THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs Lynda Walker**

Respondent: **Modular Office & Storage Systems Limited**

Heard at: **Newcastle upon Tyne Hearing Centre**
On: **Monday 24th January 2022 to Thursday 27th January 2022**

Before: **Employment Judge Johnson**

Members: **Mr S Wykes**
Mr E Euers

Representation:

Claimant: **Mr J Barker (Solicitor)**
Respondent: **Mr D Robson (Solicitor)**

JUDGMENT

The unanimous judgment of the employment tribunal is as follows:-

1. The claimant's complaint of unfair dismissal is well-founded and succeeds.

2. The respondent is ordered to pay compensation to the claimant for unfair dismissal in the sum of £14,557.34.

3. The claimant's complaint of unlawful disability discrimination (unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds.

4. The claimant's complaint of unlawful disability discrimination (failure to make reasonable adjustments) is well-founded and succeeds.

5. The respondent is ordered to pay compensation to the claimant for unlawful disability discrimination in respect of injury to feelings in the sum of £8,000.

6. The total sum ordered to be paid by the respondent to the claimant is £22,557.34.

REASONS

1. The claimant was represented by Mr Barker who called to give evidence the claimant, Mr David Morris (a former work colleague) and Mr Gary Clifton, the claimant's partner. The respondent was represented by Mr Robson, who called to give evidence Mr Bernard McWilliams (Director), Mr John Rimington (Director) and Mr Christopher Hoey (Engineer). There was an agreed bundle of documents marked R1, comprising an A4 ring-binder containing 155 pages of documents.

2. By a claim form presented on 10th May 2019, the claimant brought complaints of unfair dismissal and unlawful disability discrimination. The respondent defended the claims. In essence, they arise out of the claimant's dismissal on or about 11th February 2019, for reasons which the respondent says related to the claimant's capability to perform the duties for which she had been employed, because of her long-term absence. The respondent's position was that it could not be expected to wait any longer for the claimant to return to work. The claimant's case was that the stage hadn't not yet been reached where the respondent could not reasonably be expected to wait any longer for her to return to work. The claimant further alleged that her dismissal was unfavourable treatment because of something (her absence) which arose as a consequence of her disability and that the respondent could not justify that dismissal. The claimant further maintained that, had the respondent made reasonable adjustments to her workstation, she would have been able to continue working.

3. The parties had agreed a list of issues which appears at pages 42 – 45 in the bundle. That list contains 33 issues relating to the unfair dismissal claim, 6 relating to the allegation of discrimination arising from disability and 4 relating to the allegation of failure to make reasonable adjustments. The tribunal was satisfied that this list could fairly and reasonably be condensed into the following:-

   A Unfair dismissal

   (i) What was the respondent's reason for dismissing the claimant?

   (ii) If capability, because of long-term absence, had this stage been reached where the respondent could not be expected to wait any longer for the claimant to return to work?

   (iii) Had a thorough medical investigation been carried out to establish the nature of the illness or injury and its prognosis?

   (iv) What steps were taken by the employer to discover the true medical position?

   (v) Had the claimant's opinion as to her likely date of return and what work she was capable of performing, been fairly considered?

   (vi) Did the respondent fairly consider the nature of the claimant's illness and the likely length of her absence?

(vii) Did the respondent fairly consider the cost of continuing to employ the claimant?

(viii) Did the respondent fairly consider the size of its organisation and the unsatisfactory situation of having the claimant on very lengthy sick leave?

(ix) Did the respondent consider the possibility of alternative employment?

In respect of the complaint of unfavourable treatment because of something arising in consequence of the claimant's disability:-

(i) Was the claimant's dismissal unfavourable treatment?

(ii) Was the dismissal because of the claimant's absence?

(iii) Did that absence arise as a consequence of the claimant's disability?

(iv) Did the respondent know that the claimant was disabled and, if so, when?

(v) Did the respondent show that its dismissal of the claimant in all the circumstances was a proportionate means of achieving a legitimate aim?

In respect of the allegation of failure to make reasonable adjustments:-

(i) What was the provision, criterion or practice ("PCP")?

(ii) Did the application of that PCP put disabled persons at a substantial disadvantage when compared with persons who are not disabled?

(iii) Was the claimant placed at a substantial disadvantage because of her disability?

(iv) What was the adjustment proposed by the claimant?

(v) Would that adjustment, if implemented, have removed the disadvantage?

(vi) Was it reasonable in all the circumstances for that adjustment to be made?

(vii) Again, did the respondent know or could it reasonably have been expected to know that the claimant was disabled?

4. As was pointed out by Mr Barker in his closing submissions, and as was accepted by Mr Robson on behalf of the respondent, this was a case where there was little dispute over the facts of the case. The undisputed chronological sequence of events is as follows:-

4.1 The claimant's employment with the respondent began on 22nd January 2001. She was originally employed to undertake general administrative work and tele-sales, but her role gradually encompassed that of the office manager and that was the role which the claimant occupied at the time her absence began and up to the date of her dismissal.

4.2 The claimant was one of 6 full-time employees, which included the two directors, Mr Bernard McWilliams and Mr John Rimington. At paragraph 7 of his statement, Mr McWilliams describes the claimant's office manager role as including the following duties:-

(i) taking charge of the main office;

(ii) answering telephone calls to deal with both suppliers and customers;

(iii) dealing with customers, processing sales orders;

(iv) dealing with suppliers, placing orders as requested by contract staff;

(v) preparing quotations from contract staff, typing them up, checking them over before sending out via e-mail and post;

(vi) chasing customer quotes, dealing with queries and working towards order placement by customers;

(vii) general office duties to support site and contract staff;

(viii) general office duties to support the managing director and finance director;

(ix) managing Mr McWilliams` and other contracts staff diaries in making site appointments and following them up.

4.3 The claimant's partner, Gary Clifton, was a very close friend of Mr John Rimington, although Mr Clifton played no part in the respondent's organisation. Mr McWilliams and Mr Rimington accepted before the tribunal that the claimant was a generally conscientious and competent employee, with a clean disciplinary record throughout her employment.

4.4 The period of time which forms the subject matter of these proceedings is from May 2018 until February 2019. It was accepted by both sides that, during this period of time, the respondent company was extremely busy. The respondent worked with over 10 sub-contractors undertaking office refurbishments, which included office furniture, flooring, partitions and washrooms.

4.5 The claimant's first period of sickness absence was for one week in May 2018, because of hip bursitis. The claimant returned to work after an absence of one week. On 2nd October 2018 the claimant had a period of

sickness absence of two weeks for hip and back pain, followed by a further certificate for three weeks, another certificate or three weeks, a certificate for four weeks, a certificate for three weeks, a certificate for four weeks and then a certificate for six weeks. The final certificate would have expired on 21st March 2019, at which point the claimant would have been absent for approximately five months. The claimant was in fact dismissed on 11th February 2019, by which time she had been absent for just over four months. The respondent had never had a member of staff absent for such a significant period of time.

4.6 The fit-notes issued by the claimant's GP in respect of the first period of absence in May and June 2018 related to "hip bursitis", those from October 2018 onwards referred to "hip and back pain". The fit-note for 5th November 2018 refers to investigation by the musculoskeletal team, that of 26th November refers to the claimant awaiting an MRI scan and that of 11th January 2019 refers to awaiting the results of that scan. The fit-note for 5th February refers to "vertebrae facet joint arthritis – awaiting nerve route block".

4.7 The respondent did not have any dedicated HR staff, so Mr McWilliams in December 2018 instructed Ms Helen McDougal, a human resources consultant, to provide advice as to how the claimant's continued absence should be managed. Acting upon that advice, the respondent instructed an external occupational health physician to undertaken an examination of the claimant to consider the reason for her absence, the likelihood of her return to work and what steps could be taken to facilitate that return to work. The occupational health report dated 18th December 2018 appears at pages 124 – 126 in the bundle. The relevant extracts from the report are as follows:-

- Lynda reported she suffered with left lateral hip pain for the last two – three years which was under control with cortisone injections. She had the last injection in April from her GP and then another one privately, which did very little help. She was referred for MSK treatment through NHS and at present she is waiting for the MRI results of the hip and spine she had on 11th December 2018.

- She is under prescribed medication – Gabapentin, Codeine and Paracetamol. She has previously been prescribed Naproxen and Tramadol.

- She reports she has pain while sitting, standing, night-time and morning at any prolonged position. She has modified the way she moves, avoids left full weight-bearing and any strenuous activity. Her sleep is affected as well, the pain wakes her up every two hours. She needs to constantly change position and she needs help with all daily activities from partner, daughter and friends.

- Her reason for absence is the high level of pain that interferes severely with concentration and at the same time the medication she was prescribed makes her sleep during the day, overall she feels unable to

do her work and she is worried that her performance could be inadequate.

- I believe that the MRI result will help Lynda and the medical professionals involved in her treatment and find the best approach and Lynda will be able to return to work with the right assistance.

- She requested a desk assessment because she feels she can benefit from a better chair and desk reposition, the current set-up appears to aggravate her symptoms and complaints.

- There are no other medication conditions or reasons that render her unable to work.

At the end of the report are a series of questions asked on behalf of the respondent and the occupational health physician's answers – as follows;

1. Is there any underlaying medical condition or reason which renders the employee unable to return to work on a regular and efficient basis?

   Yes, hip pain.

2. Does the work they are employed to do in any way exacerbate their condition or put them or others at risk of injury?

   No, because she has a desk job.

3. Estimated date that employee will be fully fit to return to usual duties or whether a further period of absence anticipated.

   If the result of the MRI is negative, then Lynda will return to work with professional advice on how she can manage her symptoms. From your side, it might be useful to plan a phased return to work, to see if Lynda can do some work from home or to build up her hours programme.

4. In your view, is the employee fit to continue work in the position in which she is currently employed? If not, in your opinion, what, if any, work will they be fit to undertake.

   Yes, but she needs to learn and have advice on how to manage her symptoms.

5. Does the employee meet the requirements for ill-health retirement?

   No.

4.7 By letter dated 18th January 2019 the claimant was invited to attend "an informal meeting" on 23rd January to consider the following matters:-

- To review the current status of your condition with you.
- To discuss any options there may be for you to return to work on a suitable rehabilitation plan.
- Whether there is anything that the company can do to aid a return to work.
- Discuss any next steps that may be necessary to consider your return to work or whether the company may formally have to consider the ability to keep your role open.

The final paragraph of that letter states, "Should any further meetings be arranged to formally consider any potential termination of employment on grounds of continued ill-health, then you will be given the right to be accompanied in line with current legislation which extended to a work colleague or a trade union representative.

4.8 Minutes of the informal meeting on 23rd January appear at pages 128 – 131 in the bundle. The meeting began at 2.50pm and ended at 3.50pm, one hour later. The relevant extracts are as follows:

(i) BW asked if LW had now received a diagnosis and LW advised that she had a damaged nerve, tendonitis and an inflamed bursar. BW asked when this started coming on and LW advised April 2018, when she had an injection for an inflamed bursar, but it did not work. LW advised that it was the head of MSK who had reviewed her results and that she had not yet seen a consultant. She had been sent for an MRI scan and was now being passed on to a consultant. HM asked LW if she felt any further forward, as she seemed to have some frustrations with her treatment. LW was upset. HM asked if LW felt better, the same or worse since October 2018. LW said that she could not go on like this and she wanted to come back to work before the end of her current sick note. BM asked when LW had the MRI. LW advised that it was the 12th of December. BM asked where LW was with treatment and LW advised that she now knows what is wrong with her. BM asked if LW was still in pain and LW stated that she was in pain all the time, she could live with a certain level of it, but when it is bad she is unable to sit down or walk. BM asked LW if she had to lie down to ease it. LW advised that she can sit for a while but then has to get up and walk about, that it does not seem to get any better. LW stated that she gets two hours sleep at a time then she has to get up. She's hoping that the slow-release tablets will mean that she can drive and come back to work. BM stated that he was not pushing her to return to work, that we are concerned about her health and thought she was getting help. LW stated how can you do X, Y and Z when you don't know what is wrong with you. BM asked how long it would be until LW saw a consultant and LW advised five weeks. BM asked if LW had the appointment yet, and LW advised no but that she was ringing tomorrow. HM stated that we thought LW would be further on with her

treatment and know what was happening. LW stated that it was never ending and that BM had to live with his pain so she will have to live with hers. LW stated that she will ask for the name of the consultant to see if she can go on the cancellation list. HM asked how long she could sit for and LW advised for one – two hours. HM asked if LW could get around to do little things. LW advised that she can't lift or stretch. She has to have everything on the bench and she can't stretch to the cupboard. HM asked LW if she could walk up and down stairs. LW advised yes if she had a hand rail to hold on to. HM asked how LW managed the shopping. LW advised that Gary does it, that she can do light things but not heavy shopping bags. LW stated that she throws the washing down the stairs and then comes down after it, she manages. LW said that she would not be able to get out of the bath. HM asked LW about what she thought a possible time line might be for some improvement. LW advised her when she gets her new tablets tomorrow she will try them out, that her current sick note runs out on the 6th of February and she is hoping that is the last sick note. BM asked if her return was dependant on whether the tablets work and LW advised yes. BM asked if it was also subject to what the consultant says and LW advised yes. HM asked LW if she thought it was realistic to consider a return to work in two weeks and LW advised yes. HM asked if there was anything that the company could do to assist. LW stated that a new chair would be good or just take the arms off the chair so that she could get under the desk. BM asked if Gary had mentioned a chair to her as he had raised it with him a couple of times. LW said yes. BM stated that the occupational health report said that LW had requested a desk assessment, LW said yes that as well. LW said that she would speak to the doctor tomorrow and she was phoning at 8.30am to see if she could get an appointment, but if not she will get a telephone appointment. HM asked if LW could ask what her doctor thought about what is realistic in relation to a return to work. LW said yes and that she thought the new tablets would help. BM stated that the company is not rushing her, but he now had a better understanding of where LW was as his perception had been very different. LW said yes, it was frustrating as she was no further forward. HM thanked LW and asked if she could keep BM up to date tomorrow. LW said she would.

4.9 At page 132 in the bundle, is a note of a telephone call made by the claimant to Mr McWilliams on 24th January. The claimant reported that new medication had not yet been prescribed and that it would take two days to get the prescription electronically. The claimant said that once she had been on new medication the doctors would review whether she was able to drive. The claimant reported that the GP's receptionist was to chase up an appointment with the consultant. The claimant reported that she was expecting a call back from the GP practice the following day and would update Mr McWilliams as soon as she heard anything. The claimant did not contact Mr McWilliams the following day.

4.10 On 5th February the claimant obtained and submitted to the respondent a fit-note for a period of 6 weeks from 7th February to 21st March 2019.

4.11 By letter dated 7th February 2019, the respondent wrote to the claimant in the following terms:-

> "Thank you for attending the informal absence review meeting with myself and Helen McDougall, HR consultant on the 23rd of January 2019 and also for the updates on your condition that you have provided since then. I have arranged a formal absence meeting for Monday the 11th of February 2019 at 10.00am at the company premises. The purpose of this meeting is to consider your continued absence in light of recent medical information and the prospects of a return to work within the near future. As you are aware, it is difficult for the company to cover your absence and I must advise you that it may be that we can no longer continue to hold your job open for you. It is therefore possible that I may have to consider terminating your employment on grounds of capability due to long-term ill-health. I will conduct a meeting and will be accompanied by Helen McDougall, Human Resources Consultant. You have the right to be accompanied at the meeting by a fellow work colleague or a trade union representative, should you wish. A trade union representative must bring evidence of their official status to the meeting. I look forward to seeing you next week."

4.12 That letter was posted to the claimant on Thursday 7th February and was received by her on Friday 8th February. The meeting was Monday 11th February. The claimant was unable to obtain trade union representation as she was not a member of a trade union. By letter dated 10th February (page 134) the claimant raised a formal grievance, which letter contains the following observations:-

> "During my current period of sickness, I have submitted GP sick notes to cover my period of absence. I have attended all appointments requested of me by medical professionals at Sunderland Royal Hospital and will continue to do so. Whilst I would wish to return to work if ongoing treatment can resolve my hip pain, I genuinely feel that the company does not wish me to do so and use my period of absence as an opportunity to dismiss me or renew their efforts to pressure me into retirement. This feeling is further strengthened by the fact that I did not receive notification of the meeting scheduled for Monday the 11th of February until Friday the 8th of February. This has left me with insufficient time to arrange with the attendance of a union representative and I do not wish to ask a work colleague to accompany me for fear of putting their position in jeopardy. I have been advised by ACAS to suggest that you seek a medical or legal opinion as to the Equality Act 2010 and request that you do so prior to the 1st of March 2019 before taking this matter further."

4.13 The claimant attended the meeting on 11th February, unaccompanied. The meeting began at 10.10am and ended 30 minutes later at 10.40am. The relevant extracts are as follows:-

> "LW stated that she was here to talk about her sickness. HM asked LW if she was OK to continue with the absence meeting and LW stated yes. HM stated that LW would be invited back separately to discuss the grievance and asked again if LW was happy to proceed on the absence meeting today. LW confirmed that she was happy to proceed. HM asked LW where she had got to with treatment. LW advised that she was waiting for an appointment for an injection and that she was on the cancellation list. HM asked LW if she had a rough timescale for the injection and LW advised 2 – 3 months which is why she said she would go on short notice cancellation list as she could be at the hospital in 15 minutes. LW advised that she was also going to make an appointment with her doctor to see if the doctor could get anything moving as this has been going on for too long. LW stated that you could not say she had not tried. HM asked LW how she felt in herself since we last met. LW advised the same. She had changed her tablets but it takes 4 days to get into her system that she was still in pain and can't sit for long, can sit for a bit but then has to get up and walk about, she feels the same as she did last time. HM asked if the new tablets were better. LW advised that she thought they were a bit, but that she was in more pain as with the other tablets she could get relief for a little while. LW stated that the new tablets would be better in the long run as she will be able to drive again but that the tablets make her feel dizzy and sleepy. HM stated that the last time we met LW had been hopeful that she would be back last week. LW stated "I know." BM said that LW had stated that she hoped the medication change would help. LW stated yes. BM asked LW if she felt anything had changed. LW stated no, that she was getting used to them and that occupational health had said for her to come back 10.00am to 3.00pm or 10.00am to 4.00pm if that would help. BM asked when LW had seen occupational health. LW stated that it was when BM had sent her. HM stated that she had not mentioned hours at the last meeting. LW said no, but that's what had been said. HM stated that the issues discussed around the desks/chair etc could be done, with the exception of moving the desk as it would not fit if turned around. If those changes were made, could LW come back at all. LW stated that the changes would help, but that it depends on the tablets, that her condition is a nerve thing. LW advised that she has just been on painkillers, but now that she has got a proper diagnosis there might be something else that she can have. HM asked LW that if the desk etc was changed today, would she be able to come back to work tomorrow. LW stated no, and that BM had stated not to rush. BM stated that he had said that if LW was signed off then she could not be here, that she would only be back if she was signed off. LW stated the doctor had said that if she gets a cancellation for the injection next week then she could amend the sick note. BM confirmed that he said for LW not to come

back until the doctor said she was fit for work. LW disputed this and BM stated that LW may have misunderstood and LW stated that maybe she had, but thought BM had said not to come back if she was going to be off again. BM stated that this was not the case. HM stated that the sick notes had always been for 3 weeks but now 6 weeks. LW stated yes, that was because it is 2 to 3 months for the injection, but that if she gets the injection early the doctor will sign her off. HM asked BM if there was anything else he wanted to ask LW. BM stated that the purpose of the meeting today was to consider the effect of the absence as there is no cover and it is a small business. LW stated that she is not costing anything as she is only on SSP and the company get that back from the government and that the company could have got an agency person. BM and HM confirmed that SSP cannot be reclaimed from the government. LW stated that is not what she was told. HM stated that was about 20 years out of date. LW stated that she would try to get a doctor`s appointment. BM states that the company has to consider now. LW stated that if she can get back earlier, she will. BM advised that he was adjourning the meeting to consider and will discuss with HM. BM asked if LW was saying there was no change. LW confirmed no change.

4.14 The minutes record that there was a break of 15 minutes whilst Mr McWilliams discussed matters with Ms McDougall. When Mr McWilliams returned to the meeting, the minutes record the following:-

> "Regrettably such a small organisation as modular cannot continue to support the absence as there is no-one else in the office to cover the duties and this has been a considerable struggle over the last four months. At this time, even with modification, I cannot foresee a return to work date. I have considered all the information currently to hand and have decided to terminate your employment on grounds of long-term ill-health. As you are currently off sick it is accepted that you are unable to work your notice period and therefore this will be paid in lieu of 12 weeks' notice plus any holiday entitlement due. Today is that last day of employment with the company. This decision will be confirmed in writing to you and you have the right to appeal against this decision. An appeal must be made in writing to the company within 7 calendar days from today. The appeal must set out what your grounds of appeal are. As for your letter of grievance, I will be in touch setting out the procedure to look at this and investigate it."

4.15 The respondent's decision was confirmed by letter dated 11th February, a copy of which appears at page 139. The relevant extract is as follows:-

> "I regrettably confirm my decision to terminate your employment on grounds of capability due to your continued ill-health. At the meeting we reviewed your continued absence and the difficulty that the company had faced in having no cover in the office for a considerable period and the lack of a foreseeable return to work. Unfortunately, it

does not appear that you will be able to return to work in the near future, whatever work modifications could be made to aid this. In accordance with your terms and conditions of employment you are entitled to 12 weeks' notice of termination of employment. As you are unable due to health reasons to work your notice period, payment for this will be made in lieu. In addition, you will be paid for any holiday entitlement that you have accrued but not used. Your effect date of termination of employment with the company is therefore 11th February 2018."

4.16 By letter dated 12th February the claimant submitted a letter of appeal stating, "I think my dismissal is unfair as after treatment at Sunderland Royal Hospital I would be able to return to work."

4.17 The claimant's appeal was acknowledged by letter dated 15th February, in which the respondent invited the claimant to attend an appeal meeting on Tuesday 19th February. The appeal was again heard in front of Mr McWilliams who was accompanied by Ms McDougall.

4.18 Minutes of the appeal meeting appear at pages 147 – 148 in the bundle. The meeting began at 2.00pm and ended at 2.13pm. The relevant extracts are as follows:-

"BM asked if there was any further update from the hospital. LW stated no. BM asked if the timescale for the injection was still 2 – 3 months. LW stated hopefully not, it is the same situation. LW stated that BM had told her not to rush and she would need some time off to have the injection. BM stated that he had said not to rush as it was the GP who would have to decide when to sign LW off. LW stated yes. BM asked if LW knew anything about the recovery period after the injection. LW stated that it should work straightaway and that the doctor had said she was leaving the door open and if she got the injection the doctor would sign her off, but she had to see the consultant. LW stated that when she had a cortisone injection in her knee she was told to rest for 1 – 2 days but as she was in an office job she said 1 day. BM asked again if LW still did not have an appointment. LW responded no. BM asked LW if she was not able to come back to work until she had the injection. LW stated no. HM asked how LW's pain level was. LW stated that it was better but sitting down for long periods is not good. She can sit for a couple of hours and then needs to walk, as the pain is unreal. HM asked how LW was finding the new tablets. LW stated the slow-release ones were better and do not make her feel so spaced out. HM asked LW if she was still in pain. LW stated yes, it is manageable at the minute but not sitting for long periods. HM asked LW if there was anything else she wanted to add. LW said no but BM had told her not to rush back. BM stated that he had already explained that. LW stated that it was in the previous notes. BM stated that he had said not to rush in terms of not signing herself off without the doctors approval so as not to put herself at risk. LW stated I know. BM stated that he had to

look at the effects on the business of long-term sickness. LW stated, I am over the worst now, just needing to see the consultant. BM asked again if there was no sign of an appointment. LW stated no, the world does not run round like that and that she had not got the notes from Monday's meeting as people are busy, nothing was going to be the next day. BM stated that this was not the next day, it was a few weeks down the line of reviewing. LW stated that she had phoned the consultant's secretary, but they had not got back to her and that she had tried. BM asked LW if she had anything else to add. LW stated no. BM stated that he will take time to go through this with Helena and that he would come back to LW in the next 7 days.

4.19 Meanwhile, the claimant's grievance was considered at a grievance meeting on 19th February and the outcome set out in a letter dated 20th February. Those matters have no relevance to these tribunal proceedings.

4.20 By letter dated 22nd February, the claimant's appeal was dismissed. The letter appears at page 155 in the bundle. The relevant extracts are as follows:-

> "I am writing to confirm the outcome of the appeal. In your letter of appeal dated 12th February 2019 you stated your grounds of appeal as "I think my dismissal is unfair as after treatment at Sunderland Royal Hospital I would be able to return to work." Having considered your appeal, I regret to advise you that the original dismissal decision stands. Unfortunately the company is not able to sustain your absence as there is no foreseeable prospect of a return to work for you and you have confirmed that you are not able to return at all until such time as you've received the further treatment that you need to help with your painful condition. This is the final stage of the company's appeal procedure."

5. Following her dismissal on 18th March 2019, the claimant received the nerve block injection which had been recommended by her consultant. Within a matter of days, the claimant was fit for work and began to look for alternative employment. The claimant was effectively fit to return to work from 23rd March 2019.

6. Mr McWilliams evidence on behalf of the respondent as to the impact of the claimant's absence on the business is set out in paragraphs 16 and 17 of his witness statement, in which he states as follows:-

> "During the above period of absence, we had great difficulty managing the business. Generally, it meant that I had to spend more time in the office as opposed to being on site or dealing with customers face to face. It also meant that other staff had to consider their diaries so we could maintain office cover. We all needed to find extra time to prepare quotations, handle customers and suppliers, whilst being restricted on the time we could afford out of the office."

Mr Rimington's evidence is contained in paragraph 4 of his statement in which he states, "In the lead up to Lynda's dismissal, the business was extremely busy. This was mainly because we were picking up substantial work for Virgin Media. We also moved offices in May 2018. It's important to understand how busy we were, because when Lynda's absence started we had to pick up her duties. The engineers had to start doing their own quotes and I was left with the majority of the office-based duties, like managing the industrial catalogue, manning reception and other administrative duties. It was a huge strain that as time passed became more difficult to manage. It was clear that all staff were struggling. In fact, even the sub-contractors complained that whilst they were making good money, they were working 7 days a week. This is not sustainable."

7. When asked in cross examination why they did not look to engage a temporary worker or agency staff to undertake the claimant's administrative duties, Mr McWilliams and Mr Rimington simply stated that they were not keen on employing temporary staff or agency staff, due to a previous poor experience in the past. The tribunal found that the vast majority of the claimant's duties were routine administrative duties which could probably have been undertaken by an agency worker or temporary staff with a minimal amount of training.

8. Of similar significance was the fact that no steps were taken by the respondent to replace the claimant, following her dismissal on 11th February. The respondent's evidence in this regard was contradictory. On the one hand, they sought to persuade the tribunal that the claimant's absence through illness was having a detrimental impact on the business because other staff were having to undertake her duties, yet no-one was lined up to replace her and following her dismissal no-one was engaged to replace her. The respondent's evidence was that, towards the end of March 20019, they began to notice that the conversion rate of quotations to final orders began to reduce noticeably and that it therefore became unnecessary to replace the claimant.

9. It was put to Mr McWilliams and Mr Rimington in cross examination that the claimant had 18 years continuous service with the respondent and was thus entitled to 3 months' notice to terminate her contract. Both Mr McWilliams and Mr Rimington accepted that this was the case. Both confirmed that they had decided to pay the claimant in lieu of notice, rather than require her to work her 3 months' notice. Both Mr McWilliams and Mr Rimington accepted that in so doing they had to pay the claimant her full wages as pay in lieu of notice, whereas if they had requested her to "work" her notice, they would only have been obliged to pay her statutory sick pay, as she remained absent due to illness. It was put to both of them that a reasonable and sensible alternative would have been to give the claimant 3 months' notice, on the basis that should she obtain the necessary injection during that period and thereafter be fit to return to work, then the notice could have been withdrawn and the claimant would have been able to return to work. Neither Mr McWilliams nor Mr Rimington could give an adequate explanation as to why this was not done.

10. Neither Mr McWilliams nor Mr Rimington could give any explanation as to why they had not sought to clarify the claimant's true medical position before deciding

to dismiss her. The respondents accepted that the only medical information in their possession was the series of fit notes from the claimant and the occupational health report dated 18th December 2018. Neither Mr McWilliams nor Mr Rimington could give any meaningful explanation as to why they were not prepared to wait any longer to see whether the claimant could obtain the necessary injections and then to see whether those would have enabled her to return to work.

11. It was accepted by the respondent that the claimant had asked for a new chair, on the basis that the chair which she had been using was unsuitable and was exacerbating her pain and discomfort. The claimant initially asked that the arms on her chair be removed so that she could sit closer to the desk. Mr Christopher Hoey's evidence to the tribunal was that he had looked at the chair and "noted that the arms were screwed in place and I was therefore reluctant to take them off because I thought it would leave the chair defective." Mr Hoey's answer was that the claimant could have lowered the height of the chair so that it would fit under the desk. The respondent accepted that no workplace assessment was ever carried out to establish whether a different chair and/or desk may have enabled the claimant to return to work.

12. The respondent accepted that no consideration was given to the possibility of a phased return to work or the claimant returning on a part-time basis to undertake at least some of her routine duties.

13. The tribunal accepted the claimant's evidence that she was required to work at the same desk, using the same chair during before her final absence. From the claimant's description, the tribunal accepted that the use of that chair placed her at a substantial disadvantage in that it exacerbated her pain and discomfort. The tribunal found it likely that the claimant's pain and discomfort would have been ameliorated had the respondent provided her with a more suitable chair. Had that been done, the tribunal found it likely that the claimant would have been able to return to work at least in some capacity to undertake some of her duties pending the nerve root injection.

14. The claimant had suggested that she may be able to undertake some of her duties by working from home. The claimant's evidence was that, had she been allowed to do so, she would have been able to lie down and take rest as and when her pain and discomfort reached such a level that she was unable to continue working. Had that been done, the claimant's evidence was that she may well have been able to undertake some duties from home. The tribunal was not persuaded by this argument. The tribunal did not accept that working from home would have enabled the claimant to properly perform any of the duties for which she was engaged.

The law

15. The claims brought by the claimant engage the provisions of the Employment Rights Act 1996 in respect of the complaint of unfair dismissal and the Equality Act 2010 in respect of the complaints of unlawful disability discrimination.

UNFAIR DISMISSAL

Employment Rights Act 1996

Section 86 Rights of employer and employee to minimum notice

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,
(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

(2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.

(3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice.

(4) Any contract of employment of a person who has been continuously employed for three months or more which is a contract for a term certain of one month or less shall have effect as if it were for an indefinite period; and, accordingly, subsections (1) and (2) apply to the contract.

(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.

Section 94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

16. Section 86 of the Employment Rights Act specifies that the claimant, with continuous service of 18 years, was entitled to a minimum notice period of not less than 12 weeks. If such notice is not given, then the employee is entitled to be paid in lieu of notice. The claimant accepts that the respondent paid her in lieu of notice and paid her the correct amount. However, the entitlement to 12 weeks' notice is relevant in terms of the fairness of the claimant's dismissal.

17. The respondent relies upon "capability" as its potentially fair reason for dismissing the claimant. The respondent's position is that the claimant was no longer

capable of performing work of the kind for which she had been employed, because of her long-term absence. That is a potentially fair reason under Section 98 (2) (a). The relevant authorities which provide guidance to the tribunal on the interpretation of that statutory provision are as follows:-

Spencer v Paragon Wallpapers Limited [1977 ICR 301]
East Lyndsey District Council v Daubney [1977 ICR 566]
HJ Heinz Company Limited v Kenrick [2000 IRLR 144]
BS v Dundee City Council [2014 IRLR 131]

18. The basic principles established by those cases are as follows:-

(i) It is essential to consider whether the employer can be expected to wait any longer for the employee to return to work. The tribunal must expressly address this question, balancing the relevant factors in all the circumstances of the individual case.

(ii) Those factors include whether other staff are available to carry out the absent employee's work, the nature of the employee's illness, the likely length of his or her absence, the cost of continuing to employ the employee, the size of the employing organisation and the unsatisfactory situation of having an employee on very lengthy sick leave.

(iii) A fair procedure is essential. This requires in particular, consultation with the employee, a thorough medical investigation (to establish the nature of the illness or injury and its prognosis) and consideration of other options (in particular alternative employment within the employer's business). In one way or another, steps should be taken by the employer to discover the true medical position prior to any dismissal. Where there is any doubt, a specialist report may be necessary. The employer must take into account not only the employee's current level of fitness but also his or her likely future level of fitness.

(iv) The employee's opinion as to his or her likely date of return and what work he or she will be capable of performing should be considered.

UNLAWFUL DISABILITY DISCRIMINATION

Equality Act 2010

Section 15 Discrimination arising from disability

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

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

Section 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to--

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to--

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	Applicable Schedule
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

Section 21 Failure to comply with duty

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

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

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

Section 136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

19. One of the issues in this case, is the date from which the respondent knew or reasonably ought to have known that the claimant suffered from a disability. When considering whether an employer knew or ought reasonably to have known that an employee suffered from a disability, the following principles were identified by Judge Eady QC in **A Limited v Z [UKEAT/0273/1ARN]**.

(a) There need only be actual or constructive knowledge as to disability itself, not the causal link between the disability and its consequent effects which lead to any unfavourable treatment.

(b) The employer need not have constructive knowledge of the employee`s diagnosis to satisfy the requirements of Section 15 (2). It is however for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered from an impediment to his physical or mental health, or (b) that the impairment had a substantial and (c) long-term effect.

(c) The question of reasonableness is one of fact and evaluation. Nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(d) When assessing the question of constructive knowledge, an employee’s representations as to the cause of absence or disability related symptoms can be of importance (i) because in asking whether the employee has suffered a substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes and (ii) because without knowing the likely cause of a given impairment, it becomes much more difficult to know whether it may well last for more than twelve months, if it has not already done so.

(e) The approach adopted to answering the question posed by Section 15 (2) is to be informed by the Code of Practice on Employment which accompanies the Equality Act 2010.

(f) It is not incumbent on the employer to make every enquiry where there is little or no basis for doing so.

(g) Reasonableness must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code.

20. Having undertaken that assessment, the tribunal was satisfied that the date when the respondent knew or ought reasonably to have known that the claimant suffered from a disability was the date when they received the occupational

health report which is dated 18th December 2018. Certainly, by the time the claimant attended the first informal meeting on 23rd January and the formal meeting on 11th February, the tribunal was satisfied that the respondent knew or ought reasonably to have known that the claimant suffered from a disability. Similarly, any alleged failure to make reasonable adjustments can only succeed if it related to the period after the respondent received the occupational health report.

21. Section 15 of the Equality Act 2010 deals with what is commonly known as "discrimination arising from disability". It is for the claimant to establish 3 things:-

    (i) unfavourable treatment;

    (ii) that the treatment was because of "something";

    (iii) that the "something" arises in consequence of the claimant's disability.

    If so, then the respondent must show that the treatment was a proportionate means of achieving a legitimate aim.

22. The claimant need only establish that she has been treated unfavourably, the test is not "less favourable treatment". Accordingly, no comparator is required. There is a relatively low threshold or "disadvantage" which is sufficient to trigger the requirement for the respondent to justify the treatment.

23. The unfavourable treatment must be because of the relevant something which must itself arise in consequence of the disability. This is not a question of whether the claimant was treated less favourably because of his disability [**Basildon and Thurrock NHS Foundation Trust v Weerasinghe – 2016 ICR305**].

24. The Employment Appeal Tribunal has provided guidance on the correct approach to Section 15 cases in **Pnaiser v NHS England [UKEAT/0137/15]**.

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

    (b) The tribunal must determine the cause of the impugned treatment or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the contentious or uncontentious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for the impugned treatment in a direct discrimination context, so to there may be more than one reason in a Section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant or more than trivial influence on the unfavourable treatment and so must amount to an effective reason or cause for it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply relevant.

(d) The tribunal must determine whether the reason/cause (or if more than one) a reason or cause, is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links. In other words, more than one relevant consequence of the disability may require consideration and it will be a question of fact, assessed robustly in each case, whether the something can properly be said to arise in consequence of disability.

(e) The more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) It does not matter precisely in which order those questions are addressed. Depending upon the facts, the tribunal might ask why A treated the claimant in the unfavourable way alleged, in order to answer the question whether it was because of "something arising in consequence of the claimant's disability." Alternatively, it might ask whether the disability has a particular consequence for a claim that leads to "something" that caused the unfavourable treatment.

25. In **Grey v University of Portsmouth [UKEAT/0242/20/00]** the judgment of Mrs Justice Eady promulgated on 24th June 2021 summarises the authorities on whether the respondent can show that any unfavourable treatment was a proportionate means of achieving a legitimate aim. The tribunal is required to demonstrate that it has carried out the necessary critical evaluation set out in **Hardy and Hansens PLC v Lax [2005 ICR1565]**. The evaluation will include findings as to the level of need, about the claimant's role, or about the impact of her absence and the evidence of the respondent to its potential explanation for why the claimant's dismissal was a proportionate measure in this case. The burden of proof is on the respondent to establish justification. **[Starmer v British Airways – 2005 IRLR862]**. The tribunal must be satisfied that the measures imposed must "correspond to a real need and are appropriate with a view to achieving the objectives pursued and are necessary to that end." The principal of proportionality requires an objective to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. The principal of proportionality requires the tribunal to take into account the reasonable needs of the business but the tribunal has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary.

26. In **O'Brien v Bolton Saint Catherine's Academy [2017 ICR737]** the Court of Appeal said that the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified and it is not unreasonable for the tribunal to expect some evidence on that subject. What kind of evidence is appropriate will depend on the case. Often, it will be so obvious that the impact is very severe that a general statement of that effect will suffice, but sometimes it will be less evident and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing. What kind of evidence is needed in a particular case, must be primarily for the assessment of the tribunal.

27. In cases involving an alleged failure to make reasonable adjustments, it is for the claimant to establish 3 main elements:-

    (i) the provision, criterion or practice applied by the employer;

    (ii) the application of that PCP puts disabled persons at a disadvantage when compared to persons who are not disabled;

    (ii) the adjustment could and should have been made and how the making of that adjustment would have removed the disadvantage.

    [Project Management Institute v Latif – 2007 IRLR579]. There is no point in identifying a PCP which does not cause substantial disadvantage **[Secretary of State for Work and Pensions v Higgins – 2014 ICR341].**

Conclusions

Unfair dismissal

28. The tribunal found that the respondent had failed to show that it could not be expected to wait any longer for the claimant to return to work. The respondent's described the claimant's absence as "difficult" and described how it meant that other members of staff had to work longer hours to cover those duties. However, the respondent failed to deal with the possibility of agency workers or temporary staff being engaged to undertake most or at least some of what could only be described as routine administrative duties. The respondent had not shown any good reason as to why that could not have been done. The respondent has failed to show that the cost of continuing the employee was disproportionate in any way. She was only in receipt of statutory sick pay of less than £100.00 per week. As at the date of dismissal the respondent had not shown that dismissal was reasonable, bearing in mind the size of the respondent's undertaking. The respondent had taken no steps to establish the true medical position. All the respondent had was the claimant's fit notes and its own occupational health report, which, itself, confirmed that the claimant "will be able to return to work with the right assistance. She feels she can benefit from a better chair and desk repositioned. There are no other medication conditions or reasons that render her unable to work." Bearing in mind the claimant's length of service in

particular, it was incumbent on the respondent (and would have taken little effort and little time) to obtain a letter from the claimant's consultant confirming the present position, the likely timescale for treatment and the likely impact of that treatment. The respondent conducted a first "informal" meeting, and which the tribunal found the claimant was assured that there was no rush for her to return to work. That was followed less than three weeks later by a first formal meeting at which the claimant was dismissed. All that had happened in the meantime was that the claimant's next fit note was for 6 weeks rather than earlier ones for 2 weeks. Mr Robson accepted in his submissions that it was the issue of this 6 week fit note which triggered the respondent's change of heart.

29. The tribunal found that the respondent had failed to give any attention to the fact that the claimant was entitled to 3 months' notice and that, in accordance with the information then available to them, there was a real possibility that the claimant would obtain the necessary injection during that period and shortly thereafter be fit to return to work. The respondent failed to satisfy the tribunal that there was any disadvantage to them in so doing.

30. For those reasons, the tribunal was satisfied that the respondent's dismissal of the claimant was both substantively and procedurally unfair. The tribunal was satisfied that the procedural defects were such that, even if the respondent had followed a fair procedure, the claimant would not have been dismissed and accordingly there should be no Polkey reduction in any compensation.

31. Mr Robson sought to persuade the tribunal that the respondent's dismissal of the claimant did not amount to "unfavourable treatment" in accordance with Section 15 of the Equality Act 2010. Mr Robson's submission was that if the circumstances were such that the employee deserved to be dismissed, then it could not amount to "unfavourable treatment". The tribunal rejected that submission. The tribunal found that the respondent's dismissal of the claimant amounted to unfavourable treatment in accordance with Section 15 of the Equality Act 2010.

32. The tribunal was satisfied (and the respondent accepted) the reason for the claimant's dismissal was her long-term absence. The tribunal was satisfied (and the respondent conceded) that the long-term absence was a consequence of her disability. Accordingly, the 3 prime elements of Section 15 are established.

33. The tribunal found that the date by which the respondent knew or reasonably ought to have known that the claimant was disabled, was the date of their receipt of the occupational health report dated 18th December 2018. By the date of the claimant's dismissal, the respondent knew or ought reasonably to have known that the claimant was disabled.

34. The tribunal found that the respondent has failed to establish that its dismissal of the claimant was a proportionate means of achieving a legitimate aim. Nowhere in their pleaded case or in their evidence does the respondent identify what is their legitimate aim. The tribunal assumes that it is to have a workforce capable of attending work to perform the duties for which they were employed. The tribunal accepted that this would indeed be a legitimate aim. However, the

respondent has failed to discharge the burden of showing that its dismissal of this claimant was proportionate in all the circumstances of this case. The tribunal's reasons are the same as those given for the unfairness of the dismissal. The tribunal was satisfied that the respondent found it "difficult" to accommodate the claimant's absence. That alone did not make dismissal of the claimant proportionate. There was insufficient evidence provided by the respondent for the tribunal to make that finding. The respondent has failed to show that the reasonable needs of its business necessitated the dismissal of the claimant at that time. The claimant was not replaced. The claimant was costing very little and there was a reasonable likelihood that she would make a sufficient recovery within the foreseeable future (particularly during her notice period) so as to enable her to return to work. That is in fact what happened. The claimant's complaint of discrimination arising from disability is therefore well-founded and succeeds.

35. The tribunal found that the respondent applied a provision, criterion or practice of requiring the claimant to work from its office rather than to work from home. However, the tribunal was not satisfied that this PCP placed the claimant at any particular disadvantage when compared to people who are not disabled. Similarly, the claimant had not shown that being allowed to work from home would have made it easier for her to undertake her duties. That allegation is dismissed.

36. However, the tribunal was satisfied that the respondent applied a PCP of requiring the claimant to work in the office using the desk and chair provided for her. The tribunal found that this PCP did, indeed, place the claimant at a substantial disadvantage when compared to non-disabled persons, in that it caused her pain and discomfort to be exacerbated. The claimant maintained (as did the occupational health physician) that a more suitable chair and desk would probably mean that the claimant would be able to return to work sooner to undertake her duties. The respondent failed to address its mind to the possibility of making that adjustment. That amounted to a failure to make reasonable adjustments and, accordingly, the claimant's complaint in that regard is well-founded and succeeds.

<u>Remedy</u>

Unfair dismissal

37. The tribunal calculates compensation for unfair dismissal on the following basis.

Basic award (agreed)	£7,479.00
Compensatory award	
Loss of statutory rights	£350.00
Loss of earnings (6 weeks @ £94.25	£565.50
19 weeks @ £249.36	£4,737.84

Loss of motor vehicle (19 weeks @ £75.00)	£1,425.00
Sub-total - Compensatory award	£7,078.34
Total compensation for unfair dismissal	**£14,557.34**

Unlawful disability discrimination

38. Both representatives agreed that compensation for injury to feelings fell within the lower band of the Vento guidelines. Mr Barker for the claimant argued for an award in the upper third of that band, whereas Mr Robson for the respondent argued that it should be in the middle part of that band. The tribunal took into account the claimant's length of service and in particular her close working relationship with a relatively small team. The tribunal took into account the claimant's age and her concerns about whether she would be able to obtain alternative employment. The tribunal took into account the sudden change of heart between the first informal meeting and the meeting at which the claimant was dismissed and the claimant's distress at the manner in which she had been treated. The tribunal found that the appropriate level of compensation for injury to feelings is £8,000.00.

39. The total sum ordered to be paid by the respondent to the claimant for unfair dismissal and unlawful disability discrimination is £22,557.34.

G Johnson

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EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
28 February 2022

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