call any other witnesses.

10. There were two disputed matters relating to the evidence which we had to determine on the second day of the hearing.

<u>July 2016 email</u>

11. The first was an application by the respondent to introduce into the bundle an email exchange between the claimant and Sarah Jones in late July 2016. It referred to an attachment which was not provided. Mrs Jones had only discovered the email on an old laptop the night before she gave evidence to our hearing. Applying the overriding objective in rule 2 we decided not to allow the document into evidence. It had been disclosed very late and the claimant was without the benefit of professional representation. It was not a document of central importance to the case. We did not take that document into account.

<u>Hannah Peake Witness Statement</u>

12. The second issue related to the witness statement of Hannah Peake. She was a manager in the claimant's team from April 2015, and she prepared the management case for the hearing at which the claimant was dismissed. She left the employment of the respondent in February 2018. Mr Tinkler applied for it to be considered as a written statement without Ms Peake attending to give evidence. The respondent had not applied for a witness order to compel her to attend.

13. Ms Anwar objected to this application and asked us to exclude the statement from consideration entirely. There was much in that witness statement which the

claimant disputed, and she said it would be unfair if the claimant was not allowed to put her points to the witness in cross examination.

14. Having heard submissions from both parties we decided to admit the statement into evidence, but to attach less weight to it than if Ms Peake had attended to answer questions. That is a practice which Employment Tribunals commonly adopt. Rule 41 makes clear that the Tribunal is not bound by any rule of law relating to the admissibility of evidence in the Civil Courts. The points which Ms Anwar wished to put to Ms Peake on behalf of the claimant could be raised in two different ways. Firstly, Mr Tinkler would have to put the material parts of Ms Peake's statement to the claimant in cross examination and she could explain why she disagreed with Ms Peake's evidence. Secondly, Ms Anwar could make submissions after the conclusion of the evidence. To assist Ms Anwar with that we accepted her helpful offer to provide the Tribunal with a copy of the questions that would have been asked of Ms Peake had she attended. The witness statement of Hannah Peake was admitted into evidence as a written document alone on that basis.

Relevant Legal Principles – Equality Act 2010

General

15. The complaints of race and disability discrimination were brought under the Equality Act 2010. Section 39(2) prohibits discrimination against an employee by dismissing her or by subjecting her to a detriment. Section 39(5) applies to an employer the duty to make reasonable adjustments.

16. By section 109(1) an employer is liable for the actions of its employees in the course of employment.

17. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

18. Consequently it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

19. In **Hewage v Grampian Health Board [2012] IRLR 870** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong [2005] ICR 931** and was supplemented in **Madarassy v Nomura International PLC [2007] ICR 867**. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the

reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Time limits

20. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable…**
>
> **(2) …**
>
> **(3) For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

21. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question.

Direct Discrimination

22. Direct discrimination is defined in section 13(1) as follows:

> **"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."**

23. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

> **"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."**

24. Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person's abilities.

25. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases where the conduct in question is not overtly related to disability, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as

he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, race or disability) had any material influence on the decision, the treatment is "because of" that characteristic.

Discrimination arising from disability

26. Section 15 of the Act reads as follows:-

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

27. The causation test differs from that required under section 13. In **Pnaiser v NHS England and another [2016] IRLR 170** the EAT reviewed the authorities and summarised the applicable principles.

28. The Equality and Human Rights Commission Code of Practice contains some provisions of relevance to the justification defence. In paragraph 4.27 the code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggests that the question should be approached in two stages:-

* is the aim legal and non-discriminatory, and one that represents a real, objective consideration?

* if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

29. As to that second question, the code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

> **"although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."**

30. The application of section 15 to dismissals for long term sickness absence was considered by the Court of Appeal in **O'Brien v Bolton St Catherine's Academy [2017] ICR 737.** Although the test for the fairness of a dismissal differs from the test of justification under section 15(1)(b), in practice the two standards are broadly equivalent: see Underhill LJ in paragraph 53. Frequently the factors which have to be weighed in the balance are the same.

Duty to Make Reasonable Adjustments

31. The duty to make reasonable adjustments appears in Section 20 and includes the following:-

> **"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".**

32. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **Environment Agency –v- Rowan [2008] IRLR 20**.

33. As to whether a provision, criterion or practice ("PCP") can be identified, the Code Paragraph 6.10 says that this phrase is not defined by the Act but:-

> **"should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions….".**

34. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being "more than minor or trivial".

35. The employer has a defence if it shows that it did not know and could not reasonably have been expected to have known that the disabled person was likely to be at that disadvantage because of the PCP (Schedule 8 paragraph 20). Without such knowledge the duty to make adjustments does not arise.

36. The obligation to take such steps as it is reasonable to have to take to avoid that disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28, but as paragraph 6.29 makes clear ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards, and these include allocating duties to another person and home working.

Relevant Legal Principles - Unfair Dismissal – Part X Employment Rights Act 1996

37. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.

38. The potentially fair reasons in Section 98(2) include a reason which:-

> "**relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".**

39. Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

40. Where the respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in Section 98(4):

> **"…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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".**

41. It has been clear ever since the decision of the Employment Appeal Tribunal ("EAT") in **Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439** that the starting points should be always the wording of Section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or without that band. This approach was endorsed by the Court of Appeal in **Post Office –v- Foley; HSBC Bank Plc –v- Madden [2000] IRLR 827**.

42. The application of this test in cases of dismissal due to ill health and absence was considered by the EAT in **Spencer –v- Paragon Wallpapers Limited [1976] IRLR 373** and in **East Lindsey District Council –v- Daubney [1977] IRLR 181**. The **Spencer** case establishes that the basic question to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer, and if so how much longer. Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, and the overall circumstances of the case. In **Daubney**, the EAT made clear that unless there were wholly exceptional circumstances, it is necessary to consult the employee and to take steps to discover the true medical position before a decision on whether to dismiss can properly be taken. However, in general terms where an employer has taken steps to ascertain the true medical position and to consult the employee before a decision is taken, a dismissal is likely to be fair.

43. More recently the EAT considered this area of law in **DB Shenker Rail (UK) Limited –v- Doolan [UKEATS/0053/09/BI**). In that case the EAT (Lady Smith presiding) indicated that the three stage analysis appropriate in cases of misconduct dismissals (which is derived from **British Home Stores Limited –v- Burchell [1978] IRLR 379**) can be used in these cases. The Court of Session in November 2013 decided **BS v Dundee City Council [2014] IRLR 131** in which at dismissal the employee had been off sick for about 12 months (after 35 years' service) with a sick note for a further four weeks. The Court reviewed the earlier authorities and said this at paragraph 27:

> "**Three important themes emerge from the decisions in <u>Spencer</u> and <u>Daubney</u>. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to**

> **return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."**

Relevant Findings of Fact

44. This section of our Reasons sets out the broad chronology of events necessary to put our decision into context. Any disputes of fact of importance to our conclusions will be addressed in the discussion and conclusions section of these Reasons.

Background

45. The respondent is a substantial employer with over 40,000 employees and a dedicated HR function. It has a statutory obligation to provide support for children in the county with special educational needs. In addition to its statutory service it operates a service providing support advice and guidance to parents of such children. At the relevant time this was known as the Special Educational Needs and Disability Information, Advice and Support Service "(SENDIASS").

46. The claimant, who is Asian, was first employed by the respondent in late 2001. At the time of the events which gave rise to this case she was working as a Parent Partnership Officer ("PPO") within SENDIASS. She was employed at grade 8. The role of a PPO was to deal with cases allocated to her within the team. That involved speaking to parents on the telephone and attending meetings with parents, children, schools and other professionals. These meetings could be home visits, at schools or elsewhere. The PPO did not have absolute control over when and where meetings took place, as often it was necessary to coordinate diaries with other professionals involved.

47. The claimant had been diagnosed with fibromyalgia in 2007. Managers knew of this. It had been informally agreed that the claimant could work "compressed hours" – i.e. do her full five day working week over four days every other week.

48. The SENDIASS team was split into areas dealing with the North, West and East of the County. The claimant worked in the East team. Officially her place of work was County Hall in Preston (part of the West area), but in practice there was an office used by the County Council in Rising Bridge east of Accrington which was much nearer to her home in Blackburn.

49. Cases were allocated to a region based on the home address of the child, but the PPO might be required to travel to other parts of the county to attend meetings at different educational establishments. Public transport was rarely the best way of travelling across the county. The post of PPO attracted an essential car user's allowance: it was recognised that staff had to drive in order to do their job properly.

Policies and Procedures

50. The respondent had a number of procedures which were relevant.

51. The management of sickness absence policy appeared at pages 84-98. The procedure for long-term sickness absence (exceeding 28 calendar days) appeared at pages 94-98. It provided for referrals to Occupational Health ("OH"), for case review meetings and for referral to an attendance hearing once absence exceeded 26 weeks unless there were mitigating circumstances. Provision was made for alternative employment to be considered where OH advice indicated an employee would not be fit to return to her own role, and finally there could be an attendance hearing which could result in dismissal. The policy gave a right of appeal. It also recognised that there was a separate right to ill health retirement under the terms of the ill health retirement policy, which was a matter for decision by the Pension Fund based on the view of an independent medical practitioner.

52. The redundancy procedure appeared at pages 99-104. Provision was made for voluntary redundancy at pages 101-102. It was clear that voluntary redundancy was at the discretion of management, and one of the factors was whether or not the post in which the employee was working was one which could be deleted. In practice where the post had to be retained voluntary redundancy could only be granted where someone else who was in a redundant post was willing to move to the new post to allow the postholder to take voluntary redundancy. This was referred to as "bumping".

May – September 2015

53. Once a month there would be a meeting of the SENDIASS team across the county at County Hall in Preston. At the meeting on 21 May 2015 there was a discussion about the need to cover an area in Preston. A member of staff, Russell Hartley, was due to be leaving in January 2016. His application for VR was approved in June 2015 (pages 131-134).

54. Around this time the claimant's colleague at grade 8, Joan Bill, was acting as team manager. The claimant told us there was an email exchange with Joan Bill which confirmed that she would be taking on new Preston cases. It was not produced to our hearing. The claimant's suggestion that instead she cover Burnley and Gail Lavell cover Preston was not taken up.

55. The additional driving to the Preston area was a problem for the claimant due to her fibromyalgia and she went off sick for 2 weeks in mid-2015. After a further period of absence due to a bereavement, (page 138) she returned to work in September 2015.

56. At a SENDIASS meeting on 29 September (page 139) it was decided that the claimant and another colleague at band 8 would alternate in taking new referrals to the team for the East, whilst others would deal with cases based in Preston. From that point the claimant was not allocated any new Preston cases.

First OH Report October 2015

57. Following an OH referral discussed in July, the report from OH was issued on 13 October 2015. It appeared at pages 141-142. It recorded that fibromyalgia caused good days and bad days, and that there was a particular problem with increased joint pain as a result of extra driving. It recorded the claimant reporting that this had caused her discomfort across her neck, chest and shoulders. The report said:

> **"She says that she gets very stiff when sat static for long periods of time. She has attended for medical review and her General Practitioner ("GP") has recently increased her fibromyalgia medication. She says that she has asked not to do the Preston area as this involves most driving. She says that she is happy to increase her area from the East, but not Preston. She would prefer one area as if she knows where she will be working, she can plan and manage her symptoms better (her view). At present she is doing normal duty and full hours…She is currently fit to remain in work to undertake her normal duty and normal hours. However I would suggest the following as ways to support her in the longer term:**
>
> **(1) Her driving expectation to be realistic and limited to a defined area.**
>
> **(2) She needs to meet with management to discuss what can practically be achieved to limit her driving.**
>
> **Mrs Iqbal is aware that any accommodation of duty will depend on manager discretion and that of service need. Re-referral is advised if there are further health concerns."**

58. OH were unable to predict the pattern of absence.

59. The need to limit the claimant's driving was confirmed in a letter from her GP of 16 November 2015 (page 143).

Allegation (a)

60. After the OH report was received Joan Bill told the claimant she had to carry on with her existing cases from Preston, even though no new Preston cases were being allocated. There were four or five such cases. Some were nearing closure, but two involved appeals or tribunal hearings. The claimant still had to attend meetings on those cases in the Preston area, as well as go to Preston once a month for the SENDIASS team meeting. The claimant maintained that this amounted to race discrimination and disability discrimination. That also formed part of the allegation of a breach of the duty to make reasonable adjustments. We will return to that issue in our conclusions.

Allegation (b)

61. It was around this time that the claimant learned that other members of her team had carried out some online legal training from which she had been excluded. They had all done it together without her. This formed the basis of the second primary allegation and we will return to it in our conclusions.

Allegation (c)

62. The claimant said that the last Eid during which she was at work and not off sick was late September or early October 2015. She alleged that because of race

no one gave her a card or present, unlike at Christmas when cards and presents were exchanged. We will return to that in our conclusions.

Sick Leave January – March 2016

63. On 5 January 2016 the claimant went off sick. A fit note said she was unfit for four weeks by reason of fibromyalgia (pages 149-150). In fact she was not to return until 14 March 2016.

64. In that period there was an amended version of the first Occupational Health report issued on 21 January 2016 (pages 152-153). The substantive content of the report was the same, but a typographical error about whether the fibromyalgia had lasted for longer than 12 months was corrected. There was also a slight change so that it was clear the claimant was asking for driving to be limited to one area of Lancashire and that driving between Nelson and Preston be reduced.

65. The final fit note in this period was issued on 9 March. It appeared at page 157. It ran to 16 March and said the claimant may be fit for work taking account of a phased return and amended duties. The GP had added the following to the comments section:

> **"Suggest a phased approach with reduced [hours] and build up workload over 4-6 [weeks]."**

66. The claimant's first day back was 15 March 2016. She was at Preston for a SENDIASS team meeting. She spoke briefly to Sarah Jones and they arranged to conduct a return to work meeting on 23 March 2016.

Allegation (d) – Return to Work meeting 23 March 2016

67. The meeting was conducted at the Rising Bridge office in East Lancashire.

68. The notes of that meeting appeared at pages 158-160. The substantive comments on the form were as follows:

> **"Amina is continuing to manage her fibromyalgia symptoms. Her medication has been changed. We discussed Amina's phased return and how she would manage this. Amina was advised that she should've advised that she required a phased return so that the service could manage the phased return successfully. However, we have agreed that Amina will use TOIL/AL to manage her phased return then return to the usual arrangement of compressed hours, taking alternative Fridays off. Amina is not required to drive to [County Hall] unless it's for a team meeting which take place monthly. Sarah will attend Amina's place of work for review meetings to ensure that her return to work is manageable. Amina is required to update her return to work certificate. An appointment has been arranged with her GP.**
>
> **The SENDIASS will endeavour to accommodate Amina's needs, where possible. Referrals are being allocated on an alternating basis in the East and this will have to continue due to the number of referrals being received.**
>
> **Amina is able to [work from home] before and after meetings to reduce driving needs. However, [working from home] must be requested for whole/half days. Rising Bridge is Amina's workplace and has a modified chair so this is an appropriate base.**
>
> **Amina has already had an OH referral but if another referral is required, Sarah will arrange this.**

> **Amina and Sarah meet regularly and Amina must keep Sarah posted on any changes to health/needs during the phased return."**

69. It was the claimant's case (witness statement paragraph 13) that Sarah Jones telephoned her and insisted that she could not work from home. She said this was in the period before the return to work meeting. There was no record of this in the papers. Mrs Jones denied that she had ever said that: there was a homeworking policy and she was happy to accommodate homeworking on the basis later recorded in the return to work meeting. We will return to that in our conclusions.

70. It was also the claimant's case that despite the arrangements on the page, in fact she had to go to Preston four or five times a week in the two or three weeks that followed. We will return to this in our conclusions.

April 2016 – Sick Leave Resumes

71. In any event the claimant only managed about three weeks in work. She had a week's annual leave and then was certified unfit for work again on 12 April 2016 because of her fibromyalgia (page 162). She was never to return to work.

Second and Third OH Reports

72. During her absence there were two Occupational Health reports prepared in April and July 2016.

73. The April report (pages 163-164) said that she was struggling with mobility and activity and was not able to drive. She was not fit for work in any format and the timescale for her recovery and a return to work was unknown.

74. The July report (pages 168-169) was to the same effect, and the possibility of IHR was raised. That had already been discussed at a home visit meeting on 26 May 2016.

75. There was a case review meeting on 13 July 2016. The notes appeared at pages 171-175. It was done at the claimant's home. The notes recorded that there had been no physical improvement, and that her mental state had been worsened by the "fibro fog" that she also experienced. The claimant was advised that the next step would be an attendance hearing but a decision on IHR would also be made.

Fourth OH Report August 2016

76. A fourth OH report was produced in August 2016 (pages 183-184). The report said that the GP did not think she would be medically fit for work in the short or long-term future. Under the heading "Capability for Work" it said:

> **"Mrs Iqbal is medically not fit for work and is unlikely to be in the foreseeable future (nine months). She has discussed ill health retirement with her GP and manager and has come to the conclusion that this is the option she would like to explore…"**

IHR Refusal

77. The IHR forms were completed by the claimant when she was visited at home by Sarah Jones on 18 September 2016. They were considered by the Independent

Registered Medical Practitioner, Dr Blatchford, on 5 October 2016. Her report appeared at pages 188a-188d. Based on her view IHR was refused by a letter of 11 October 2016 (pages 189-190). The reason given was as follows:

> **"This is because with avoidance of opiate analgesia, weight management, a graded exercise programme, cognitive behavioural therapy and additional iron, your health is likely to improve sufficiently to enable you to do your job prior to retirement age."**

78. The claimant had more than a decade to go before retirement age.

79. The claimant lodged an appeal against this decision. On 30 November 2016 (page 192) Hannah Peake wrote a letter supporting that appeal. The letter said there had been universal agreement that she was unable to return to work, and no further adaptations to the role were possible. The letter said:

> **"Principally this is due to the fact that this role necessitates that the postholder drive throughout the East, and indeed the County, on a daily basis. This is a key part of the role."**

80. On 31 January 2017 the IHR appeal was rejected. The letter appeared at pages 218-220. It was an appeal under the internal disputes resolution procedure applicable to the Local Government Pension Scheme. Reference was made to Dr Blatchford's opinion that it might be possible for the claimant to return to work, or possibly retrain or undertake light work. The conclusion was that in light of Dr Blatchford's advice, correct procedures had been followed.

Fifth OH Report January 2017

81. On 12 December 2016 the claimant was certified unfit for work due to fibromyalgia for a further six months (page 193). The Fit Note said:

> **"Very unlikely to be fit for any work in foreseeable future".**

82. An OH referral had been made in October 2016 and after some delay the OH report was produced on 4 January 2017. This was the last report available before the claimant was dismissed and its contents are therefore important. It appeared at pages 194-195. It was based on a review with the claimant that day.

83. The report recorded that there was going to be a change to antidepressant medication and an urgent psychologist appointment was being sought by the pain clinic. It recorded the present position as follows:

> **"At the present Mrs Iqbal perceives her pain to be severe, she is limited to walking ten metres and then needs to rest; she walks with a stick due to poor balance. She is not able to drive at present due to both her physical limitations and her psychological ill health. Mrs Iqbal advises me that she requires help to get washed and dressed and is unable to cook or clean. Mrs Iqbal has problems with memory and concentration and is very low in mood…Mrs Iqbal is unfit for work at the present time; I am unable to predict when she is likely to be fit for a return to work as there has been no improvement in her symptoms."**

84. The same day the claimant made an enquiry about VR. Her email to Hannah Peake appeared at page 196. Ms Peake responded the following day saying:

> **"I will email and double check but, as I understand it at the moment, no-one in the team or the service is being offered VR."**

Preparation for Attendance Management Hearing

85. Ms Peake prepared for an attendance management hearing. On 10 January 2017 she completed the attendance management checklist (page 197). It was a method of checking that all relevant steps had been taken before a hearing. One of the questions was whether up-to-date OH advice had been received (within four weeks), to which the answer was "yes". Reasonable adjustments had been considered. Ill health retirement had been explored.

86. The case management report was completed the same day at pages 198-206. It gave a chronology of contact with the claimant and her periods of absence. It recorded that OH, the GP and the claimant all agreed that she could not work (page 205).

87. The section for relevant information on page 206 contained the following:

> **"The impact of Amina's absence has had a significant impact on service delivery. Other team members are carrying a very high caseload. There is only one member of staff now dedicated to the East area, where Amina was based. Another team member has also been relocated to that area to support. However, this has led to an increase of work for team members in Central/South."**

88. Ms Peake and the claimant carried out a case review meeting on 20 January. The notes appeared at pages 207-211. They recorded the current medical position and that there was no ability to return to work. The claimant was unable to get to meetings other than at her home. Ill health retirement had been refused.

89. Following a further case review meeting with the claimant (page 221-225) Ms Peake referred the case to the attendance panel on 30 January 2017 (page 212). The next date on which the panel sat was 23 February 2017.

90. On 1 February 2107 Hannah Peake emailed the claimant a copy of a letter of 30 January 2017 at pages 216-217. It confirmed the reasons for referral to the attendance panel as a result of the case review in January. The letter recorded that the claimant was going to complete the forms for seeking VR.

91. Having received estimated figures some time earlier, the claimant completed form VR5 and formally applied for VR by email on 5 February (pages 228-229). By email of 6 February at page 230 Ms Peake confirmed that she supported the application and had already been in touch with the relevant senior managers and HR.

92. The claimant was invited to an attendance hearing by a letter of 10 February at pages 231-232. The meeting was at County Hall in Preston. Copies of the reports were enclosed. The claimant was warned that the meeting could result in the termination of her employment, and that it could go ahead in her absence if she did not attend without a satisfactory explanation.

93. By email of 14 February at page 217 the claimant confirmed she would attend.

Allegation (e): VR Application

94. In the meantime HR and managers were considering the application for VR. The conclusion reached was that the claimant's post was still needed in SENDIASS and therefore that she could be released only if someone else in a post which was being lost elsewhere in the council was willing to move across and "bump" her. That was confirmed by the Head of Service, Sally Allen, in an email of 20 February at page 242. The next step was to prepare an advert for the claimant's grade 8 post to be published internally so that people at risk of redundancy in other roles could consider whether they were interested in it. According to an email at pages 277-279 Hannah Peake provided the information for the advert to the corporate HR team on 17 February 2017. An email from corporate HR of 13 March 2017 (page 276) indicated that a candidate had expressed an interest.

22 February Union Contact

95. The claimant consulted her trade union, Unison, and the Branch representative, Mr Kearsley, met her on 21 February.

96. The following morning he emailed a letter which the claimant had prepared dated the previous day. His email appeared at page 254 and the claimant's letter at page 244. The letter began by apologising for the fact the claimant would not be attending the hearing. She said it was because of her physical and mental health, and that she would not be able to cope with such a stressful meeting.

97. The letter then said:

> **"I am writing to request that you consider giving me more time to recuperate from my current sickness absence. As you know I have fibromyalgia which is a treatable yet severe condition that is acutely debilitating. Over the last number of months I have been hoping that my current fibromyalgia flare-up would have deteriorated by now, however these flare-ups cannot be judged as the flare-ups are inconsistent."**

98. The letter went on to explain that the claimant had also started to experience kidney problems and was awaiting a CT scan. Her sleep had been seriously disturbed and she now struggled with simple cognitive tasks. The letter ended as follows:

> **"Considering my situation [I] think that it is reasonable and fair to allow me additional time to recover. It has always been my intention to return to work at the end of my current absence, and I would like the opportunity to do so when I am better. I have 17 years' service with LCC. I love my job and I really do want to come back once I am well again."**

99. In response to the union emailing this letter in, Mr Kearsley was asked by the HR Business Partner, Helen Scott, to confirm whether he or the claimant was requesting a postponement. She asked when the claimant would be fit to attend.

100. The response of 22 February 2017 from Mr Kearsley appeared at page 255. It said the following:

> **"No, we are not requesting a postponement. Amina is just asking that the panel consider giving her more time to recover, and has written the letter in support of this request. Amina understands that the panel can make a decision in her absence, and**

> **that that decision may be to dismiss her. The process itself is proving very stressful for Amina and to ask her to attend a panel would just exasperate [sic] this."**

Attendance hearing 23 February 2017

101. The attendance hearing went ahead on 23 February 2017. The decision maker was Debbie Ormerod. It was also attended by Ms Peake, Helen Scott and Louise Storey, another senior manager. There were two sets of handwritten notes and one typed set of notes in our bundle between pages 257 and 264.

102. Hannah Peake told Mrs Ormerod that the claimant was seeking VR, but the HR advice was that this was entirely separate. Ms Peake said that VR could not be agreed within service. According to the typed notes at page 264, she did not tell Mrs Ormerod that there was a possibility of VR of a "bump" could be found.

103. Ms Peake was asked why the OH report from 4 January was not from the last four weeks, and according to the notes at page 264 Ms Peake said:

> **"Didn't think anything had changed – didn't want to put [the claimant] through another appointment. Have discussed with [the claimant] and have agreed nothing has changed."**

104. After the meeting the claimant was informed by telephone call that her employment had been terminated.

Dismissal Letter 28 February 2017 – Allegation (g)

105. The decision letter was issued by Mrs Ormerod on 28 February 2017 at pages 265-267. It confirmed that the hearing went ahead in the claimant's absence following the email from her union representatives. It recited the history and that the service had not been able to agree to VR at this time. The letter recorded that the claimant agreed with the OH advice that she was not able to return to work in any capacity at present, and that there was no prediction as to when a return to work might be possible. The impact on the service was also noted.

106. The decision was to dismiss the claimant immediately with effect from 23 February 2017, but to pay her in lieu of her 12 weeks' notice. Mrs Ormerod explained in our hearing that this was not a decision she took but based upon the guidance from HR as to how such dismissals were handled.

Joan Bill's VR Application

107. According to Mrs Sumner's witness statement, 28 February was also the day on which Joan Bill sought VR. She was in the same role as the claimant and the job advertisement which had been prepared in the claimant's case was available for use. Her post was advertised internally on 2 March 2017. Mrs Sumner's witness statement said that a person interested in "bumping" Ms Bill applied the next day, but the email at page 277 seemed to indicated that a candidate came forward on 13 March, not 3 March, and was interested in the advert for the claimant's role.

108. An email from Hannah Peake of 13 March 2017 (page 276) showed that she thought it was an application for the claimant's role which could be treated as one for Joan Bill's role.

109. The formal VR5 form was submitted by Ms Bill on 16 March 2017 and she subsequently left by way of VR.

110. It was part of the claimant's case that if her job had been advertised promptly in February the same person would have applied and therefore she would have been able to go on VR rather than being dismissed for poor attendance. We will return to that issue in our conclusions.

111. She only found out about this months after she left. She had not been invited to Joan Bill's leaving party. Nor had there been any leaving party for the claimant. These matters formed allegations (f) and (h) and we will return to them in our conclusions.

112. Nor was the claimant able to send an email to her colleagues explaining why she was leaving. Her IT access was blocked within a few days: the claimant tried to access it on Monday 27 February but had been blocked. Efforts through the union to get access restored so she could get some files on her personal drive and send a message to her colleagues were unsuccessful. There were some personal belongings (such as stationery and a mug) which were not returned. These matters formed allegation (i) and we will return to them in our conclusions.

Appeal against Dismissal

113. The claimant's email appealing the decision was dated 13 March at page 268.

114. The appeal hearing took place before the Deputy Director for Children's Services, Tony Morrissey. The claimant and Mr Kearsley attended on 30 March. The typed notes appeared at pages 285-287. The claimant said she was willing to come back but needed time. Consideration of "bumping" the claimant out by way of VR was raised. The first hearing was adjourned because the claimant had not received the management report for the attendance hearing, not realising it had been attached to an email.

115. The hearing resumed on 19 April 2017 (pages 299-302). At the second hearing Ms Anwar accompanied the claimant. She pointed out that the OH report was more than four weeks old. The claimant wanted VR to be reconsidered. Mrs Ormerod responded and explained her decision. She emphasised the impact on the service of the claimant's absence. There were excessive workloads and families were waiting longer to see someone.

116. According to the notes at page 301 in her closing submission Ms Anwar said that there had been a merger of teams on 27 February, a few days after the claimant was dismissed, and this would have created more VR opportunities. It was suggested that the claimant was not currently in an acute phase so there would be three months before she could get back to work.

117. The decision of Mr Morrissey to reject the appeal was contained in a letter of 5 May 2017 at pages 310-313. He was happy alternative employment had been considered but because the medical advice was universally that the claimant was not fit for work, that could not be progressed. The OH report was outside the four week timescale but that was managerial guidance and not formally part of the policy. There had been no point in a further OH referral as the recommendations would

have been the same, and he recorded that the claimant had agreed with this. The possibility of VR was not within the remit of the appeal hearing and was not considered. The decision to dismiss was not premature as the claimant had been unfit for work for ten months at the time of dismissal. The appeal was rejected.

Submissions

118. At the conclusion of the evidence each party made an oral submission.

Respondent's Submission

119. On behalf of the respondent Mr Tinkler began by addressing allegations (a)-(d) and time limits. He said these were all individual matters which were out of time. There was no basis for concluding that there was a continuing act or any grounds for a just and equitable extension. The same was true of the reasonable adjustments complaints: the PCPs, even if applied, cannot have disadvantaged the claimant after April 2016 because she was completely unfit for any work from that period onwards.

120. Mr Tinkler then addressed the complaints of direct race and disability discrimination. He emphasised the need for the Tribunal to consider the mental processes, conscious or subconscious, of the decision maker. He suggested that there was no detrimental treatment of the claimant in late 2015 as new Preston cases were not allocated to her and she simply had to finish the small number of cases outstanding. There was no basis for concluding that this or the arrangements made on her return to work in March 2016 were affected by race or the fact she was disabled. Similarly there was no basis for concluding that the claimant was excluded from online legal training because of race or disability: it was simply because she was off work at the time. On the allegation about cards and gifts for Eid, Mr Tinkler submitted that the claimant was asking for different treatment not equal treatment. No-one else received such cards and gifts. The dates of Eid were different each year and there may have been ignorance amongst colleagues about when it was. The claimant tended to be on leave at Eid anyway. There was no race discrimination. He reminded us that Mrs Jones had wished the claimant Eid Mubarak when she saw the claimant on a home visit around Eid.

121. In relation to the allegation about VR, he submitted that there had been no rush to hold an attendance meeting by Ms Peake. She could have arranged it in January once the OH report arrived but went for the February date instead. Further, the failure to adjourn was entirely explicable by the fact that the union expressly ruled out an adjournment on behalf of the claimant. There was no basis for concluding any discriminatory decision by Mrs Ormerod in that respect.

122. As to the VR application itself, it had been treated in the same way as the application made by Mrs Bill, and the difference in timescales was simply explained by the fact that the work of preparing the advert had already been done (for the claimant) by the time Mrs Bill applied. It was reasonable and non discriminatory to treat VR as a separate process from attendance management and ultimately the application was not successful because the claimant was no longer in employment.

123. In relation to the allegations about leaving parties, (f) and (h), Mr Tinkler submitted that it was not for line managers to decide who was invited. That was up to staff themselves. There was no evidence to suggest any discriminatory motive which

would shift the burden of proof. As for the arrangements upon termination of employment, steps to block IT access were a natural and obvious step once employment ended and the claimant had not pleaded in advance the allegation that there had been email or text contact with Hannah Peake, so this had not been addressed in the evidence. In any event there was no evidence from which any discriminatory approach could be detected.

124. In relation to the complaint of discrimination arising from disability, Mr Tinkler accepted that dismissal was because of something arising in consequence of disability, but argued that it was justified. The reference to the impact on the service was clear from the paperwork before the attendance hearing (page 206), from the discussion in the attendance hearing recorded at page 263, and from the dismissal letter and Mrs Ormerod's own evidence. Given the medical evidence that there was no prospect of returning in the foreseeable future it was plainly proportionate to dismiss the claimant.

125. As to the other allegations he submitted either that there was no unfavourable treatment, or where that treatment was related to absence that it was justified.

126. Turning to the reasonable adjustments complaint, Mr Tinkler accepted that a PCP about regular driving was applied but submitted there was no evidence of any substantial disadvantage. There were no written complaints and the OH advice fell short of saying the claimant should cease driving. Even if substantial disadvantage was shown, however, the respondent had taken such steps as were reasonable to reduce driving. Driving could not be eliminated entirely given the nature of the role.

127. It was denied that any PCP about refusing a phased return had been applied to the claimant: she had enjoyed a phased return in March 2016. There was no PCP of requiring PPOs to attend the office rather than work from home: homeworking was permitted and indeed had been allowed to the claimant.

128. In relation to unfair dismissal, Mr Tinkler submitted that none of the claimant's arguments rendered it unfair. The claimant had asked for the hearing not to be postponed through her union representative. The medical report was more than four weeks old at the date of the hearing, but the guidance to refer the matter to an attendance panel had been satisfied. There was no point in further medical evidence as nothing had changed. Similarly there was no reason to delay the decision because there was no evidence to back up any suggestion that the claimant might improve in the foreseeable future. The suggestion of any link between the decision and the need to ensure Mrs Bill got VR was misconceived. Alternative employment was entirely academic because the claimant remained unfit for any work at all. It was therefore a fair dismissal.

129. As to what would have happened if the claimant had not been dismissed, Mr Tinkler said that there was no prospect of the claimant remaining in employment in the long-term. There was a possibility she might have been selected for voluntary redundancy in competition with Mrs Bill. This would need to be addressed further at a remedy hearing if it arose.

Claimant's Submission

130. As part of her submission Ms Anwar had helpfully provided the Tribunal with a list of the questions which she intended to put to Hannah Peake had Ms Peake attended to give evidence in person. In addition she made oral submissions.

131. Ms Anwar reminded the Tribunal that it was very difficult to expect anyone to admit (even to themselves) that they had acted in a discriminatory way. If there were any allegations of race discrimination she had not put to the witnesses it was because she knew their answer would be a denial. The Tribunal had to be sensitive to how difficult it was to raise racism at work, and how a series of small matters in themselves could contribute to a strong feeling of being isolated or not part of the circle. The claimant had been employed for 17 years but these problems had only begun once her previous manager, Brenda Corlett, had left. The arrangements made to avoid her going to Preston were not sufficient: the claimant should have been allowed to hand over her remaining Preston cases. The evidence given by Mrs Jones was evasive, as was that given by Mrs Sumner. We were invited to prefer the evidence of the claimant and to draw the appropriate inferences from it.

132. Ms Anwar then went through the List of Issues and addressed each individual allegation on the question of direct race and/or disability discrimination. When asked to identify the evidence which would shift the burden of proof beyond simply a difference in protected characteristic and a difference in treatment, she emphasised how the claimant felt and that all these matters had to be seen together. Joan Bill would not have insisted the claimant had to cover existing Preston work had the claimant not been Asian or disabled, and similarly Mel Adam would have emailed the claimant about online training during her sickness absence had it not been for race and disability.

133. In relation to the allegation about Eid, this was another example of the claimant feeling excluded from the team. It was part of the general exclusion due to race.

134. The return to work arrangements in March 2016 were discriminatory. The claimant was told on the telephone that she could not work at home. The requirements for her to get permission were not imposed on other people. The claimant had no choice but to agree to what was being proposed because she was being treated differently.

135. In relation to the VR application, the possibility was that Hannah Peake and Joan Bill were friends and Hannah Peake knew in advance that Joan Bill would want VR. When she completed the checklist Ms Peake knew that the OH report would be more than four weeks old at the date of the hearing. She did not delay the hearing to get updated OH input. There was a strong contrast between how quickly the claimant's application had been handled and how Mrs Bill's application had been handled.

136. In relation to the allegations about leaving parties (allegations (f) and (h)) this was still part of the social exclusion of the claimant because she was not in the inner circle. These were further instances of direct discrimination. As for dismissal, a white person would not have been dismissed but would have been allowed more time. Finally, there was no adequate explanation for the arrangements upon the dismissal

of the claimant. She should have been allowed to communicate with her colleagues and to have her personal belongings returned. All these matters were influenced by the claimant being Asian and by her disability.

137. In relation to the complaint under section 15, Ms Anwar focussed on the dismissal complaint and submitted that the respondent had failed to show it was justified. She accepted that after a couple of months there could have been a fair dismissal, but dismissal on 23 February was premature. The claimant should have been allowed more time to see if she would recuperate. The timescales for medical reports were wrong.

138. Turning to reasonable adjustments, Ms Anwar submitted that this complaint was within time because there was a continuing course of conduct even though the claimant was off sick. The adjustments she sought should reasonably have been made. There was no reason why she could not have been relieved of Preston cases altogether: it was only a handful of cases that would need to be reallocated.

139. The unfair dismissal complaint should succeed. The points made in paragraph 13 of the List of Issues remained valid save for (e): Ms Anwar sensibly accepted that at the date of the dismissal decision there was no point considering alternative employment at that stage given the medical position.

140. At the conclusion of the oral submissions the Tribunal reserved its judgment.

Discussion and Conclusions – General

141. The Tribunal decided to approach the List of Issues as follows. Firstly, we considered in relation to allegation (a)-(i) whether they amounted to direct race discrimination (issues 1 and 2), direct disability discrimination (issues 3 and 4), and/or discrimination arising from disability (issues 5 and 6). However, we excluded from that exercise allegation (g) about dismissal because that overlapped with the unfair dismissal complaint.

142. We then considered the allegations about a breach of the duty to make reasonable adjustments.

143. Finally, we turned to the dismissal decision and considered whether it amounted to direct race discrimination, direct disability discrimination, and/or discrimination arising from disability, as well as whether it was fair or unfair.

144. We bore in mind at each stage the summary of the applicable law contained above.

Discussion and Conclusions – Allegations Prior to Dismissal

145. For convenience each allegation will be reproduced before we address it in these reasons. At the end of this section we will consider the cumulative case that the claimant was excluded by her colleagues because of race or disability.

(a) In Joan Bill insisting in October or November 2015 that the claimant had to cover Preston area cases until they were concluded, meaning that her driving was not in practice reduced.

146. It was clear from the notes of the SENDIASS meeting on 29 September 2015 (page 139) that the claimant was not taking on any new Preston cases from that point onwards. That preceded the first OH report of 13 October 2015. That report recorded that the claimant was happy to increase her area from the east but did not want to do the Preston area. There was to be a meeting with management to discuss how to limit her driving. There was no statement from OH that the claimant should not be required to drive to Preston at all.

147. The crux of this allegation was that even after that report was received the claimant still had to continue and conclude her existing Preston cases even though no new ones were being allocated. We accepted the claimant's evidence that in practice this meant her travelling to Preston more than simply once a month for the team meeting. Although not all meetings for Preston cases would be in Preston, the claimant was still concerned at having to travel to Preston as much as she did. We were satisfied that this requirement did continue until the claimant went off sick in the spring of 2016. However, the requirement for her to travel to Preston on existing cases diminished as those cases were concluded.

148. There was no evidence from which we could conclude that this was because of race. There was nothing at all to suggest that played any part in the decision to require the claimant to continue with her existing Preston cases until they were concluded. The decision was made to ensure continuity on those cases.

149. Nor was there anything to say that this was because she was a disabled person. The decision would have been exactly the same for a person in the same position as the claimant (i.e. with a medical need to reduce driving) who was not disabled under the Equality Act. Both direct discrimination complaints failed.

150. In relation to the complaint under section 15, the requirement that she continue with current Preston cases could well have been unfavourable treatment, but the reason for it had nothing to do with the claimant’s disability. The reason was to preserve continuity for the service users. That was not something which arose in consequence of the claimant's disability. That complaint failed as well.

151. The real issue with retention of the Preston cases was whether there was a breach of the duty to make reasonable adjustments, which we will address below.

(b) In Mel Adam excluding the claimant from online legal training in or around September 2015.

152. It was clear that the mandatory online training was being discussed prior to the claimant going on sick leave before she returned to work in September 2015, but when she came back she found that her colleagues in Rising Bridge had done the training together at the same time. The claimant felt excluded by this and had to arrange to do it in conjunction with the Preston team.

153. There was no evidence from which we could conclude that this was less favourable treatment because of race. There was nothing to suggest that a person of a different race who had been off sick at the time it was arranged would have been

included; nor was there anything to suggest that a person off sick who was not disabled would have been included. The direct discrimination complaints failed.

154. The exclusion from the training was unfavourable treatment and we found as a fact it was because the claimant was off sick at the time the staff undertook that training. The fact she was on sick leave arose in consequence of her disability. Potentially, therefore, this amounted to a breach of section 15.

155. However, applying the balancing exercise required by the legislation and the case law we concluded that the respondent had shown that having the staff do the training whilst the claimant was absent was a proportionate means of achieving a legitimate aim. The aim was to get the training done by a particular date. It was mandatory not optional. The impact on the claimant was relatively small given that she was able to do that training when she came back. Further, it was evident that the members of staff organised themselves to do the training together. That was not a formal requirement or arrangement on the part of management. To have delayed the training for everyone because the claimant was on sick leave when there was no date fixed for her return would not have been a less discriminatory way of achieving the same end because the training was time limited. Accordingly we concluded that the respondent had justified the unfavourable treatment. There was no breach of section 15 and this allegation failed as well.

(c) In the failure of colleagues to prepare cards and gifts for the claimant when it was Eid.

156. This allegation was not put as any form of disability discrimination. It was solely put as direct race discrimination.

157. It was clear that the claimant did have a perception that she was treated differently from her white British colleagues in this respect. We accepted her evidence that she felt that Christmas was celebrated in a way that her religious festival of Eid was not. However, this was not an allegation of discrimination because of religious belief. It was an allegation of direct race discrimination. There was no evidence from which the Tribunal could conclude that a person of a different race celebrating Eid (e.g. a white British Muslim) would have received any more favourable treatment than the claimant received. On that basis alone the direct race discrimination complaint failed.

158. However, this was one of the allegations which contributed to the claimant feeling excluded from her colleagues, and we will return to it in considering that cumulative case below.

(d) In Sarah Jones on 23 March 2016 telling the claimant she had to deal with Preston cases and minimise her working from home and visit the office regularly, unlike the comparators Kevin Maher, Joan Bill and Alison [*surname not specified*].

159. There was a conflict of factual evidence between the claimant and Sarah Jones about whether Ms Jones told the claimant on the telephone before the return to work meeting on 23 March 2016 that she could not work from home. On balance we found that was not said by Ms Jones. There was no note or other record kept by the claimant of this, and it was inconsistent with what Ms Jones subsequently said at the return to work meeting which was recorded on paper (pages 159-160). Mrs

Jones denied that she would say that to a member of staff, being aware that there was a homeworking policy. We concluded that the claimant must have been mistaken if she thought this was what Ms Jones was saying.

160. As to the record of the meeting on 23 March 2016, we concluded the written record was accurate. The claimant had to carry on with her existing Preston cases. We concluded that was not unlawful for the same reasons as in relation to allegation (a) above.

161. As to the position in relation to working from home, the note made clear that the claimant could work from home before and after meetings to reduce driving needs, but would need to request to work at home for a whole or a half day. Ms Jones explained in oral evidence that this was not in truth a request for permission but simply notification so that she knew where staff were working at all times.

162. There was no evidence from which we could conclude that this was direct discrimination because of race or because the claimant was disabled. We did not have sufficient information about the circumstances of the comparators to conclude that there was any less favourable treatment of the claimant. It was apparent that Joan Bill was allowed to work from home in Preston, as she lived there and was dealing with Preston cases so it would make no sense for her to have to report to the office in Rising Bridge, but we had no information as to whether this was something she could do without a request. The direct discrimination complaints failed.

163. The reason for the requirement to request working from home was not something which arose in consequence of disability. It was simply the application of normal homeworking practices. Even if that were unfavourable treatment, the complaint under section 15 failed.

164. In reality this allegation was more appropriately considered as a breach of the duty to make reasonable adjustments, and we will address that below.

> **(e) In failing in February 2017 to grant the claimant's application for Voluntary Redundancy, unlike her comparators Joan Bill, Janet Brennand, Russell Hartley and Brenda Corlett.**

165. The Tribunal found that the chronology was essentially as follows.

166. Having obtained estimated figures, the claimant applied for VR on 5 February 2017. A decision was taken in the next two weeks or so that her post was still needed and therefore that she could go only if there was a "bump". That was confirmed by Sally Allen on 20 February (page 242).

167. On 28 February Joan Bill also expressed an interest in leaving by way of VR.

168. By 13 March (page 276) the claimant's role had been advertised and a candidate had expressed an interest. By that date the claimant had already been dismissed but Sally Allen confirmed that the candidate could be interviewed for Joan Bill's post (page 276).

169. Joan Bill formally submitted her application for VR on 16 March 2017: as there was a person to "bump" her it was quickly accepted and she left on that basis.

170. There was no evidence from which we could conclude that the failure to grant the claimant VR prior to dismissal was because of race. Although we inferred that the comparators were of a different race to the claimant, there was nothing to suggest that played any part in the decision-making process, whether consciously or subconsciously. In any event it was not established that the material circumstances were the same. Mrs Sumner was the only witness with any knowledge of the circumstances of the comparators. Ms Corlett and Mr Hartley had been in posts no longer needed so no "bump" had been required. Ms Hartley had left under compulsory redundancy, not VR. Mrs Sumner had no information about the circumstances of Ms Brennand's departure in 2014. We concluded that there was no comparator in the same material circumstances: where there was a parallel attendance management process where dismissal was delayed to allow exit on VR terms instead.

171. For the same reason there was no evidence from which we could conclude that this was direct disability discrimination. None of the comparators were in the same position as the claimant but not disabled. There was no evidence that the fact that she was disabled played any part in the decision.

172. That left the complaint under section 15 Equality Act 2010. Failing to grant voluntary redundancy was unfavourable treatment. The claimant would rather have left employment on that basis than face dismissal at an attendance management hearing. Further, the reason for that treatment was something which arose in consequence of disability. The reason the claimant was not granted VR when the "bump" candidate arose was because she had been dismissed on 23 February, and that dismissal was something arising in consequence of her disability.

173. The question was therefore whether the respondent could justify the failure to grant VR prior to dismissal. The impact on the claimant was that she left employment without a redundancy payment, and in a way that might have been viewed as preferable to a dismissal for long term absence. That was a significant matter, although not as significant as if she might have been able to keep her job. We had to balance that negative impact on her against the respondent's aims and decide whether its actions were proportionate.

174. There was a legitimate aim held by the respondent: ensuring that voluntary redundancy is granted only where it meets organisational needs. It was also a legitimate aim to maintain an effective workforce of people medically able to do their jobs or likely to become able in the near future.

175. The decision that the claimant's post was needed, and therefore that a "bump" would be required, could not be criticised. The same position was taken in relation to Joan Bill's post.

176. Nor could the respondent be criticised for failing to grant VR to the claimant when she had already been dismissed. She was no longer in employment after 23 February 2018, in particular when the "bump" candidate arose on 13 March.

177. Finally, there was no evidence that the placing of the advertisement for the claimant's position had been delayed beyond what was normal. The process happened much more quickly for Joan Bill only because the identical post had

already been advertised for the claimant. The timescale for dealing with the VR application was reasonable and proportionate.

178. Putting these matters together we were satisfied that the respondent had justified the failure to grant VR prior to dismissal as a proportionate means of achieving its legitimate aims. Put another way, the failure to grant VR would only be unlawful if the dismissal itself was discriminatory, which we will consider below.

> **(f) In failing to invite the claimant to Joan Bill's leaving party, unlike her comparators Peter Livesey, Brenda Corlett, Diane Hartley, Russell Hartley and Janet Brennand.**
>
> **(h) In failing to arrange any leaving party or present for the claimant, unlike her comparators Peter Livesey, Brenda Corlett, Diane Hartley, Russell Hartley and Janet Brennand.**

179. It was convenient to deal with these two matters concerning leaving parties together.

180. We had very little evidence about these allegations. The claimant became aware months after she was dismissed that Joan Bill had held a leaving party but that she had not been invited. She thought that others who had left had been invited but did not realise that employees such as Sarah Jones had not been invited. Nor had any leaving party or present been arranged for her, unlike situations in the past where other employees had left with a party and a present. It was clear to the Tribunal that the claimant was aggrieved that no-one had acknowledged her contribution over 17 years by way of words of thanks or a present at the time her employment terminated.

181. There was no evidence from which we could conclude that either of these matters was because of race or because the claimant was disabled. It may be that the reason for her not being invited to Joan Bill's party was because she had left some months earlier, which would be something arising in consequence of disability, but that would be speculation. In any event there was nothing to say that the leaving party was organised by managers as opposed to something which Joan Bill herself organised, choosing which colleagues or former colleagues she invited.

182. Similarly, by the time the claimant was dismissed in February 2017 she had been absent from work for ten months, and she had no opportunity to organise her own leaving party because of the arrangements made to block her access to the work IT system (see below).

183. Overall the Tribunal was satisfied that the claimant had failed to prove facts from which we could conclude there was any discrimination in these matters, save insofar as they formed part of a broader picture of exclusion which we will address below.

> **(j) In the practical arrangements made upon the dismissal of the claimant, namely denying her the chance to explain her departure to colleagues and others, blocking her access to the IT system, and failing to return personal belongings?**

184. The claimant was dismissed in her absence at a meeting on 23 February 2017. Having received notification she tried to access her work emails on Monday 27 February. She was unable to do so. Even the IT department could not help her,

telling her that her access had been blocked. She was therefore unable to send a message to her colleagues saying goodbye, and nor was she able to access personal files (such as her CV) which were stored on the personal area of the drive.

185. It was clear that this came as a blow to the claimant. She had no inkling that her access would be restricted in this way. However, there was no evidence from which we could conclude that it amounted to direct race discrimination or direct disability discrimination. There was no evidence at all about the circumstances of any comparators of a different race or who were not disabled, and nor was there anything to suggest that the claimant's race or disability played any part in the decision to block her access once she was no longer an employee.

186. The blocking of her access was unfavourable treatment, and we inferred that it must have been due to the fact that her employment had terminated. That was something which arose in consequence of her disability. However, bearing in mind that the respondent has a legitimate aim of ensuring the integrity of the sensitive personal data which it holds about young people and their families, we concluded that the respondent had shown that blocking IT access for people who were no longer employees was a proportionate means of achieving that legitimate aim. The detriment to the claimant was not a significant matter. It was open to the claimant to have contacted her former managers to see if a message could be sent to staff to say goodbye, but the claimant said that she felt it was not appropriate for her to do that. She could have done the same for any personal files. Given the relatively limited impact on the claimant, the respondent's action in pursuit of its aims was proportionate.

187. As the justification defence succeeded we rejected the complaint of discrimination arising from disability.

<u>Cumulative Effect – Exclusion – Direct Discrimination</u>

188. A strong theme of Ms Anwar's submission on behalf of the claimant was that the claimant felt excluded from aspects of working life and that this exclusion was direct discrimination because of race and/or disability. We considered that point. The perception that the claimant was being excluded was a consequence of the online training issue (allegation (b)), the fact she did not receive cards and gifts for Eid (allegation (c)), and in the circumstances of her departure (no leaving party; blocked from IT access). It was a perception reinforced some months after dismissal when she found out she had not been invited to Joan Bill's leaving party. It was important for the Tribunal to consider whether taken as a whole these matters could give rise to a finding that she was being treated differently because of race or disability.

189. Leaving aside the issue about cards and gifts for Eid, which appeared to be if anything to do with religious belief rather than race or disability, it seemed to the Tribunal that the reason for the claimant's genuine perception that she was not being included in everything was neither her race nor her disability per se, but rather her absence. That was why she was not included in the online legal training in September 2015, and her absence eventually resulted in her dismissal. The circumstances of that dismissal were such that the blocking of her IT access was not explained to her, and she lost the chance to arrange a leaving party. Those feelings

were exacerbated when she found out some months later that she had not been invited to Joan Bill's leaving party.

190. Putting these matters together the Tribunal was satisfied that even taken as a whole there was no evidence of direct race discrimination or direct disability discrimination in these matters.

191. Cumulatively, therefore, the complaints of direct disability discrimination, direct race discrimination and discrimination arising from disability in relation to matters other than dismissal failed and were dismissed.

Discussion and Conclusions – Reasonable Adjustments

Driving

192. The first matter the Tribunal considered was the PCP concerning regular driving (issue 7(a)).

193. Mr Tinkler conceded that this PCP was applied by the respondent. He disputed that it placed the claimant at a substantial disadvantage because of her disability, but we rejected that argument. Any disadvantage which is more than minor or trivial is substantial, and it was clear that the driving was an issue for the claimant from the terms of the OH report of October 2016 alone. That was also supported by her GP letter of 16 November at page 143. Both recommended that steps should be taken to reduce or limit her driving.

194. The question was therefore whether the respondent took such steps as it would have been reasonable to have taken to have avoided that disadvantage. The steps taken by the respondent were to confine new cases to the east area, and to expect the claimant to continue with her existing Preston caseload until that concluded. That was going to require her to visit Preston for those cases from time to time for a few weeks or months, as well as attending once each month for the team meeting.

195. Bearing in mind that the medical advice did not recommend that all driving to Preston be stopped, and hearing in mind that there was a need to maintain continuity on casework so far as possible, the Tribunal concluded that the respondent had taken such steps as it was reasonable to have to take. The claimant did not make any request at the time to be relieved of travelling to Preston for all purposes, and the medical evidence was such that the respondent acted reasonably in what it did. Essentially the steps taken by the respondent complied with the medical advice to reduce (not to stop) driving to Preston.

Phased return

196. The next PCP on which the claimant relied was that the respondent required staff to go back to full duties without any phased return or amendment to duties.

197. This complaint failed at the first hurdle. No such PCP was applied. The management of sickness absence policy at page 89 recognised that there should be a discussion upon a return to work to establish what support or measures could be made to assist the employee to maintain her attendance. Further, the claimant

herself was given a phased return when she came back to work in March 2016. The notes appeared at pages 159-160 and recorded that she would be allowed to use time off in lieu and/or annual leave to phase her working hours before returning to her compressed hours arrangement. She was only required to drive to County Hall for a monthly team meeting, and any review meetings would take place at her place of work at Rising Bridge rather than in Preston. She was also allowed to work from home before and after meetings to reduce driving needs, and to work from home on whole or half days as long as she requested that. Accordingly this allegation failed.

Homeworking

198. The final reasonable adjustments complaint concerned homeworking. The claimant said there was a PCP of requiring PPOs to attend the office rather than work from home.

199. This allegation also failed at the first stage. No PCP preventing homeworking was applied. There was a homeworking policy, and the claimant (and other PPOs such as Joan Bill) were allowed to work from home.

200. We concluded there was no breach of the duty to make reasonable adjustments, and this complaint failed.

Discussion and Conclusions – Dismissal

201. That left the complaints about the decision to dismiss the claimant.

Direct Discrimination

202. The Tribunal was satisfied that there were no facts from which we could conclude that the claimant was dismissed because of race or because she was a disabled person. The Tribunal was satisfied that a person of a different race in the same material circumstances (i.e. having been off work since April 2016 and with the same medical evidence) would have been dismissed, as would a person without a disability in the same position. The complaints of direct discrimination failed.

Justification/Reasonableness: Criticisms of the Dismissal

203. That left the two questions of whether the dismissal could be justified by the respondent under section Equality Act 2010, and whether it was fair applying the test of the band of reasonable responses under section 98 Employment Rights Act 1996. As the Court of Appeal observed in **O'Brien**, in dismissals of this kind there is no real distinction between those two tests. It was convenient, therefore, to consider the various bases upon which the claimant criticised the dismissal decision before taking a view on justification under section 15 Equality Act 2010 and on fairness under section 98(4) Employment Rights Act 1996.

204. The List of Issues agreed by the parties summarised the claimant's main points about the dismissal in paragraph 13 of the List of Issues. We considered each in turn, excluding 13(f) which was simply a statement of the overall test of fairness.

205. **Issue 13(a):** The first criticism was about the hearing taking place in the absence of the claimant. The difficulty for the claimant with this point was that it was

done with the agreement of her union representative. On 21 February 2017 the claimant wrote a letter at page 244 saying that she was too unwell to attend, and asking for more time to recuperate. That letter did not say in terms that she wanted the meeting to go ahead in her absence, but nor did it expressly request that the meeting be postponed. Sensibly Ms Scott sought to clarify this the following day by the email of 22 February at page 255, and the response from the claimant's union representative was unequivocal. No postponement was requested. The claimant simply wanted the panel to consider giving her more time to recover. She understood that they might decide to dismiss her in her absence. In those circumstances the respondent cannot be criticised for proceeding in the absence of the claimant, whether or not the email from the union represented her true intention.

206. **Issue 13(b):** The second point raised by the claimant was that at the date of the decision to dismiss her, the OH report was more than four weeks old. The attendance management policy made no reference to this timescale, but it appeared on the checklist to be completed by a manager arranging an attendance hearing (page 197). The manager was asked to confirm that medical evidence had been obtained in the last four weeks. The form was completed by Hannah Peake on 10 January, and the decision to refer the matter to an attendance panel was confirmed to the claimant on 30 January (pages 216-217). The OH report was within the last four weeks on both of those occasions.

207. By the time of the attendance hearing on 23 February, however, the report was about seven weeks old. This was not a point overlooked during the hearing. The note at page 264 recorded that Helen Scott raised this as an issue, to be told by Ms Peake that she had discussed that with the claimant and it had been agreed nothing had changed. That must have been a reference to their case review meeting on 20 January. Ms Peake also said that she did not want to put the claimant through another OH appointment.

208. We noted that even had the claimant not agreed this, there appeared to be no suggestion that the medical position had improved. The OH report of 4 January did not recommend any review in the next few weeks, and the claimant's own letter of 21 February at page 244 did not say that her condition had improved, even though she was requesting more time before a final decision was taken. If anything, her letter indicated that because of the onset of kidney problems she was in a worse position medically than she had been in January.

209. In those circumstances it seemed to us that the fact the OH report was more than four weeks old at the time the decision was taken was not a significant point in favour of the claimant. Indeed, read literally the manager checklist required only that the report have been obtained within the last four weeks at the date the checklist was completed. In truth the OH report represented the up to date medical position at dismissal. Nothing significant had changed since early January.

210. **Issue 13(c):** The third broad point made by the claimant was that the decision to dismiss should have been delayed to see if her medical position improved. That was the point of her letter of 21 February at page 244. However, that letter itself did not give any hope that the fibromyalgia would improve. The claimant had been certified unfit for any form of work at all because of fibromyalgia since April 2016. The kidney problems which she had started to experience were going to be

investigated, and one might reasonably hope that those symptoms would improve, but the underlying reason for her long-term absence was fibromyalgia.

211. Further, the medical evidence provided no support for the prospect of an improvement in the near future. The OH report of 4 January 2017 said (page 195) that the adviser could not predict when the claimant was likely to be fit to return to work. There had been no improvement in her symptoms. No suggestions could be made to get her back to work. Sadly the medical position was bleak.

212. In those circumstances it was entirely understandable that the respondent did not consider there was anything to be gained by delaying the decision on whether to terminate employment. In might have been different, for example, had the claimant supplied some medical evidence indicating that an improvement was likely in the near future, but no such evidence was made available to the respondent.

213. Of course, the Tribunal could understand how the claimant found this difficult to reconcile with the refusal of her application for IHR. However, the timeframe by which suitability for IHR was judged was not the immediate future, but rather the long-term position. The claimant had more than ten years to go before her retirement age. The view of Dr Blatchford that she was likely to be fit to return to work within that period was not necessarily inconsistent with the view of the OH adviser that the claimant would not be fit to return in the foreseeable future. It would not be reasonable to expect an employer to wait for a period of what could be a decade before terminating employment; an employer is entitled to have regard to the immediate future, not the long-term position.

214. **Issue 13(d):** The next point raised by the claimant was the assertion that there had been a refusal to delay the attendance management hearing because Ms Peake wanted to ensure that the claimant was dismissed so that her friend, Joan Bill, would be able to get VR. Implicitly this included criticism of the length of time it took to process the claimant's VR application.

215. In relation to the attendance management process, we rejected the contention that it had been rushed through. The OH report was available from 4 January. The attendance management checklist prior to the hearing was completed by Ms Peake on 10 January. There was one attendance management hearing date each month, and Louise Storey in HR was aware by 12 January that there were hearings on 26 January and 23 February 2017 (pages 212-214). She copied Hannah Peake into her reply at page 212. Ms Peake could have taken steps then to ask that the hearing take place on 26 January. She would still have been within time to have provided the claimant with a copy of the management report five working days before that hearing. It had already been drafted on 10 January (pages 198-206). However, Ms Peake instead held a further case review meeting with the claimant on 20 January and then did not progress matters to the panel until the end of that month. Accordingly the suggestion that the attendance management procedure had been rushed, or a decision made not to adjourn it, in order to favour Joan Bill, was not made out on the evidence.

216. In any event, there was nothing to suggest that Joan Bill made her intentions known until the end of February. The claimant's view that Hannah Peake was acting as she did out of friendship for Joan Bill was simply speculation, no doubt based upon her surprise at hearing after her dismissal that Joan Bill had left on VR terms.

217. Similarly the VR process did not appear to have been artificially delayed for the claimant: see paragraph 177 above. Accordingly, we declined to make a finding that the VR advert process had been deliberately delayed so as to allow the dismissal to take effect. Indeed, those responsible for placing the advert appeared not to have been aware that the claimant had been dismissed until the candidate came forward.

218. For those reasons we rejected the contention that either process had been manipulated so as to ensure that the claimant was dismissed before any volunteer to "bump" her could come forward.

219. There was, however, another point for the claimant which did not depend upon any manipulation of the process. The claimant's VR application of 5 February was still pending at the time of the attendance hearing on 23 February, although a decision had already been taken that she would only be allowed VR if a "bumping" match could be found. The claimant was not present at the attendance hearing, but Hannah Peake informed Mrs Ormerod that VR was pending (page 263). She went on to say that VR could not be agreed within service (page 264). There was no record of Hannah Peake informing Mrs Ormerod that the claimant might still be able to go by way of VR if a "bumping" match was found.

220. In her witness statement (paragraph 20) Mrs Ormerod said that she confirmed that the issue of redundancy was not part of her decision. In answer to questions from the Tribunal she said that she was "steered" by HR to the position that the two processes were completely separate and that the possibility of VR "couldn't influence my thinking". She understood that there might be the possibility of a "bumped" redundancy even if it could not be accommodated within service, but she had no knowledge of where that was up to. It was plain as a fact, therefore, that no consideration was given by the respondent to the possibility of delaying the attendance management decision to see whether a "bump" might come forward to enable the claimant to leave on VR terms rather than through ill health dismissal. We will return below to the impact of that conclusion on the discrimination and unfair dismissal complaints (see paragraphs 227 - 229 below).

221. **Issue 13 (e):** It is factually correct that the respondent did not give any consideration to whether alternative employment could be found to enable the claimant to return to work. Equally it is factually correct that the OH advice did not suggest that this should be considered, and nor did the fit notes issued by the GP. None of them suggested a return to work might be possible with different duties. Nor did the claimant at any stage put this forward. Her plea in her letter of 21 February at page 244 was simply for more time to be allowed, and when she attended the appeal hearings her position was that she would be able to come back in three or six months. She did not suggest that she could return to work any earlier than that in a different role. It appears that a return in an alternative role never arose for consideration. Sensibly, Ms Anwar accepted during submissions that that paragraph 13(e) was no longer sustainable.

222. Having considered the various points made by the claimant we turned to apply the legal framework under section 15 Equality Act 2010 and section 98 Employment Rights Act 1996 respectively.

Section 15 Complaint – Issue 13(g)

223. The respondent conceded that dismissal was unfavourable treatment because of something arising in consequence of disability. It was also clear that the respondent did have a legitimate aim, being the provision of a prompt and effective information advice and support service for children with special educational needs and disabilities.

224. The question for the Tribunal was whether dismissal was a proportionate means of achieving that aim. As the case law and the ECHR Code of Practice makes clear, that requires the Tribunal to undertake a balancing exercise between the discriminatory effect of the decision and the reasons for making it, taking into account all relevant factors. If the same aim could have been achieved by less discriminatory means, the respondent will have failed to show that the treatment was justified.

225. We considered first the impact on the claimant of dismissal. In one sense it was significant. The claimant had been employed by the respondent since November 2001. She loved her job. Had it not been for her health problems she would have been delighted to have continued with it. She was well regarded. However, towards the end of her employment her approach had been tempered by the realisation that her health condition was making it very difficult to see how she could continue in the long term. That was the reason for her applications for IHR and then VR. In reality by mid-February 2017 this was not a situation where the alternative to dismissal for capability was remaining in employment for any significant period. The alternative to dismissal for capability was dismissal by reason of redundancy. Accordingly this was a case where the effect on the claimant of the dismissal was much less severe than if she would otherwise have been able to continue doing her job.

226. Set against that had to be the employer's needs. The impact on the service of the absence of the claimant was considered during the attendance management hearing, and reiterated in the dismissal letter at page 267 and the appeal outcome letter at page 312. There had been higher caseloads across the team, causing delays in families being able to access support. Managers had taken the view that this was not sustainable long term.

227. We considered carefully whether the failure to delay the decision to see whether a "bumping" match for VR might arise was such as to mean the respondent failed to justify the dismissal. This would not have relieved the claimant of the main impact upon her of the dismissal, namely the loss of her job after so many years of service. It would have provided her with an additional financial payment beyond the value of her notice pay. It might have been reasonably substantial given her length of service. Leaving on VR terms might have carried less stigma. However, from the employer's perspective that was money which would otherwise be available for other purposes, and it would still not have resulted in the claimant remaining in employment. Ultimately there was no way in which the respondent could avoid terminating employment, whether by means of VR or ill health absence dismissal.

228. In those circumstances we concluded that the respondent had shown that dismissal was a proportionate means of achieving its legitimate aim.

Unfair Dismissal – Issues 12 and 13

229. We considered whether the respondent acted within the band of reasonable responses in deciding to dismiss the claimant on 23 February.

230. Applying the summary in **BS v Dundee City Council**, we were satisfied the respondent had considered whether it could wait any longer for the claimant to return to work. The claimant had been consulted and her views had been taken into account. Finally, the respondent took reasonable steps to obtain confirmation of the medical position and took this information into account. The fact that it was more than four weeks over the date the decision was taken was not a significant factor and it was within the band of reasonable responses to proceed on the basis of that medical evidence when there was nothing to suggest it needed to be updated.

231. Further, the appeal was handled fairly. The decision to reject the appeal fell within the band of reasonable responses.

232. For the reasons set out above none of the points made by the claimant as summarised in the list of issues resulted in unfairness.

233. In this context too the possibility of waiting until the VR application was determined did not assist the claimant. It was within the band of reasonable responses to treat that as a separate process. Our decision would have been different had the other process been one which would have preserved employment (e.g. possible redeployment to a role for which the claimant was fit). That was not the case here. Either way the claimant was going to be dismissed. The only difference was whether she would go with a redundancy payment or not. That did not undermine the fairness of the decision to terminate her employment on health grounds in February 2017. It was within the band of reasonable responses to proceed in that way even while the possibility of a “bumped” VR was pending.

234. For those reasons we concluded that the dismissal was fair. The unfair dismissal complaint failed and was dismissed.

235. Because the complaints failed on their merits the Tribunal did not need to make any determination about time limits under the Equality Act 2010. Issue 11 fell away.

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Employment Judge Franey

7 December 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 December 2018

FOR THE TRIBUNAL OFFICE

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