EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Oligbo**

Respondent: **London Borough of Tower Hamlets**

Heard at: **East London Hearing Centres**

On: **18, 19, 21 July 2017 (20 July in chambers)**

Before: **Employment Judge Moor**

Members: **Mr P Quinn**

Mr D Ross

Representation

Claimant: In Person

Respondent: Mr C Adjei, Counsel

JUDGMENT having been given orally on 21 July 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **The claim for unfair dismissal is well-founded.**
2. **The claim of direct disability discrimination contrary to sections 13 and 39 of the Equality Act 2010 fails and is dismissed.**
3. **The claim of disability discrimination contrary to sections 15 and 39 of the Equality Act 2010 succeeds, in that the Respondent failed to objectively justify the dismissal, which arose in consequence of disability.**
4. **The claim of disability discrimination contrary to sections 20 and 39 of the Equality Act 2010 succeeds in that the Respondent failed to make the reasonable adjustment of extending the redeployment period by 12 weeks.**
5. **The Respondent is ordered to pay to the Claimant £5050.60 comprising:**
   - **5.1. A basic award of £3839.94.**
   - **5.2. An award of compensation for injury to feelings of £1100.00.**
   - **5.3. Interest of £110.66.**

6. The Tribunal does not make a re-engagement order.

REASONS

1. This claim arises out of the Claimant's employment as a Lead Dining Assistant with the Respondent, at St Matthias primary school.

The Issues

2. At a hearing on 30 January 2017 EJ Russell clarified the issues between the parties as follows (as amended by further discussion at the outset of the hearing and by concession):

3. *Unfair Dismissal claim*

   3.1 What was the reason for the dismissal? The Respondent asserts that it was a reason related to capability which is a potentially fair reason under section 98(2) of the Employment Rights Act 1996 ('the ERA').

   3.2 Was the dismissal fair in all the circumstances of the case?

   3.3 Was a fair procedure followed? An appeal hearing was held in December 2016: the Tribunal will need to decide whether the delay in hearing the appeal renders the dismissal unfair and/or amounted to a breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Claimant further relies on her three grounds of appeal as aspects of unfairness: (a) not waiting longer to give her time to recover; (b) not considering adjustments; (c) not allowing a longer period for redeployment.

   3.4 Polkey: if a fair procedure was not followed, what are the chances that the Claimant would have been dismissed in any event.

4. *Disability*

   4.1 The Respondent concedes that the Claimant is a disabled person within the meaning of the Equality Act 2010 ('EqA) by reason of:

      4.1.1 the physical impairment of osteoarthritis of the hips and knees; and

      4.1.2 the post-operative symptoms relating to the Claimant's hernia namely, pain (often described as chronic) and restriction of movement and the day to day tasks of lifting and carrying.

5. *Section 13 EqA: Direct discrimination because of disability*

   5.1 In dismissing her, did the Respondent treat the Claimant less favourably than it would have treated a hypothetical comparator?

   5.2 If so, was it because of disability?

6. *Section 15 EqA: Discrimination arising in consequence of disability*

   6.1 Did the Respondent dismiss the Claimant because of something arising in consequence of the Claimant's disability?

   6.2 The 'somethings' relied upon are: (a) her period of sickness absence; and/or

(b) her need to use crutches; and/or (c) her inability to undertake the full range of her duties.

6.3 If so, does the Respondent show that the dismissal was a proportionate means of achieving a legitimate aim? The Respondent relies on the aim of providing efficient service.

7. *Reasonable Adjustments: sections 20 and 21 EqA*

7.1 Did the Respondent apply the following provision, criterion and/or practice ('the provision') generally, namely the requirement to (a) maintain satisfactory levels of attendance; and/or (b) carry out the full range of contracted duties?

7.2 If so, did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

7.3 If so, did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant relies on the following steps which she says would have been reasonable: (a) not dismissing her for her sickness absence levels; (b) modifying her duties by removing the physical parts of the job such as moving tables and chairs; (c) redeploying her to another job; (d) extending the redeployment period beyond 12 weeks; and/or (e) allowing her more time to recover.

7.4 The Respondent's case is that there were no steps that it was reasonable to take to avoid the disadvantage.

8. *Remedy Issues:* At the outset of the hearing, the Tribunal decided to hear issues on liability and remedy separately. The Tribunal gave its decision on liability orally on the morning of Friday 21 July. It then agreed the issues in relation to remedy as follows:

8.1 What gross weekly pay should the basic award be calculated with?

8.2 Whether the Tribunal should make an order for re-engagement?

8.3 Whether there should be any award for compensation under the ERA and/or EqA.

8.3.1 what were the chances that a fair procedure would have resulted in dismissal in any event?

8.3.2 what were the chances that, after a redeployment period extended by 12 weeks the Claimant would have been successfully redeployed?

8.4 Whether the Claimant should be awarded any compensation for injured feelings, and, if so, how much that award should be.

8.5 Whether interest should be awarded on any injury to feelings award, and, if so, how much that interest should be?

8.6 Whether any unfair dismissal award should be uplifted by reason of a failure to follow the ACAS Code on Discipline?

Adjustments to the hearing

9. As requested, the Tribunal provided the Claimant with a chair with arm and back rests and adjusted the hearing to provide for longer mid-morning and afternoon breaks and shorter Tribunal days. The Tribunal allowed the Claimant, if she needed to, to stand up and move around. We checked with the Claimant on the first morning of the hearing

that no other adjustments were needed to the hearing. We encouraged her to inform us if anything further was required.

Findings of Fact

10. After reading the statements of and hearing from Ms Bingham; Miss Selby, Miss Sylvain, Mr Golds and the Claimant and reading the statement of Ms Burke-Larner, and having read the documents referred to us we make the following findings of fact.

11. None of the witnesses before us sought deliberately to mislead. They did their best to assist and we thank them for those efforts.

12. The Respondent is a large London borough, employing approximately 6000 staff.

13. The Claimant started employment as a kitchen assistant with the Respondent on 2 September 1996. On 1 July 2008 she was promoted to Lead Dining Assistant, Grade 1A2. From September 2011 she moved to St Matthias primary school. She worked Monday to Friday from 10.30 to 2.30 with half an hour for lunch during school terms. The school had approximately 200 pupils.

14. While we don't accept that the roles of Kitchen Assistant and Lead Dining Assistant are the same there is overlap between them. Staff, including the Claimant, used the terms interchangeably. A Kitchen Assistant works in a school kitchen where hot meals are prepared as well as served, whereas a Dining assistant works in a school kitchen where meals are delivered from off site, heated up and only cold food and steamed vegetables are prepared. After food preparation both Kitchen Assistants and Dining Assistants set up the dining area by moving tables and chairs (stored for the rest of the day); laying tables, serving food from a hot counter; washing up using dishwashers; clearing tables, putting tables and chairs away; and cleaning up including dealing with rubbish and sweeping.

15. In addition to these tasks, as Lead Dining Assistant, the Claimant came in half an hour early and undertook some administrative tasks for example: ordering frozen food; ensuring the rota prepared by Miss Selby was complied with; and ensuring timesheets, holiday forms were completed. She was also in charge of the team during the shift. Miss Selby estimated that this took only 10% of the Claimant's time. 30 minutes of the 3.5 hour session, would make it no more than 15% of her time. On any level, we agree administrative tasks were not a major part of the role.

16. Miss Selby, the Claimant's line manager described both roles as physical jobs with the member of staff 'being on their feet' most of the time. We accept this. There was no time for sitting down between tasks except for the 30 min lunch break, which was taken at St Matthias between the first and second lunch sittings.

17. At the school there were 2 other Dining Assistants working with the Claimant. A rota was designed to rotate the jobs in order to deal them out fairly, so that no one could say 'I always wash up' or 'I'm always the one left sweeping'. We were shown an example (55a). From 11am each member of staff had to do food preparation either cooking vegetables, and putting food in hotplate or buttering bread or cutting fruit. Then from 11.15 there was preparing the dining hall or preparing the waste trolley, water beakers, putting out salad and fruit and bread. Then all serving food and doing the cleaning and clearing tasks as allocated by the rota.

18. The Claimant had worked in these two roles for many years and enjoyed it.

Sickness Absence

19. As a result of her osteoarthritis the Claimant had a right knee operation in 2013,

which necessitated some time off work (164). Since then her right knee has not fully recovered. (She has also had some investigation of her left knee.) She has reduction of movement in it and chronic ongoing pain. On 30 January 2014 the Claimant had a hernia operation (65) and has been left with serious complications from it, causing chronic abdominal pain and weakness in her abdomen. She also had a hip joint replacement in September 2015. She is left with what she describes in her impact statement and we accept as '*serious problems with mobility, flexibility and general movements'*. She walked and still walks with a crutch or stick. She was and is in daily pain for which she takes tramadol, butrans, pregabalin, ibuprofen and paracetamol.

20. From 30 January 2014 until the date of her dismissal on 19 April 2016 the Claimant was on sick leave. From time to time the Respondent has described this as 500 odd working days of absence. (This is obviously wrong because the Claimant only worked during term time.) Nevertheless, the Claimant was not present at work because of sickness for the best part of 7 school terms.

21. The Respondent paid the Claimant contractual sick pay of full pay during the first 6 months of absence, reduced to half pay for the next 6 months.

22. The Respondent had to employ an agency worker to cover her role during her absence while still employed. Until we asked, the Respondent had not provided any evidence of the cost of this. We still have no clear evidence of how much the Claimant's continuing absence cost it and what impact that had upon the relevant budget. The best evidence we have, and we accept, is Miss Selby's evidence that agency workers at the time were more expensive and took her more time to supervise.

23. The Respondent's Sickness Management Procedure (171) provides for a sequence of reviews and referrals to occupational health (OH).

24. During the Claimant's sickness absence, the Respondent referred her to its Occupational Health ('OH') advisers. They advised that she was unfit for work. There were nine reports in total. For much of the period of sickness absence each OH reported a future likelihood of recovery and recommended keeping the situation under review. Miss Selby has told us and we accept that she was therefore prepared to extend the sickness review period for longer than she usually would have done in order to give the Claimant time to get back to work. Even at September 2015 there was hope that there would be an improvement in 3 months time.

25. OH considered from time to time whether adjustments could be made to enable the Claimant to come back to work.

26. After the initial absences, a final review meeting was held by Mr Hales at the Claimant's home on 16 May 2014. She was receiving on-going treatment so Mr Hales decided that the Claimant should keep Miss Selby updated when she had a clearer prognosis and that a further referral to OH should be made.

27. Miss Selby continued to keep the situation under review with referrals to OH as she describes in her evidence (paras 12-16). Recovery was delayed by a series of medical interventions and setbacks:

27.1 there were complications from the hernia operation for which surgery was planned and took place in July 2014;

27.2 on 2 Sept 2014 Miss Selby spoke to the Claimant on telephone about her current condition. The Claimant was seeking a second opinion;

27.3 on 22 September 2014 OH advised no adjustments at that stage but if pain could be managed in future then the Claimant might return to work with no lifting and carrying. The prognosis was hopeful (87);

27.4 in October 2014 OH reported a right knee replacement was planned for December 2014. At this stage they advised the Claimant was not fit, there were no practical workplace adjustments that could be made, and she would need 12 weeks recovery time from the operation. This deferred the final review hearing;

27.5 Miss Selby referred the Claimant back to OH in March 2015 to check progress. They reported a strong likelihood further surgery was required because of complications with the hernia. Recovery was still likely with further treatment. They suggested a further review time (101);

27.6 a planned admission was delayed from May until July 2015 (103);

27.7 on 30 September 2015 OH reported a further operation to improve abdominal symptoms has been unsuccessful; a right hip replacement had taken place on 4 September and there would be a 3 month recovery time for that; finally the right knee had become very stiff. They advised the Claimant was unfit for any work and no adjustments were possible to get her back for at least 2-3 months;

27.8 a 2nd final review meeting took place on 6 November 2015 with Mr Hales, attended by Miss Selby, HR, and the Claimant's trade union representative Ms Larner. The Claimant was informed adjustments would be considered. The outcome of that meeting is at 109-111. The Claimant was unfit for work and OH had advised no workplace adjustments would help. The Respondent informed her its support could not be indefinite as sickness had an impact on the service and if there was no significant improvement by the beginning of December 2015 there would a further referral to OH for a consideration of the options and a meeting would be arranged with Ms Bingham who would make a decision as to whether or not her employment could continue (111).

28. By 9 December 2015 OH advised no significant improvement had been made (112). Dr Sperber, Occupational Health Consultant, advised that, functionally, the Claimant remained impaired, walking slowly, aided by crutches and that she continued to have right lower limb pain and on-going abdominal pain. He advised that she was fit for sedentary work and such restrictions would have to last for at least 3 months. He suggested a reference back in February 2016.

29. On 5 January 2016 the Claimant provided a further doctors certificate that she was unfit for work for 3 months. The fit note format allows GPs to suggest adjustments to work that might enable a patient to return. The Claimant's GP crossed out that adjustments to her work were possible.

30. On 12 January 2016 Ms Bingham wrote to the Claimant to advise that a 'Consideration for Dismissal' ('CFD') meeting would be held on 26 January 2016 (114). One item on agenda was that adjustments would be considered.

31. Dr Sperber reviewed the matter on the telephone with the Claimant in January 2016 after which he reported that matters remained unresolved and that she was unfit for her current role because of its physical demands. He recommended redeployment on medical grounds involving mainly seated work (116).

Decision to Give Notice of Dismissal

32. A CFD meeting took place on 26 January with Mr Hales: we are surprised not to have heard from him and are disappointed not to have seen the minutes. But we have heard from Miss Selby and the Claimant who were both present. One of the items for discussion was whether there were adjustments that could be made to the role to allow the Claimant to return (119). Miss Selby cannot remember whether adjustments were discussed but thinks it likely and the Claimant's evidence is that there was some discussion about adjustments but that she did not suggest any particular examples. Miss Selby says and we accept that at the meeting the Claimant stated she was suffering from pain caused by the hernia operation and knee replacement. She said she was unable to bend down or stand for long periods. Her uncertain prognosis was discussed.

33. Mr Hales decided to give the claimant 12 weeks' notice of dismissal to run concurrently with a redeployment period. In his outcome letter he gave his reasons 126 '*During your CFD meeting, I carefully considered all documentation presented … including up to date OH advice, your current health situation, the effects on service delivery and the options available to you and have concluded that you remain unfit and that prognosis for the future does not show significant improvement.*'

34. He informed her that, if redeployment was unsuccessful, then there would be a further CFD meeting with Ms Bingham, Service Head, and that meeting would provide an opportunity to discuss any new medical evidence such as a change in prognosis before dismissal was confirmed (127).

Redeployment period.

35. The Claimant filled-in a profile informing Miss Sylvain, People Resourcing Officer, of her capabilities. During the redeployment period Miss Sylvain had to ensure that any job vacancy within the Respondent up to grade 4 was considered so that the Claimant, if she wished, could be put forward for consideration before it was internally or externally advertised.

36. Ms Sylvain did not know that the Claimant was disabled but did know enough about her health conditions to form the judgment that manual work was not an option. Four vacancies arose within the grade range during the 12 week redeployment period. One of these was trainee solicitor for which the Claimant did not have the qualifications. The three others were manual jobs. Ms Sylvain did not discuss these with the Claimant or ask whether she might be able to do them with adjustments. This is because Ms Sylvain took the view that the Claimant could not do manual work. At the same time, the Claimant had online access to the same job vacancy information and informed us she looked at it every week. She did not suggest to Ms Sylvain that she was suitable for any of the 3 vacancies and has not argued before us that she could have done them with adjustments.

37. Before the effective date of termination, the Claimant identified one other vacancy, that of a grade 5 receptionist. She asked Miss Sylvain for support in applying for it. Miss Sylvain told her she could not apply for it through redeployment because it was too high a grade. If the job had been within the grade range, Miss Sylvain would have been able to assist the Claimant with tailoring her profile to the job. The Claimant told us the application form was difficult to fill in and before she had completed it she heard the job had gone.

38. Dr Sperber reviewed the Claimant on 5 April 2016 and advised that she '*is still likely to struggle with her current role at present'* and that the longer term outlook was '*unclear'*. She had right lower limb pain, pain in the back and abdomen and walks with crutch. He recommended medical redeployment (129).

39. The final GP 'fit note' 30 March 2016 did not suggest adjustments to the job (as the GP is able to do on the form) but stated that the Claimant was unfit for work for a further 3 months.

40. Therefore the CFD meeting was reconvened before Ms Bingham on 19 April 2016. At this meeting the Claimant stated she was only restricted in lifting (135). Ms Bingham explored with her the use of the crutch. She said could put her crutch 'away' but without it she had 'issues' with her balance (136). She also said she had problems with standing for more than 30 minutes at a time because her knee was not strong enough (136). Miss Selby argued therefore there were health and safety problems with use of crutch. The OH report and prognosis were considered. The Claimant suggested she might recover within a few more months. Ms Larner did not argue for her member at the time that there were adjustments that could be made and does not suggest this in her written statement to us.

41. Ms Bingham announced her conclusions that the Claimant's dismissal should be confirmed. Ms Bingham's conclusions were given orally (138) and then confirmed in letter dated 27 April 2016 (140-142). '*Taking into account the length of time of your current sickness absence, the complexity of your medical condition, continuing uncertainty regarding the resolution of both your hernia and knee problems: a) the decision [was taken] in January 2016 to place you on redeployment, as no efficient or reasonable adjustment could be made in Contract Services to your current substantive role as a Kitchen Assistant. In the past 12 weeks there have been no matches against your redeployment profile and internal vacancy list. b) OH states that despite your self-referral to a private consultant, the longer term outlook remains unclear and confirms that you remain unfit for any work, which is supported by an extension of a medical certificate for a further three months. c) whilst redeployment is the recommended option, this has been pursued in its entirety (even in the event we extended that period, when taking the Disability Act into consideration it would be successful [sic]) that it would be extended. I have taken the decision to dismiss you from the Council's services, effective immediately.'*

42. We note that the whole of the medical evidence, including the GP fit notes, supported the conclusion that Claimant would struggle with her job as the majority of it was physical. The prognosis for recovery was uncertain at best – there being no likelihood of recovery in the near future. The medical evidence also supported that there were no adjustments to the job that could be made. While Ms Bingham did not say it in terms, the effect of her decision is that she disagreed with Claimant that the restriction upon her was only lifting tables and chairs. Ms Bingham had clearly decided that all the physical aspects of her job would be a struggle.

43. The sickness management procedure requires in the case of a disabled employee that if the '*impairment significantly restricts the type of work for which you are suitable, the manager and service head, HR and workforce development, will consider making a recommendation that your period of medical redeployment be extended beyond 12 weeks if it is likely to assist you in obtaining suitable alternative employment.'* (181)

44. Ms Bingham states that she considered the option of extending redeployment period but decided against because the fit note of 30 April stated she was unfit for work for 3 months and HR had advised her there were no suitable vacancies. We observe that these reasons do not make sense: We find that HR could not possibly have predicted what vacancies might arise in the next few months, all they could predict to was what was imminently in the pipeline (hence the exceptional 2 week case for an extension in the procedure). And the fit note related to the Claimant's current work not to any future sedentary work that OH had advised she might do, which was the whole point of

recommending medical redeployment.

45. We also note with some concern that Ms Bingham's decision letter:

45.1 gives the wrong job title. This is sloppy. However, given that terms appear to have been used interchangeably by all and the physical tasks of the job were the same or similar, nothing turns on it in this case. Nor did the Claimant complain about this in her appeal;

45.2 contains incorrectly and contrary to the procedure (182 para 3.2) the suggestion that the Claimant was confined to *only* specific grounds of appeal (141). This restriction is not relevant to this case because, despite it, the Claimant felt able to put the grounds she wished in her appeal. But the confining of grounds of appeal is something we deprecate and wish the Respondent to note is an inappropriate practice.

45.3 again sickness absence was described as 518 days, which might be misleading.

46. At some time in 2016 before the appeal, the Claimant's disabilities led her successfully to claim the non-means tested benefit Personal Independence Payment for which she receives the standard daily living amount. She claimed this and received it on the basis that she needed help with cooking a meal; washing and bathing; and dressing.

47. The Claimant appealed in a letter dated 7 May 2016. She set out 3 grounds asking that:

47.1 she should be given a longer period to recover;

47.2 *'On my recovery suitable adjustments could be made to work practices to enable me to carry out my duties as a Kitchen Assistant'*; and

47.3 that a longer period to find suitable redeployment be allowed.

48. The ill health procedure provides that appeals against dismissals under it will '*normally be heard within 3 months*.' [182]

49. The Claimant received a holding reply and then, after she chased, a letter on 9 August informing her that there had been a delay in organising the appeal. It appears from the oral evidence and the Claimant's witness statement that a date was originally set in late October 2016. The Claimant accepted that this may have been postponed because her representative could not attend. We have seen no documentary evidence about this. The appeal was eventually heard on 15 December 2016.

50. Mr Golds, a member of the appeal panel told us, and we accept, that the reasons for the delay were that the removal of the elected mayor had sent the Respondent into crisis resulting in several dismissals and a larger number of appeals. The Respondent had a policy that required appeals to be heard by councillors rather than managers. There was a limited number of councillors with the necessary training.

51. In October 2016 the Claimant provided a full GP report which sets out in detail her health problems (283). It is apparent from that letter that the constellation of symptoms we have described above had not improved.

52. Mr Golds and 2 other councillors heard the appeal. They looked at the role through the example rota prepare by Miss Selby (55a) and they considered what parts of the role the Clamant could do by reference to OH, her GP's more recent letter (283) and what the Claimant said.

53. In answers to members' questions the Claimant said that she could return to her role with the adjustment of not moving chairs or lifting anything heavy, that she didn't need to used her crutch inside the school and could safely move around and serve food. And that 3 months had not been a sufficient time to apply for alternative jobs.

54. The panel upheld the dismissal (158):

54.1 they decided that the evidence was that her symptoms had not improved, there was no imminent prospect of a return to work and therefore rejected ground 1 (more time);

54.2 in relation to adjustments they preferred the OH advice that there were no adjustments that could be made;

54.3 they decided that, because she had put in a further medical certificate, she was unfit for any work, and it was highly likely that even if the redeployment period had been extended she would not have been in a position to take up the work.

55. There is a dispute between the Claimant and the Respondent about what she would have been able to do if she had returned to work at the point of dismissal. On the facts we have heard, we do not consider that the Claimant would only have had difficulty with moving tables and chairs. We find, that:

55.1 at the time dismissal – by reference to the evidence of Miss Selby, the GP fit note (no adjustments); OH (ditto); the Claimant's impact statement in which she describes the job as having '*a lot of physical work'* – this was a physical job. The Claimant would be on her feet preparing food, serving food, sweeping, and carrying rubbish. All of this would have caused her problems. Being on her feet while serving is likely to have been a struggle. Most of tasks involved moving things about which she would have found difficult and this degree of physical work would have been beyond her given her much reduced mobility, reduced abdominal and knee strength and balance problems. Even if she had not used her crutch at work she was then at risk of falling.

55.2 at time appeal – this was also likely to be true. By then she had been awarded PIP partly on the basis that she needed help preparing food at home; and the GP full report did not describe improvement.

55.3 and it is equally true now – her impact statement describes her as having serious problems with mobility, flexibility and general movements.

55.4 Therefore both at time dismissal and appeal we find the Claimant's difficulties at work would not have been confined to lifting and carrying tables and chairs or just heavy lifting. We don't think the Claimant has sought deliberately to mislead us but we do find there is an element of wishful thinking in her evidence or perhaps that she is misleading herself as to her capabilities.

Law

56. Under section 120 of the Equality Act 2010 ('EqA') the Tribunal has jurisdiction to determine a complaint relating to employment under Part 5.

57. The complaint here is that the Respondent discriminated against the Claimant;

57.1 by dismissing her contrary to section 39; or

57.2 by failing to comply with a duty to make reasonable adjustments, contrary to section 39(5), section 20-21, as read with Schedule 8.

58. The Claimant claims direct discrimination and discrimination from something arising from her disability. These are different types of discrimination and we explain them legally here.

Direct disability discrimination

59. Direct discrimination contrary to section 13 of the EqA requires the Tribunal to find that the Claimant has been treated less favourably by the Respondent than it would have treated someone without the protected characteristic but whose circumstances are not materially different. The ECHR Code of Practice on Employment 2011 puts it this way '*direct discrimination occurs when the employer treats someone less favourably because of disability itself*'. The Code (para 3.30) gives the example of someone with arthritis whose typing is slow and therefore is not given a job. The appropriate comparison in a direct discrimination claim is someone without arthritis but whose typing is similarly slow.

60. It is not often that direct discrimination therefore succeeds for someone with a disability: an employer will often be able to show that it would have treated a non-disabled person with a similar level of activity, the same. This is why section 15 of the EqA was enacted.

Section 15 'arising from' discrimination

61. Section 15(1) of the EqA provides that:

> *'(1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.'*

62. Section 15 therefore does not require the like for like comparison. It recognises that a disabled employee may be adversely treated for something that other employees would be adversely treated for but, where that something arises 'i*n consequence of their disability',* the disabled employee is afforded greater protection. There is no need for the employee to point to a comparator.

63. Para 5.9 of the Code states that the consequences of a disability include anything that is the result, effect or outcome of a disabled person's disability. They will be varied and will depend upon the individual effect.

64. Here the unfavourable treatment relied upon is dismissal. We must ask what was the employer's reason for the dismissal. We must look at who made the decision and their reason. If the reason is the '*something arising as a consequence of disability'* then the first part of the section is made out.

65. Section 15 does not give the disabled employee in these circumstances complete protection: the employer can avoid liability if it can 'objectively justify' the treatment.

66. First, it must identify that the treatment was in order to pursue a legitimate aim: a real, objective consideration or real need on the part of the business.

67. Second, it must satisfy us that treatment was a proportionate means of achieving this aim: *both* an 'appropriate means' of achieving it and 'reasonably necessary' (not the only possible way but we should ask whether lesser measures could have achieved the same aim). This requires an objective balancing exercise between the discriminatory

effect of the treatment and the importance of the aim. This is an objective test and does not matter if employer did not have these reasons in its mind at the time.

68. We have had regard to the Code of Practice para 5.21: '*if an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified*.'

Failure to make adjustments

69. It is not in dispute that the Respondent was under a duty to make reasonable adjustments. This arises

> *'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. …'* (section 20, EqA)

70. The Tribunal must first identify the comparative substantial disadvantage.

71. It must then consider how the proposed adjustment would have addressed the substantial disadvantage in question.

72. As to the degree of likelihood that the disadvantage is avoided, Counsel sensibly summarised the principles without express reference to the case law behind them[1]. It is well established that this is an objective question, the focus being on the practical result (not on the correctness of employer's reasoning for refusing the adjustment). Nor does the test require a definitive answer. What must be shown is '*a prospect*' (according to the EAT in Foster and in Collingwood) or '*a real prospect*' (according to the EAT in O'Sullivan). A mere opportunity to avoid the disadvantage is insufficient (Romec).

73. The Tribunal considers a wide variety of factors in deciding reasonableness: the size and resources of the employer; what proposed adjustments might cost; the availability of finance or other help in making the adjustment; the logistics of making the adjustment; the nature of the role; the effect of the adjustment on the workload of other staff; the other impacts of the adjustment; the extent it is practical to make (see 7.29 of the Code).

74. Failure to consult about adjustments does not itself constitute a breach of the EqA, although obviously it is good practice to do so.

75. We also note that just because the employer has already made adjustments does not mean that there may be others that might have to be made.

Unfair Dismissal

[1] Romec Limited v Rudham (UKEAT/0069/07Judge Clark QC); Cumbria Probation Board v Collingwood (UKEAT/0079/08/JOJ) (Judge McMullen QC); Leeds Teaching Hospital NHS Trust v Foster (UKEAT/0552/10/JOJ Keith J) and Royal Bank of Scotland v Ashton (UKEAT/0542/09, 0306/10/LA, Langstaff J) and *London Underground v O'Sullivan UKEAT/0355/13*. The earlier cases were concerned with the earlier statutory wording in which the adjustment had to 'prevent' the disadvantage. The wording is now 'avoid' but the principles are the same.]

76. Section 98(4) of the ERA provides:

> *'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.'*

77. The language of the statute is paramount. The test is whether the employer acted reasonably in treating the reason as a sufficient reason for dismissal.

78. Whether an employer acted reasonably was considered in Spencer and Paragon Wallpapers Ltd [1977] ICR 301 EAT, which held that, in the case of a long term sickness absence, it is essential for the Tribunal to consider whether the employer can be expected to wait any longer for the employee to return. There are a number of relevant factors including: whether other staff available to do the work; the likely length of the absence; the cost of continuing to employ; the size of the organisation; and the unsatisfactory situation of having an employee on very lengthy sickness absence.

79. Procedurally in sickness dismissals, section 98(4) reasonableness generally requires: consultation with the employee; medical investigation including of the prognosis; and consideration of other options including alternative employment. Sainsbury's Supermarkets v Hitt [2003] ICR 111 reminds us that the test is whether the employer's procedure was one a reasonable employer could have adopted bearing in mind there will be a range of reasonable procedures, some employers adopting a more exacting approach than others. We must not apply our own view of what we would have done but consider whether the Respondent's procedure fell within a reasonable range of procedures.

80. Where it is relevant the Tribunal may consider the ACAS Code on Discipline at work. The ACAS Code does not apply to ill health dismissals. Nevertheless we consider that reasonableness under section 98(4) would generally require there to be no unreasonable delay in the process, especially in providing an appeal given how important a final decision about dismissal is to any employee's future.

Submissions

81. Mr Adjei made adept and skillful submissions. His cross-examination was efficient and respectful and put the Claimant under no greater stress than the litigation already demanded. The Claimant also conducted her case calmly, focusing on her important points. We recognise how difficult it is to be a representative in one's own cause.

82. We refer to the Respondent's written submissions. The Claimant made submissions akin to those that she had made during her appeal.

Application of law and facts to issues

83. We decide the claims in the order that appears most logical to us, starting with reasonable adjustments.

Reasonable Adjustments: sections 20 and 21 EqA

Issue 7.1 Did the Respondent apply the following provision, criterion and/or practice ('the provision') generally, namely the requirement to (a) maintain satisfactory levels of attendance; and/or (b) carry out the full range of contracted duties?

84. The Respondent accepts that generally it applied the above provisions.

Issue 7.2 If so, did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

85. We find that both provisions put the Claimant at a substantial disadvantage because:

85.1 the continuing and significant symptoms arising from her disabilities meant she could not physically do the major part of her job; she could not therefore attend work; and therefore did not maintain a satisfactory level of attendance. This put her at a greater risk of dismissal than a non-disabled person would have been put at because (we risk stating the obvious here) a non-disabled person would have been more likely to maintain a good level of attendance and would have been more likely to be able to do the physical aspects of the job; and

85.2 the options for alternative work in the redeployment pool were fewer than that would have been available to a non-disabled person because she could not do physical work. The pool out of which suitable work could be found within the Respondent was narrowed to sedentary work.

Issue 7.3 If so, did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant relies on the following steps which she says would have been reasonable: (a) not dismissing her for her sickness absence levels; (b) modifying her duties by removing the physical parts of the job such as moving tables and chairs; (c) redeploying her to another job; (d) extending the redeployment period beyond 12 weeks; and/or (e) allowing her more time to recover.

Issue 7.4 The Respondent's case is that there were no steps that it was reasonable to take to avoid the disadvantage.

86. *Issue 7.3 (a) not dismissing her for her sickness absence levels*. We find it was not a reasonable adjustment not to dismiss from the role of Lead Dining Assistant. There had been a very lengthy period when prognosis and condition were kept under review by the Respondent. It had always extended time where there appeared to be hope of recovery within some foreseeable time. In so doing it had already adjusted its review procedure and extended time. Miss Selby in particular had been careful to do this.

87. By the time of Mr Hales' decision in January 2016 the prognosis was uncertain, the significant symptoms of pain and restrictions in movement and mobility had not improved and were such that the Claimant unfit for work as a Lead Dining Assistant and the medics could not advise any suitable adjustments to that work. Agency staff were being used to cover and, while we do not know how expensive this was, it was an on-going expense. Moreover, it took up more supervisory time to manage agency staff. For

all of these reasons, not dismissing her from her then role was not an adjustment that was reasonable to make: there was no real prospect of recovering in the foreseeable future to do the job and absence had an impact.

88. *Issue 7.3 (b) modifying her duties by removing the physical parts of the job such as moving tables and chairs* It follows from our findings of fact about what the Claimant was capable of doing at the time of dismissal that merely removing the duties of moving tables and chairs would not have been sufficient to enable the Claimant to do the role of Lead Dining Assistant. She would have been unable to do the other physical parts of her job because of the significant limitations in mobility and movement we have described. This step therefore would not have avoided the disadvantage of not being able to do the major part of the job.

89. Nor would it have been a reasonable step to take to leave her to do only the administrative/supervisory duties because they accounted for, at most, only about 15% of her work. The rota shows that each member of staff had a physical job to do at each stage in the shift, so it would not have been possible to share them out somehow so as to avoid giving the claimant any physical work.

90. *Issue 7.3 (c) redeploying her to another job.* This was not a reasonable step during the redeployment period because there were no other suitable jobs to redeploy her into at the time of her dismissal. She did not herself identify the 3 vacancies that came up in the redeployment period as being suitable nor did she make that argument before us.

91. We have considered whether it was a failure to make a reasonable adjustment not to offer the Claimant assistance in filling in the application form for the receptionist role. We were all concerned that the Respondent had adopted too rigid an approach to its failure to support her in this application i.e because it was a grade 5 role. If it had been a grade lower, Miss Sylvain would have been able to help the Claimant tailor her profile to the job.

92. We have decided in this case, however, that this was not a failure to make a reasonable adjustment because:

92.1 the first substantial disadvantage is that she was at risk dismissal. Helping her with the application form would in theory have assisted to avoid this disadvantage however there was no prospect of it doing so in practice: the job was at a much higher grade; that the Claimant had no recent experience of such work; and most importantly she herself did not fill in the application form in time when her disability did not make it difficult for her to do so, all of which means that in our judgment she had no prospect of securing the position and, applying the legal principles we set out above, there was no prospect of avoiding the disadvantage by this proposed adjustment and it was not a reasonable one to make.

92.2 the second substantial disadvantage was that she had reduced options in redeployment pool in comparison with disabled persons. For the same reasons as above and the fact that this was not a job within the redeployment pool in our judgment there was no prospect of the Claimant securing this position and therefore it was not a reasonable adjustment to make.

93. That is not to say that in the future the Respondent should not adopt a more flexible approach to the support it offers disabled employees in the redeployment period. Miss Sylvain did not appear to have been trained to appreciate that the Respondent might have a positive obligations to adjust the process to assist a disabled redeployee. This is

not a criticism of Miss Sylvain personally but of the Respondent's training of her.

Issue 7.3 (d) extending the redeployment period

94. While it is an objective test for us to consider, we observe in passing that Ms Bingham's reasons for not extending the redeployment period are illogical: the Claimant was indeed unfit for her current work but there was medical evidence which advised sedentary work. Thus a further period of redeployment was not pointless. As we have found, HR could not predict what vacancies might arise in the next few months. All they could predict to was what was imminently in the pipeline.

95. In our judgment it would have been a reasonable adjustment to double the redeployment period in the Claimant's case. In other words give her a further 12 weeks in the pool. We set out our reasoning below:

96. One of the substantial disadvantages was that she was at risk of dismissal because she could no longer do her job; the other was that the pool of potential alternative work was reduced in comparison to non-disabled persons by her only being able to do sedentary work.

97. A doubling of the redeployment period would have avoided (or at least provided a real prospect of avoiding) the disadvantage of being in an effectively smaller pool for alternative work by giving twice the time for sedentary vacancies to arise. We are reinforced in this view because the Respondent's own procedure anticipates this and allows expressly for an extension of time in that case (181). In addition the redeployment procedure itself is a supported process: if a suitable job arose, the Claimant's application is given priority.

98. The other disadvantage was the risk of dismissal. We do not know the vacancies that came up in the period, so we cannot assess for sure whether extending the time would have led to redeployment. We do consider, however, that it gave a more realistic prospect of doing so by giving more time for suitable vacancies to arise. We therefore consider that the real prospect test is satisfied.

99. Finally, we have considered the other factors that go to whether the extension of the redeployment period was reasonable: it did not have an impact on the efficiency of the service to keep the Claimant in the redeployment pool because the Respondent could have recruited to her old position. It had made the decision, reasonably, that she could not do her old job. Nor is the additional work that Miss Sylvain would have been put to, unreasonable in the circumstances, given that it was part of her role in any event.

Issue 7.3 (e) not r to allow more time to recover

100. We do not consider this would have been a reasonable step because it is unlikely to have assisted the Claimant to get back to her old job nor would it have widened the pool of possible suitable jobs: the Respondent already had given a lot of time to recover, where prognoses were hopeful; at dismissal the prognosis was too uncertain. (Hindsight also enables us to say that more time would not in fact have assisted the Claimant as her symptoms were equally poor in October (GP report) and now (impact statement).)

Section 15 EqA: Discrimination arising in consequence of disability

Issues 6.1 and 6.2 Did the Respondent dismiss the Claimant because of something arising in consequence of the Claimant's disability? The 'somethings' relied upon are: (a) her period of sickness absence; and/or (b) her need to use crutches; and/or (c) her inability to undertake the full range of her duties.

101. The Respondent admits that it dismissed the Claimant because of her period of

sickness absence and admits that this was a 'something arising in consequence' of her disability.

102. It is clear to us that the Claimant was dismissed because she could not undertake the full range of her duties in tandem with its conclusions that there were no adjustments to those duties which could reasonably be made. This too is a 'something' that arises in consequence of the disability.

103. We do not consider that it was the use of crutches alone that led the Claimant to be dismissed, though they were relevant to the extent that they were part of the picture of her significant mobility problems.

Issue 6.3 If so, does the Respondent show that the dismissal was a proportionate means of achieving a legitimate aim? The Respondent relies on the aim of providing efficient service.

104. We accept that providing an efficient service is a real need of the Respondent. This is not just about money but running the kitchen efficiently with permanent staff. Miss Selby took more time to supervise agency staff, which cost more.

105. In future cases the Respondent may need to provide better evidence of the costs or other impact in order to succeed in an objective justification defence.

106. The Respondent then has to show that dismissal was an appropriate and reasonably necessary way of achieving the aim.

107. In every respect except one we have found the dismissal to have been justified as an appropriate response to the lengthy absence and fact Claimant could not do her job. The employer had waited long enough to see if she recovered and it needed to replace her to run an efficient service.

108. The difficulty here for the Respondent is that we have found it ought to have extended the redeployment period before dismissing. Would this extension have been a lesser measure which achieved the legitimate need identified of providing an efficient service? We think it would have because it did not stop recruitment to the Claimant's old job.

109. We therefore find that the s15 claim is successful to the extent that it should not have dismissed the Claimant until the end of extended redeployment period (if it had been unsuccessful).

Section 13 EqA: Direct discrimination because of disability

Issue 5.1 In dismissing her, did the Respondent treat the Claimant less favourably than it would have treated a hypothetical comparator?

110. The Claimant has not really pursued this claim. She was not able to say to us that the Respondent would have treated someone with a similar level of absence but no disability differently. We do not think it would have done. It is clear to us that the Respondent dismissed in order to permanently recruit into the position and it would have done this whether or not the member of staff was disabled. We therefore dismiss the direct discrimination claim.

Unfair Dismissal

Issue 3.1: It is clear that the Claimant was dismissed for capability, which is a potentially fair reason for dismissal within section 98(2) of the ERA. We refer to the reasoning in the Hales and Bingham outcome letters, which we accept. The Claimant was not capable of doing the job.

Issue 3.2. *Was the dismissal fair in all the circumstances of the case?*

111. Did the Respondent act reasonably in treating capability as sufficient for the dismissal?

112. First, in our judgment the employer here could not be reasonably expected to wait any longer for the employee to return to her old job. There were no other staff available to do the work; the prognosis for the future was uncertain; there was an ongoing agency worker cost and albeit that the Respondent is a large organisation it had already allowed a very lengthy sickness absence.

113. Moreover it was reasonable for the Respondent to reject the Claimant's argument that she could do all aspects of the job except for moving the tables and chairs:

113.1 The OH advice and medical certificates went in entirely the opposite direction.

113.2 The rota illustrated that there was other physical work to be done, which the Claimant would have struggled with, given the medical advice about her pain and difficulty with mobility.

113.3 The Claimant herself said that without her crutch her balance was a problem.

114. Procedurally there was reasonable consultation with the employee – 2 final review meetings with Mr Hales, a further meeting with Ms Bingham and an eventual appeal. There was also a thorough medical investigation including of the prognosis with 9 referrals to OH, and an opportunity by the time of the appeal for a full GP report.

115. There are two aspects of the procedure we are concerned about as against test of reasonableness.

116. First, the Ms Bingham's perverse and illogical decision not to extend the redeployment period as the Respondent's procedure allowed (181):

116.1 The Claimant was exactly the kind of person envisaged by this procedure as likely to benefit from an extension to it: where '*the nature of your impairment significantly restricts the type of work for which you are suitable*'.

116.2 Ms Bingham's reasons were perverse: the fit note related to the current role; and HR could not predict future vacancies.

116.3 There was no impact on the service by extending the period except as to Miss Sylvain's work and that was a major part of her job.

116.4 Therefore, applying the reasonable employer test, we find before the decision to dismiss, all reasonable employers would have extended the redeployment period, as envisaged by the procedure, in order to make it more effective.

117. Second, the delay in appeal. There was about 2.5 months of delay beyond the already generous 3 months in the procedure. Therefore there was a delay 2.5 months beyond what would normally be regarded as reasonable, nearly double the time.

117.1 the reasons for the delay are genuine – the crisis, the number of appeals and councillors;

117.2 while those reasons explain the delay in our view they do not excuse it. A reasonable employer would have found an alternative way to offer an

appeal earlier. Just because there are reasons for something doesn't necessarily make it reasonable.

117.3 Mr Adjei argues that one of the grounds of appeal was asking for more time therefore as it turns out the delay was in the Claimant's favour. This is a clever argument but one which we do not accept. Pending the appeal she was left in limbo about her future. It was obviously very important to her to have the appeal heard. Asking for more time was a substantive ground of appeal. The delay did not do that, it simple kept her in limbo.

117.4 We therefore find that the delay falls outside the range of reasonable procedures. It was outside the Respondent's own procedure and any sensible timescale for the review of a decision. It left the Claimant in a stressful period of 'uncertainty'. No reasonable employer would have considered 5.5 months a reasonable time for appeal, especially where there were few facts in dispute.

118. We therefore find that the unfair dismissal claim to be well-founded.

Remedy Issues

119. After giving its oral decision on liability, the Tribunal identified the issues for remedy as follows.

119.1 What the basic award calculation was: we encouraged the parties to agree a gross weekly pay figure and provide us with the relevant multiplier;

119.2 Whether the Tribunal should make an order that the Respondent re-engage the Claimant;

119.3 Whether there should be any award for compensation to reflect the chance that an earlier appeal would have been successful; and/or the likelihood of the Claimant securing a role in the extended redeployment period;

119.4 Whether there should be an award to compensate for injury to feelings; and if so whether it should award interest and if so at what rate.

119.5 Whether the Tribunal should make any recommendations;

119.6 Whether the Tribunal should consider an ACAS uplift.

Remedy Findings of Fact

120. Having heard the evidence of Ms Southgate, Senior People Resourcing Adviser, and further oral evidence from the Claimant on the relevant issues and reading the documents referred to us, we make the following findings of fact:

121. Our findings of fact in relation to an extended redeployment process. The Claimant would have been given help with her profile, if a suitable vacancy came up an interview prior to internal and external advertisements. She would not have been slotted in to any potentially suitable post but more leeway would have been given with aim of the redeployee being bedded in to the new rule over 6-8 weeks.

122. In relation to the person specification for any role. Ms Southgate and her redeployment team were looking for a 75% fit with the essential requirements in order to recommend a redeployee. Some of the essential requirements for a role were more important than others.

123. Of the list of jobs that would have been available in the extended redeployment period (R5) The Revenue Support Administrative Assistant ('Revenue Support') was the only vacancy that the Claimant indicated she may have been suitable for.

124. Revenue Support is a sedentary role. It requires the post-holder to use a computer while taking and answering telephone queries from members of the public about Council Tax. The post-holder is required to input information via a keyboard at the same time and using the telephone and give accurate responses to those queries.

125. We accept Ms Southgate's evidence that keyboard speed was a very important requirement for this role, that computer literacy was important and, although knowledge of council tax, not vital initially, it was desirable and the successful candidate would have was expected to learn this information quickly.

126. The role was at Grade 4, 2.5 grades higher than the grade Claimant had worked at before.

127. The Claimant has basic computer literacy from an NVQ she took some time ago. On her own admission her computer literacy is 'rusty'. She cannot touch type and on her own admission her typing is not fast. She does not know about Council Tax issues but states, and we accept, she was willing to learn.

128. Ms Southgate also gave evidence to the Tribunal about current job vacancies (R2 287). Of those, the Claimant identified a reception job, grade 4, as one she might be suitable for. The Claimant admitted, however, in her evidence under oath that if she had seen the role advertised she would not have applied for it. It was a full time job. The Claimant was diffident about doing full time hours. Nor is she experienced in this work.

129. This reception role was not completely sedentary. It is responsible for the operation of the Brady and Kobi Nazrul Centres, two buildings where a large variety of courses and activities take place. The work involves moving around them to look after groups who were hiring rooms.

130. The Claimant told us about her feelings at having been discriminated against. We asked her to do her best to tell us how not having the redeployment period extended had felt. From her evidence, plainly the most significant aspect of the Claimant's hurt feelings relates to the loss her job. The day she was told was very upsetting for her. She felt that it was not right. Her disabilities were not her fault. The Claimant had also asked for redeployment to be extended and her employer had refused. This, too, formed part of her upset but, we find from her evidence, a relatively minor part of the whole. In her evidence to us the Claimant also referred to how her disabilities laid her low. This is entirely understandable. By early September 2016 the Claimant was looking for other work.

131. The parties agreed a gross monthly wage of £639.99 making a gross weekly wage of £147.69.

Law

Unfair dismissal

132. The Claimant did not ask for reinstatement. Section 116 of the ERA provides that the Tribunal must consider whether to make an order for re-engagement before compensation. And it must consider whether it is practicable to do so.

133. If an order for re-engagement is not made, then the Tribunal will consider whether there is any compensation to be made and section 123 ERA provides the amount of compensation is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the complainant in consequence of the dismissal so far as that

loss is attributable to action taken by the employer.

Discrimination

134. Where the Tribunal has found there to be an act of discrimination it can award compensation for any injury to feelings ('ITF') caused by that act.

134.1 Awards for ITF are compensatory not punitive;

134.2 The ITF for which the award is made must be attributable only to the discriminatory act.

134.3 Awards that are too low would diminish the respect for the policy underlying the Equality Act. Excessive awards have the same effect.

134.4 The severity of the treatment may be a factor going to the extent of the Claimant's ITF. The period of time may also be a factor.

134.5 It is helpful to consider the 'band' into which injury falls. We are careful to note that while the Vento bands are by references to the act complained of, we must compensate for the feelings that are hurt.

134.6 In 2009 Da'Bell the EAT found the lower ITF band to be £600-£6000. (We are to await guidance before uprating for further inflation unless there is cogent evidence before the tribunal of a rate of change in the value of money.)

134.7 We have borne in mind the value in everyday life of the sum we award.

134.8 In De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 the Court of Appeal decided that there should be a 10% uplift in the awards for ITF.

135. In discrimination cases the principle of compensation is that the Tribunal should consider what would have happened but for the discrimination.

136. In an appropriate case, the Tribunal can make a recommendation that within a specified period the Respondent take steps for the purpose of obviating or reducing the adverse effect upon the Claimant of any matter to which the proceedings relates.

ACAS Uplift

137. The ACAS Code does not apply to ill-health dismissals, Holmes v Qinitec [2016] and therefore we cannot go on to consider whether there should be an uplift of compensation in this case.

Application of facts and law to remedy issues

Basic Award

138. The basic award is 26 x £147.69 = **£3839.94**

139. The Respondent is ordered to pay the basic award of £3839.94 to the Claimant.

Re-engagement

140. Even with training or adjustments we find the job of receptionist currently available with the Respondent was not suitable to the Claimant: the hours, the grade, her own view of whether she would have applied for it, the lack of relevant experience, and the moving around required. It is not therefore reasonable practicable to make a re-engagement order in this case.

Compensation

141. Under the ERA: In our judgment there was no chance of an earlier appeal hearing resulting in a different outcome for the Claimant. Mr Golds and his members looked at the matter even-handedly and carefully and reached a reasonable conclusion in all but the decision not to allow an extension of the redeployment period (and it follows from our findings below that an extension of this period would not have made any difference).

142. Under the Equality Act: we consider what would have happened in the absence of discrimination. Thus we ask, what were the chances that, after a redeployment period extended by 12 weeks the Claimant would have been successfully redeployed?

143. We find that while the Claimant would have received sufficient help probably to get an interview for the Revenue Support role, her admitted lack of touch typing skill; her lack of typing speed and her rusty and basic computer literacy meant she definitely would not have been regarded as sufficiently suitable for the job to be appointed. These, in the judgment of the Tribunal, are not skills she could have developed in the bedding-in time along with learning about Council Tax. That would have been asking too much of the Claimant. In our judgment the Claimant had no chance of being recruited into the Revenue Support role in an extended redeployment period: the skills gap was too wide.

144. It follows that there is no compensation for loss of earnings payable to the Claimant in respect of the discrimination we have found: her sickness period had expired; and there is no chance that she would have been redeployed. Even in the absence of discrimination, she still would have lost her job and not been reemployed.

Injury to Feelings and Interest

145. We find that the act of discrimination we have found did contribute to a minor extent the Claimant's injured feelings. We find that she asked for an extension to the redeployment period and was refused. This will have hurt her feelings.

146. But, in our judgment, the vast majority of her hurt feelings is attributable to the dismissal decision itself, the substance of which we have not found to be discriminatory. Furthermore, the fact of the Claimant's worsening health and the catalogue of health difficulties she found herself in, also plainly caused her to be depressed and upset about her situation. We cannot compensate her for these feelings either.

147. We know she had recovered sufficiently within 5 months to start her work search.

148. While an award for the whole of her hurt feelings relating to the dismissal might have been at the high end of the low Vento band or the low end of the middle band, the element of injured feelings concerning the discriminatory act of not extending the redeployment period is in our judgment much smaller. We put it at the low end of the low Vento band. Any act of discrimination is a serious matter, but we remind ourselves that an award of IFT is not about the act but about the effect upon the Claimant. We must compensate for the hurt feelings we have heard about. We consider £1000 (prior to the 10% Castle uplift) does so.

149. We therefore award **£1100** in injury to feelings to account for the 10% uplift.

150. We do not think there is any reason why the interest on award Order should not be followed in this case. It runs at 8% per annum from the date of discrimination. That is 1 year and 94 days i.e. 10.06% in total. We therefore award interest of (£1100 x 10.06%) = **£110.66**

ACAS Uplift

151. It follows from our statement of the current law that there can be no uplift on the award in this case.

Recommendation

152. There is no recommendation we can now make that would obviate the effect of the discrimination upon the Claimant.

153. Had the statutory scope for recommendations been wider, we would have made a recommendation that the Respondent provide training to the relevant staff on the positive obligations the Equality Act sometimes requires employers to make for disabled employees, including adjusting its redeployment process to assist them.

154. Recoupment does not apply.

Employment Judge Moor

27 July 2017