EMPLOYMENT TRIBUNALS

Claimant: Mrs I Shah

Respondent: TIAA Ltd

Heard at: London Central **On:** 10, 11, 12, 13 & 14 September 2018

Before: Employment Judge H Grewal
Mr D Carter and Ms T Breslin

Representation

Claimant: Ms E Banton, Counsel

Respondent: Ms K Anderson, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of unfair dismissal is not well-founded;

2 The complaints of disability discrimination are not well-founded; and

3 The complaints of age discrimination are not well-founded.

REASONS

1 In a claim form presented on 15 September 2017 the Claimant complained of unfair dismissal and age and disability discrimination.

The issues

2 It was agreed at a preliminary hearing on 4 March 2018 and at the outset of the hearing before us that the issues to be determined were as follows.

Disability Discrimination

2.1 It was not in dispute that the Claimant was disabled at the material time because she had back problems.

Direct Discrimination

2.2 Whether the Respondent dismissed the Claimant because she was disabled.

Discrimination arising from disability

2.3 Whether the Respondent treated the Claimant unfavourably by:

a. Dismissing her;
b. Requiring her to reach unrealistic chargeable targets/billable hours;
c. Subjecting her to an unfair capability process;
d. Failing to conduct a fair grievance procedure.

2.4 If it did in respect of any of the above, whether it did so because of the Claimant's inability to travel extensively and/or her reduced chargeability/billable hours.

2.5 Whether the Claimant was unable to travel extensively and unable to achieve the chargeability/billable hours that were expected because of her disability.

2.6 If so, whether the Respondent's treatment of the Claimant was a proportionate means of achieving a legitimate aim.

Reasonable adjustments

2.7 Whether the Respondent required the Claimant to travel for work and to meet unrealistic chargeability/ billable hours targets.

2.8 Whether that put the Claimant at a substantial disadvantage in comparison with persons who were not disabled.

2.9 If it did, whether the Respondent took such steps as were reasonable to alleviate the disadvantage. The Claimant contended that it should have made the following adjustments:

a. Provided her with an ergonomic chair;
b. Allowed her to continue working mainly from home;
c. Limited her travel;
d. Reduced her chargeability/billable hours target;
e. Transferred her to a suitable alternative role.

Disability-related harassment

2.10 Whether the Respondent harassed the Claimant by failing to do the acts set out at paragraph 2.9 a-d and by doing the acts at 2.3 a and d (above) and by dismissing her.

Indirect Disability Discrimination

2.11 Whether the Respondent:

a. Required the Claimant to travel to Norfolk, Kent or Wales;
b. Provided her with inadequate support;
c. Required the Claimant to reach unrealistic chargeable/billable hours targets.

2.12 Whether those requirements put disabled persons at a particular disadvantage;

2.13 Whether they put the Claimant at that disadvantage;

2.14 If they did, whether the Respondent had shown that it was a proportionate means of achieving a legitimate aim.

Direct Age Discrimination

2.15 Whether the Respondent dismissed the Claimant in the way that it did because of her age.

Indirect Age Discrimination

2.16 Whether the Respondent applied a PCP of dismissing for other reasons when the real reason was redundancy.

2.17 If it did, whether that PCP put persons who were aged 58 or over at a particular disadvantage in comparison with younger people.

2.18 Whether it put the Claimant at that disadvantage.

2.19 If it did, whether the Respondent had shown that it was a proportionate means of achieving a legitimate aim.

Unfair Dismissal

2.20 What was the reason for the dismissal?

2.21 Whether the dismissal was fair.

The Law

3 The onus is on the employer to prove the principal reason for the dismissal and that it is a potentially fair reason. A reason relating to the capability of the employee for performing work of the kind which he was employed by the employer to do is a

potentially fair reason (section 98(1) and (2) of the Employment Rights act 1996 ("ERA 1996")).

4 Section 98(4) ERA 1996 provides that once an employer has established a potentially fair reason for the dismissal, the determination of whether the dismissal is fair or unfair 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 shall be determined in accordance with equity and the substantial merits of the case.

5 Section 13(1) of the Equality Act 2010 provides that a person (A) discriminates another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others. Age and disability are protected characteristics. In comparing the treatment of B with the treatment of others, there must be no material difference between the circumstances relating to each case (section 23(1)).

6 Section 15(1) of the Equality Act 2010 provides that a person (A) discriminates a disabled person (B) if A treats B less favourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. That section, however, does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability.

7 Section 19 of the Equality Act 2010 provides that indirect discrimination takes place if –

a. A person (A) applies to B and to others with whom B does not share the protected characteristic a provision, criterion or practice ("PCP");
b. It puts persons with whom B does share the protected characteristic at a particular disadvantage when compared with persons with whom B does not share it;
c. It puts B at that disadvantage; and
d. A cannot show it to be a proportionate means of achieving a legitimate aim.

8 Where a provision, criterion or practice ("PCP") 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, A is required to take such steps as it is reasonable to have to take to avoid the disadvantage (section 20(3) Equality Act 2010). A discriminates against a disabled person if A fails to comply with the duty to make reasonable adjustments in relation to that person.

9 A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, that a disabled person has a disability and is likely to be placed at the disadvantage referred to in Section 20 (paragraph 20 in Schedule 8 Equality Act 2010). Similar provisions are to be found in section 4A DDA 1995.

10 Section 26(1) Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has the effect referred to in subsection 1, the Tribunal must take into account the

perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect (section26(4)).

11 Section 136(2) of the Equality Act 2010 provides that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred unless A shows that he did not contravene the provision.

12 Section 123(1) of the Equality Act 2010 provides that a complaint of disability discrimination may not be brought after the end of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal considers just and equitable. Conduct extending over a period is to be treated as done at the end of the period (section 123(3)(a)) and failure to do something is to be treated as occurring when the person in question decided on (section 123(3)(b)). In the absence of evidence to the contrary, a person (A) is to be taken to decide on failure to do something when a does an act inconsistent with it or, if a does no inconsistent act, on the expiry of the period in which A might reasonable have been expected to do it (section 123(4)).

The Evidence

13 The Claimant and Stephen Smith (National Officer, Managers in Partnership) gave evidence in support the Claimant. The following witnesses gave evidence on behalf of the Respondent – Kevin Limm (Director), Deborah Croad (Head of HR) and Andrew Fife (Regional Managing Director). We had before us a lever-arch file of 500 pages. Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of Fact

14 The Claimant was born on 14 September 1958. She commenced employment with the NHS on 20 June 1983. From January 2001 she worked as Senior Audit Manager. She was 58 years old when she was dismissed on 20 May 2017.

15 Over the years there were a number of TUPE transfers of the Claimant's employment. In 2013 she was working for Parkhill Audit Agency. Following a restructure in August 2013 the Claimant was offered and accepted the position of Senior Manager - Special Projects. This role was different from the Claimant's previous role and she was unhappy in that role because she felt that it was not clearly defined.

16 On 1 October 2013 the Claimant's employment and that of Kevin Limm transferred from Parkhill to the Respondent. The Claimant continued to be unhappy in her role and to raise issues about it.

17 At a meeting on 29 May 2015 Paul Grady (Director) told the Claimant that he would seek approval from Senior Management to see whether she could revert to her original Senior Audit Manager role. The Claimant indicated that she wanted the main focus to be London clients (mainly Imperial Healthcare NHS Trust and North West London NHS Trust), a chargeable target of 100-120 days and to be permitted to work from home when possible.

18 On 29 July 2015 the Respondent sent the Claimant a letter confirming that her contract would be amended from 1 August 2015 to show her job title as Senior Audit Manager. The Claimant was asked to sign the letter to indicate acceptance of the amended terms and conditions. Enclosed with the letter was a job description and person specification for the Senior Audit Manager role. In the role the Claimant was expected to manage, on a day to day basis, clients allocated to her by the Audit Director and Audit staff within the team and other staff as required for audit assignments. The job description also provided,

> "*The post holder will be expected to work anywhere within the geographical areas covered by the Company."*

19 The Claimant did not sign the letter and expressed concern about the mobility clause. Mr Grady said that it was unlikely to cause any difficulty in practice as the Respondent had at that time an expanded client base in London and there would, therefore, be more than enough work in close proximity to the Claimant's home and office base. The Claimant lived in North Wembley and her office base was Hammersmith Hospital.

20 The Respondent sets chargeable days' targets for all client facing employees at the beginning of the year. The targets are set by job role and are calculated on the basis of covering the cost of employing the individual in that role. The salary for the Senior Audit Manager role is £53,367 gross per annum. The role of Senior Audit Manager had a target of 150 chargeable days per year. The manager would meet that target by discharging his/her client management responsibility and staff management responsibility. A Senior Auditor Manager was expected to manage two to four clients depending on the size and scale of the clients and total days on the contract from the client and to have between one and three members of staff reporting to him/her. Some of the audit could be undertaken remotely but a large part of it needed to be undertaken on site working together with the client.

21 The Claimant started working in the Senior Audit Manager role in August 2015. She was responsible for two clients – Imperial Healthcare NHS Trust and London NW NHS Trust. In 2016-2017 the Respondent had 650 days on the Imperial contract and 200-210 days on the London NW contract. The bulk of the Claimant's working week was spent working on the Imperial contract.

22 In that role the Claimant worked mainly from home and travelled to the client sites only when it was necessary for meetings. Mr Lazenby, the Audit Director and her line manager at the time, understood the main reason for that to be that she had some caring responsibilities for an elderly relative.

23 On 3 May 2016 Ian Sharp, Regional Managing Director, Corporate Resources, wrote to the Claimant that she had not reached her chargeable target for 2015-2016 and because the shortfall was large (about 50%), he asked her to provide him with reasons as to why she had not reached the target and to explain how she would ensure that she achieved her target for 2016-2017. The Claimant provided a long list of reasons on 5 May 2016. These included that Imperial was a very demanding client, there was a mismatch between client expectations and staff abilities, the client drip fed information, old laptops, etc. There was no reference to her health having had any impact on her ability to meet her targets. Mr Sharp informed her that he

would discuss the team's responses with Mr Grady. The Claimant was not the only employee who had not met her chargeable targets, although the shortfall in her case was more significant.

24 On 20 June 2016 the Claimant sent Messrs Lazenby and Grady an email that she would not be able to attend a meeting that day. She said that she had had severe back pain over the weekend which had restricted her movement and that the problem had been ongoing for some time. She attributed the pain to the dining chair on which she sat while working from home. She asked whether a referral could be made to assess the use of the chair.

25 Mr Lazenby spoke to the Claimant and said that as her home environment was unsuited to work she should come into the office (Hammersmith Hospital) more frequently, at least three times a week. The fact that he did that supports our finding that the Claimant was working mainly from home. He said that there was a support chair in that office which she could use. The Claimant's evidence was that he told her that the Respondent would not fund the cost of a support chair. We did not accept that evidence. The Claimant complained to Stephen Smith about this on 24 June and made no reference to Mr Lazenby having made that comment. It is also inconsistent with what Mr Lazenby told HR he and Paul Grady had decided.

26 On the same day Mr Lazenby discussed the matter with Paul Grady and updated HR on the situation. He told HR that the Claimant had historically effectively worked from home for some time. He said that he and Mr Grady had decided that they would like to undertake an assessment of the suitability of her work environment at home and in the office, an occupational health referral and a list of staff reporting to him with their Bradford Factor scores.

27 Mr Lazenby told all the members of his team, including the Claimant, that his managers had requested that all staff work at the office a minimum of 3-4 days a week for standard office hours and that they indicate on their calendars where they are working.

28 On 23 June the Claimant sent Mr Lazenby a fitness for work note from her doctor. It said that she was unfit to work until 30 June 2016 because of low back pain. The doctor advised that she had had low back pain mainly to the right side on and off for six months and that it was "*mainly noted during working hours when sitting on chair".* He recommended that an occupational health assessment should be carried out. Mr Lazenby asked the Claimant whether he could pass that note on to HR and the Claimant was initially reluctant. Mr Lazenby told her that if she wanted the Respondent to get a chair or make allowances for her not being in the office, they would require the note.

29 On 1 August Ms Croad from HR sent Mr Lazenby a draft referral to Occupational Health and informed him that she had arranged for a DSE assessment to be undertaken at the Hammersmith office and the Claimant's home. She asked him to seek the Claimant's approval for both of them. The Claimant was on annual leave until the middle of August.

30 On 17 August the Claimant informed Mr Lazenby that her doctor had reassessed her health that morning and had seen an improvement in her lower back pain. She said that she was going seek advice from BUPA on the chair and purchase one

herself and, therefore, did not require a DSE assessment. She also informed him that she had injured her shoulder on holiday and that her doctor had given her a note to say that she was unfit to work for two weeks because of that. The note which was provided later said that she was unfit to work because of low back pain and right shoulder injury from 17 to 31 August 2016. That was subsequently extended to 4 September.

31 On the same day the Claimant sent Mr Lazenby her comments on the draft OH referral. Ms Croad had given the background and reasons for making the referral as follows –

> "*Indira has provided evidence that she is currently unable to travel due to severe lower back pain and indicated limitations on her ability to work from home.*
> *Management are required to be based at our offices in order to support their teams. In Indira's case this is primarily in Hammersmith and her role requires her to be able to visit clients to support chargeability as well as meet client needs.*
> *She has been allowed to work from home due to personal circumstances and ill health however this was on a temporary basis. As this has been protracted we need further advice."*

The Claimant took issue with all of that. She said that the first and third paragraphs were not true and the second one was being misinterpreted. She said that she was happy for the assessment to be arranged in the first week of September but she had major concerns about the misrepresentations.

32 On 12 September Mr Lazenby told the Claimant that it would be very difficult for the Respondent to make any reasonable adjustments without the appropriate professional advice and he repeated the offer of an Occupational Health referral and a DSE assessment. Ms Croad met with the Claimant on 15 September to discuss the same issues, and on 19 September the Claimant gave her consent for the OH referral. The referral was made on 27 September.

33 At the Claimant's mid-year appraisal on 21 October 2016 Mr Lazenby noted that the Claimant remained "*a long way short of her chargeable target"* and whilst she might in theory be able to achieve it, in reality it seemed unlikely. He acknowledged that she had mitigating factors in her involvement with the Imperial contract which was a complex plan to deliver with a constant dialogue with management required. He also noted that reasonable chargeable expectations would be agreed for the rest of the year for the Claimant and a member of her team and their performance would be monitored. However, that would not remove failure to meet the original target but would be used as a gauge of the level of improvement required.

34 The OH assessment was to take place on 15 November but did not because the Claimant arrived late and could not find the venue. It took place on 29 November 2016.

35 In a report dated 8 December 2016 the OH Physician advised that her examination had confirmed a restricted movement of the Claimant's lower spine and slow gait which would be consistent with arthritis. She recommended that a workstation assessment be carried out in the office and the Claimant's home as she

undertook "*a significant proportion of her time working from home."* She said that consideration should be given to continuing home working to minimise the need to carry heavy equipment, such as the laptop and essential documents which weighed approximately 6.5 kilograms. She said that as prolonged sitting and standing increased the pain in her lower back the necessity to travel to client sites should be reviewed and limited in order to manage her symptoms. It was highly likely that prolonged sitting in her car and/or carrying heavy bags on public transport or up and downstairs would cause additional discomfort to her back. Limitation of long distance travel would be advisable.

36 On 11 January 2017 Mr Lazenby and Ms Croad met with the Claimant to discuss the Occupational Health report and its implications. The Claimant was accompanied by her trade union representative. The Claimant said that her back condition had become more acute and that she went to the office when she needed to but preferred working from home or more locally. Ms Croad said that she had sent the Claimant the DSE guidelines and they had someone who could do the assessment both in her home and in the office. She reiterated, however, that the Claimant's home was not her place of work but the Respondent had permitted her to work from home when she needed to. The Claimant's trade union representative asked why she could not work from home, and both the Claimant and Mr Lazenby explained that some audits needed to be done face to face at client sites. Mr Lazenby gave the example of an audit of A and E and said that it would very difficult to undertake an assessment of the efficacy of A and E without being there. He said that many of the audits would be across multiple sites. In spite of that, the Claimant asked later in the meeting why she could not work from home full-time. The Claimant was asked to reflect on what she considered was long distance travel. The Claimant said that Paul Grady had previously agreed that she would work with local clients and where possible from home. Mr Lazenby said that even if there had been any such agreement, the Respondent was client dependent and if it lost Imperial and London North West, then he did not see how they could accommodate that. It was agreed that they would meet again in a few weeks to progress matters further.

37 On 20 January 2017 Ms Croad asked Christian Classen to undertake a DSE assessment at the Claimant's home and workstation.

38 A follow up meeting with the Claimant and her trade union representative took place on 9 February 2017. Mr Lazenby said that it was almost certain that the Respondent would lose Imperial as a client when the contract ended in March. That would have a knock-on effect on the Claimant's chargeability, which she was not on track to achieve even with Imperial as a client. He asked her whether she would be prepared to travel to Kent if the Respondent was able to put her up in a hotel while she was there. Ms Croad said that they would look at reasonable adjustments, but they would still expect the Claimant to perform her role. The issue was whether with reasonable adjustments she could perform her role. Mr Smith said that the Claimant could only travel 45 minutes on public transport. Mr Lazenby said that the Respondent had only one client within 45 minutes (he was not counting Imperial) and the Claimant was already on it. Mr Smith said that his approach was to avoid "*the obvious paths that this is going down*". We understood that to be a reference to dismissing the Claimant if she could only travel limited distances and the Respondent did not have clients within that limited travel area. They decided to meet again in a month's time when they would know more about what was happening with the Imperial contract.

39 On 28 February 2017 Mr Classen carried out the DSE workstation assessment at the Claimant's home and the offices at Hammersmith and Northwick Park hospitals. He found all the workstations to be suitable for the Claimant, subject to minor adjustments (removal of low shelf restricting leg space) to the home workstation. He did not find anything wrong with the chairs and did not recommend the purchase of any special chair. He said that every effort should be made to reduce travel unless it was essential and the Claimant's home and Northwick Park should be considered as her main office bases.

40 On 6 March 2017 Mr Smith wrote to Ms Croad about the Claimant's situation. The last topic covered in the letter was "*Options (viz a viz future employment, redeployment, redundancy)"*. He concluded the letter by saying that he was prepared to have a "without prejudice" discussion with a representative of the Respondent.

41 In early March Kevin Limm had a meeting with the Chief Finance Officer, Deputy Chief Finance Officer and Corporate Secretary of Imperial to discuss the potential extension of the contract for another year. At the end of the meeting, Imperial agreed to extend the contract for one year provided that three front-line members of staff on the contract were taken off the contract. A core team of six people (including Mr Limm) had been working on the contract. Imperial wanted the management team, which comprised Mr Lazenby, the Claimant and Layla Somji, to be removed from the contract. The reason that they gave was that they wanted a fresh approach to the management and some delivery aspects of the contract. Mr Limm asked them to put that in writing in an email and they agreed to do so, but never did.

42 On 13 March 2017 Mr Limm informed the attendees at a managers' meeting (which included the Claimant and Mr Lazenby) what Imperial had said about extending the contract. On 21 March 2017 he met with Layla Somji and conveyed the same information to her. They had a discussion about where Ms Somji could be deployed going forward. Mr Limm said that his division was adequately resourced but that there was a general shortage in East Anglia and over-resource in West London. There were further discussions with her as to whether she would be able to travel to East Anglia. Mr Lazenby and Ms Somji were subsequently deployed to other contracts.

43 On 20 March Mr Limm responded to Mr Smith's letter of 6 March. He said that he was Mr Lazenby's line manager and a Director of the Respondent. As Mr Smith had mentioned a potential "without prejudice" conversation taking place, he would chair the meeting with the Claimant on 22 March.

44 By the meeting of 22 March it was clear that the Claimant was not going to be working on the Imperial contract in the next financial year and, unless she was prepared to travel further afield to some other contract, she would not be able to achieve the chargeable days that someone in her role had to achieve. Mr Smith said at the outset of the meeting that they needed to look at how the Claimant could continue working productively for the organisation and, if that was not possible, what they could do to avoid the Claimant being dismissed for capability. Mr Limm said that the chargeable days was a measure of the productivity of the workforce and they needed to consider what they could do to support the Claimant whilst ensuring that she met her chargeable days. The Claimant said that her health had gotten worse. Mr Limm explained that travel and movement between sites was a requirement of the

role and asked the Claimant whether that was a barrier for her. The Claimant did not answer that directly, but a bit later said that moving forward she needed to know where she would be working as she could not travel. Mr Limm said that he could not give any guarantee where the Claimant would be working long-term because the situation was fluid because of structure changes in the NHS and contracts being won and lost. Central London with its headquarters in Victoria was raised as a possibility. The Claimant maintained that her health had deteriorated, travelling had an impact on her and that she did not want to be in a position where she was risking her health. Mr Smith said that he and the Claimant understood the position and would have a discussion and get back to the Respondent. A further meeting was arranged for 6 April 2017.

45 On 5 April 2017 Mr Smith wrote to Ms Croad. He suggested three reasonable adjustments for the Respondent to consider to enable the Claimant to manage her condition which he said was progressive. The adjustments were reduction in travel (which would reduce having to carry heavy objects), transfer to another role where travel was limited and redundancy.

46 At the meeting on 6 April Mr Smith summarised the position as being either there was a role for the Claimant which suited both her and the Respondent or a conversation would have to be had about parting ways. Both sides agreed that they could have a "protected discussion" and the meeting was adjourned for 15 minutes for them to do so. When the meeting resumed Mr Limm informed them that there was no suitable alternative role with reduced travel and that it was not a redundancy situation because there was work for the Claimant to do in her role but she was not able to travel to it. The Claimant said that she required a further reduction in travel and Mr Limm asked how they could do that without it impacting on her ability to work the required chargeable days. The Claimant said that it was not fair to treat her the same as other managers because of her progressive health condition. She said that she could not travel to the other clients that that the Respondent currently had because she could not travel that far.

47 By the end of that meeting the parties had reached an impasse. The Respondent had very limited work in the area close to where the Claimant lived (the only client was London North West NHS Trust). That was not going to provide the Claimant with sufficient work to achieve the target of 150 chargeable days which was necessary to pay for her role. The Claimant was not able to travel to any of its other clients because of her back condition. The work for those clients could not be done by the Claimant working from home. There were no other adjustments that the Respondent could make which would enable the Claimant to continue working as a Senior Auditor Manager. The Claimant and her representative were given every opportunity to suggest other adjustments. They never put forward the suggestion of the Claimant becoming a part-time worker (working one or two days a week) because the Claimant was not interested in taking a substantial pay reduction.

48 On 20 April 2017 Mr Limm sent the Claimant a letter headed "Re: Health Problems". He sent her copies of all the meetings that the Respondent had held with her since the start of the year. He said that they had sought to work with her to identify any reasonable adjustments that they could make to enable her to fulfil her role but both sides agreed that they had reached an impasse. He said that she had been unable to meet the requirements of her role, including achieving the chargeable days target, because of issues with her health. Her final performance for 2016-2017

was 64.7 chargeable days which was 43% of her target. He did not believe that the Respondent could make any further adjustments and there was, therefore, an issue about her capability to fulfil her role. He had reviewed opportunities for redeployment and there were no suitable vacant roles within the organisation. He invited her to a meeting on 8 May to demonstrate that she could carry out her role and warned her that a possible outcome of the meeting could be the termination of her employment. She was advised of her right to be accompanied. Although the letter did not refer to the policy under which the hearing was taking place, it ought to have been abundantly clear to both the Claimant and Mr Smith, from the discussions that had taken place at the meetings and the contents of the letter, that the Respondent was contemplating dismissing the Claimant on the grounds of medical incapability.

49 The Respondent's Sickness Policy and Absence Management Procedure provides,

> "*Where an employee is not capable of carrying out their contractual duties, medical advice has been sought and all other reasonable options explored, termination of the employee may be necessary. This process will be conducted under the final stage of the Capability and Performance Management Policy and the employee will be dismissed on the grounds of capability due to ill health."*

50 The Claimant and Mr Smith did not attend the meeting on 8 May 2018. Mr Smith wrote to Ms Croad and suggested that the Respondent consider two further adjustments – amending the Claimant's role so that she could work mainly or exclusively from home and a proportionate reduction of her chargeable days target. On 10 May he asked Ms Croad to clarify under what policy or procedure the meeting was taking place. Ms Croad referred him to the two policies mentioned above (in paragraph 49) and said that the hearing was being conducted in accordance with those procedures. She said that the purpose of the hearing was to consider what, if any, reasonable adjustments could be made as well as what other options there were for the Claimant in light of her condition. In the event that no reasonable adjustments could be made to enable the Claimant to do fulfil her role and there was no other suitable role, then dismissal would be a possible outcome.

51 The hearing took place on 18 May 2018. The Claimant was accompanied by Mr Smith. Mr Limm went through six vacancies but all the roles were client facing and required travel. The Claimant agreed that they were not suitable roles for her. She accepted that due to being taken off the Imperial contract at the client's request, she did not have enough work. Mr Limm said that the two adjustments proposed by Mr Smith in his letter of 8 May were not reasonable. The Claimant could not work exclusively or mainly from home in what was essentially a client facing role and required her to have presence in the client's work environment and chargeable performance was the way in which the Respondent funded the post. Mr Limm told them that the purpose of the meeting was to consider the Claimant's capability to perform her role and whether any adjustments could be made to facilitate that. The Claimant said that there were no clients close to her. Mr Limm said that the Respondent had clients in Tooting, Surrey, Central London, East Anglia, Kent, Oxfordshire and Northamptonshire. The Claimant said that she could just about manage Imperial because it was one train from her local station but that it was not possible for her to travel to the other clients. She needed to manage her health and no alternative roles appeared to be available. Mr Limm said that the work was there

for the Claimant to achieve her chargeable target but because of the restrictions on travel, it was difficult to know where to place her.

52 On 20 May 2017 Mr Limm sent the Claimant his decision. He explained again why reducing billable days was not a reasonable adjustment. He said that her role was funded by the money charged to clients for her billable days. Without that funding the Respondent would have to find funding for her role from other means, which would put the company at a financial deficit. The Claimant was not able to travel to any of the Respondent's clients. It was a requirement of the role to be client facing and the clients expected to see the staff providing the service that they had outsourced. The Claimant had agreed that none of the vacancies was a suitable role for her. Having reviewed the OH report and all the discussions that they had had over the previous four months he had come to the conclusion to terminate her employment on the grounds of ill health incapability as she was unable to undertake her role due to ill health and that was unlikely to change in the foreseeable future if at all.

53 The Claimant's employment was terminated on 20 May 2018. She was paid in lieu of the 12 weeks' notice to which she was entitled. She was advised of her right of appeal.

54 The Claimant appealed on 25 May 2017. The appeal as heard by Andrew Fife on 25 July 2017. He sent his decision to the Claimant on 9 August 2017. A large part of the Claimant's appeal was based on the ground that the Respondent had not followed the Capability and Performance Management Procedure and had not made her aware of any issues with her performance. Mr Fife said that there was confusion on their part as to the reason for the dismissal. He said that they had been told that the process was being followed in accordance with the Sickness Policy and Absence Management Procedure and the Capability and Performance Management Procedure, and drew their attention to the paragraph in the former policy quoted at paragraph 49 (above). He continued,

> "*The policy effectively means that the same procedure as the final stage of the performance management process is followed in cases of ill-health capability and therefore it does not detract from the fact that your performance was not the reason for your dismissal. The reason for your dismissal was that you were not able to undertake your job on account of your medical condition and reasonable adjustments could not be made to enable this. Whilst your performance was an issue, your medical condition was impacting on your performance."*

He said that by the time the hearing on 18 May took place, the Claimant had had sufficient notice that it was a formal meeting and of the process in accordance with which it was being conducted. The invitation letter had outline the potential outcome of the meeting and given the Claimant the right to be accompanied. All the information given indicated that it was a formal meeting and not just another general discussion meeting. He also agreed that reducing chargeable targets and/or allowing the Claimant to work from home were not reasonable adjustments. He, therefore, upheld the decision to dismiss.

Conclusions

Failure to make reasonable adjustments

55 It was not in dispute that the Respondent required Senior Audit Managers to travel to travel to and spend time working at the sites of the clients for whom they were responsible. The Respondent could not reasonably have been expected to know that the Claimant was disabled by reason of her back condition and that travel beyond a certain distance was difficult for her until it received the Occupational Health report of 8 December 2016. We have found that form 1 August 2015, when the Claimant reverted to that role, she worked mainly from home and avoided travel to the sites unless she had to attend meetings. There was no evidence before us that she did that because of her back problems. Having carefully considered all the evidence and what the Claimant said at the meetings between January and May 2017, we concluded that the PCP to travel to client sites did not put the Claimant at a substantial disadvantage in comparison with persons who were not disabled while she was allocated clients that were close to her home or in the "local" area.

56 That changed, however, at the end of March 2017 when the Claimant was no longer able to work on the Imperial contract. The only other clients that the Respondent had were farther away and the Claimant could not travel that far. At that stage that PCP put the Claimant at a substantial disadvantage and the duty to make reasonable adjustments arose. We considered what steps it would have been reasonable for the Respondent to take to alleviate the disadvantage and to enable the Claimant to continue working as a Senior Audit Manager. We had regard to reasonable adjustments suggested by the Claimant (at paragraph 2.9 above).

57 One of the adjustments suggested by the Claimant was working exclusively or mainly from home. It was clear from all the evidence that the role required interaction with the clients, attendance at the client sites and staff management responsibility. A Senior Audit manager was expected to manage two to four clients, each client potentially being based on more than one site. A limited part of the role could be performed from home but a large part of it had to be performed working together with the clients and the staff being managed by the Auditor. That had to be done at the office and the sites of the clients. The Claimant had fallen far short of her chargeable days targets in the preceding two years. One of the reasons for her low productivity was the fact that she had not attended at client sites as often as she should have. A Senior Audit Manager could not carry out the role effectively working predominantly from home. That adjustment was not reasonable as it would not have enabled the Claimant to fulfil the duties of her role.

58 It was also suggested that the Claimant's chargeable days target should have been reduced. That is tantamount to saying that the Claimant's productivity levels should have been lowered. In other words, the Claimant should have been required to do one-fifth of what was required of someone in her role while being paid the salary of a full-time employee. That is not a reasonable adjustment. The Claimant never expressed any interest in working part-time because it would have involved a significant reduction in her remuneration package.

59 We found that the Respondent applied a practice whereby it expected its Senior Audit Managers and other client facing staff to meet their chargeable days targets. It was not the Claimant's case that while she was working on the Imperial and NW

Hospital contracts that her inability to meet her targets was in any way attributable to her back problems. We accepted that from April 2017 that PCP did put her a substantial disadvantage because she could not, because of her travel restrictions, be allocated the contracts which she needed in order to achieve the targets. She could only travel to one client (London NW Hospital) and that was a small contract. If the Claimant were to work only on that contract, on the basis of what she had achieved in the previous two years, she would have achieved less than 20% of her chargeable days target. We did not consider that lowering the Claimant's chargeable days targets by 80% would be a reasonable adjustment. We did not consider that paying someone a full salary for doing 20% of the work that he/she is expected to do in particular role to be a reasonable adjustment.

60 Neither of the disadvantages identified above would have been alleviated by providing the Claimant with an ergonomic chair. Neither the Occupational Health physician nor the DSE assessment advised that the Claimant should be provided with an ergonomic chair. The Respondent did look for a suitable alternative role and discussed what was available with the Claimant. There was no other role that was suitable and did not involve travel.

61 We concluded that in light of the restrictions placed on the Claimant's ability to travel, the location of the Respondent's clients and the nature of the Claimant's role, there were no reasonable steps which the Respondent could have taken which would have alleviated the disadvantage and enabled the Claimant to perform her role.

Indirect Disability Discrimination

62 The Respondent did not require the Claimant to travel to Norfolk, Kent or Wales. It required her to travel to the sites of the clients that she was allocated. It did not require her to reach unrealistic chargeable hours targets; it expected employees in client facing roles to achieve their chargeable days targets. It provided the Claimant with adequate support. We have, therefore, not found that the Respondent applied the PCPs alleged by the Claimant. That is the end of her indirect discrimination claim. The two PCPS that we have found put disabled persons with back problems at a particular disadvantage and put the Claimant at a particular disadvantage (as set out in paragraphs 55-61 above). However, the Respondent has shown that those PCPs were a proportionate means of achieving legitimate aims. The legitimate aims were that Senior Audit Managers should be able to fulfil the requirements of their roles and achieve productivity levels that financed their roles. Those aims could not be achieved if the Senior Audit Managers did not travel to client sites and did not achieve a large percentage of their chargeable days targets. The PCPs were, therefore, a proportionate means of achieving legitimate aims. Even if the Claimant had complained of the PCPs that we have identified, her claim would not have succeeded.

Direct Disability Discrimination

63 It is abundantly clear to us that the Respondent dismissed the Claimant because she was incapable of carrying out her role because her medical condition prevented her from being able to travel to where the Respondent's clients were situated. That gives rise to claim under section 15 of the Equality Act 2010. The Respondent did not dismiss her because she had a disability or back problems. The appropriate

comparator in a direct disability discrimination would be someone who was not disabled but unable to travel far from home for some other reason, for example, childcare. There was no evidence before us from which we could infer that someone in that position would have been treated any more favourably than the Claimant. The reason for the Claimant's dismissal was not her disability but the consequences of that disability upon her ability to do her job.

Discrimination arising from disability

64 We have not found that the Respondent required the Claimant to reach unrealistic chargeable targets. We do not accept that the Respondent subjected the Claimant to an unfair capability process. Following receipt of the Occupational Health report, which advised that consideration should be given to continuing home working and limiting long distance travel, the Respondent held a number of mattings with the Claimant to try and establish what she could do, to look at where the work was available, what adjustments could be made to enable the Claimant to continue in her role and to look at alternative roles. She was accompanied at all those meetings be her trade union representative. There was nothing unfair in that process. The Claimant did not raise a grievance under the grievance procedure. She raised complaints in the course of the capability process. They were addressed as part of that process. We concluded that the Respondent did not treat the Claimant unfavourably by doing any of those things. The Claimant did not specify what the reason for the alleged unfavourable treatment was and how it arose in consequence of her disability.

65 The Respondent treated the Claimant unfavourably by dismissing her. It did so because she was unable to perform her role because she could not travel to where the clients were. That was something which arose in consequence of her disability. We then considered whether the Respondent had shown that dismissing the Claimant was a proportionate means of achieving a legitimate aim. The Respondent's aim was that it should have a Senior Audit Manager in post who could fulfil the requirements of the role so that they could provide the service that they were contracted to provide to their clients. The extent to which the Manager fulfilled the requirements of the role was measured by the number of chargeable days he/she achieved. That is a legitimate aim. By the time the Respondent dismissed the Claimant it had sought medical advice, it had had a number of meetings with the Claimant over a period of four months, It had looked at whether any adjustments could be made to enable the Claimant to fulfil the requirements of her role, all the evidence from the Claimant indicated that her condition was going to get worse and not better and it was clear that the Claimant was incapable of fulfilling the requirements of her role. By the time of her dismissal in May 2017 the Claimant was still an employee of the Respondent but she was not fulfilling the requirements of her role. We were satisfied that dismissal in the above circumstances was a proportionate means of achieving a legitimate aim.

Disability-related Harassment

66 The same matters that are said to be unfavourable treatment for the purposes of the section 15 claim are also alleged to be acts of disability-related harassment. We have not found that any of them other than the dismissal occurred. Furthermore, they were not related to the Claimant's disability and did not have the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or

offensive environment for her ("the proscribed consequences"). Equally the Respondent's failure to make the adjustments which the Claimant wanted (set out at paragraph 2.9 above) did not have the proscribed consequences.

Age Discrimination

67 There was no evidence from which could infer that the Claimant was treated less favourably than another employee would have been in similar circumstances and/or that her age played any part in the decision to dismiss her. We have not found that the real reason for the dismissal was redundancy. There was work available for Senior Audit Managers on other contracts and the Claimant was offered the opportunity to work on those, but she could not because she could not travel to those clients. We did not find that the Respondent applied the PCP which the Claimant alleged that it did.

Unfair Dismissal

68 We found that the reason for the dismissal was that the Claimant could not perform the role that she was employed to do because the role required travelling to client sites and the Claimant could not do so because of medical reasons. That is a reason relating to the capability of the Claimant to do the kind of work that she was employed to do.

69 We then considered whether in all the circumstances the Respondent acted reasonably in treating that as a sufficient reason for dismissing the Claimant on 18 May 2017. In considering that issue, we took into account all the factors set out at paragraph 65 above. The reality was that the Claimant has not been fulfilling the requirements of her role for some time. In the preceding year she had achieved less than half her chargeable days' target. That was partly attributable to the fact that she worked mainly from home and did not travel to client sites as often as she would have. With her having been removed from the Imperial contract from 1 April 2017 and her not being able to work on any of the other contracts other than NW London, it was abundantly clear that she could not fulfil the requirements of her role. She would struggle to achieve 20% of her chargeable days' target. The Respondent could not continue to pay in excess of £50,000 to someone who did less than 20% of the work expected of her. There was nothing to be gained by waiting any longer or getting another medical report. In the four months in which the Respondent had been discussing matters with the Claimant nothing had changed, her medical condition had not improved. We were satisfied in all the circumstances that the Respondent acted reasonably in dismissing her on 20 May 2017 and that the dismissal was fair.

_____

Employment Judge Grewal

Date 6 November 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

7 November 2018

.....

FOR THE TRIBUNAL OFFICE