EMPLOYMENT TRIBUNALS

Claimant:	Mrs Noreen Raja	
Respondent:	Slough Borough Council	
Heard at:	Reading	**On: 2, 3, 4, 5 October 2017 and (chambers discussion) 4 January 2018**
Before:	Employment Judge Gumbiti-Zimuto Members: Mr J Cameron and Mrs B Osborne	

Appearances
For the Claimant: Miss A Farah (Solicitor)
For the Respondent: Mr Simon Oakes (Counsel)

RESERVED JUDGMENT

1. Claimant was unfairly dismissed.

2. The claimant's dismissal was procedurally unfair. Had the correct procedure been followed the claimant's dismissal would have been delayed by a period of four weeks.

3. The claimant's complaints of discrimination arising from disability pursuant to section 15 Equality Act 2010 and breach of the duty to make reasonable adjustment pursuant to section 21 Equality Act 2010 are not well founded and are dismissed.

4. A remedy hearing has been listed for one day on **9 April 2018** commencing at 10.00 am at Reading Employment Tribunals, 30-31 Friar Street (Entrance in Merchants Place), Reading RG1 1DX.

5. The parties are to disclose any documents relevant to remedy by the **28 February 2018**.

6. The parties are to exchange the witness statements on which they will rely at the remedy hearing by **12 March 2018**.

REASONS

1 In a claim form presented on June 2016 the claimant made complaints of unfair dismissal and disability discrimination.

2 The claimant was employed by the respondent as a neighbourhood housing officer, from 12 September 2011 until 8 January 2016. The respondent concedes that at all material times the claimant was a disabled person by reason of Fibromyalgia.

3 The unfair dismissal claim was first made in a claim form presented on 14 April 2016. That claim form was struck out pursuant to the provisions in the Employment Tribunals And The Employment Appeal Tribunal Fees Order 2013. The effect of the Supreme Court ruling in the case of R (on the application of Unison) v Lord Chancellor the fees regime introduced by the Employment Tribunals And The Employment Appeal Tribunal Fees Order 2013 was unlawful. The claim presented on 14 April 2016 should not have been struck out. The Tribunal made the following order:

> *"Upon it being accepted by the parties that the claim form on 10 June 2016 is a duplicate of the claim form submitted by the claimant on 14 April 2016; and upon it being further accepted by the parties that the claim for unfair dismissal has been presented in time; upon the order to strike out the claim for unfair dismissal made to the 26 January 2017 being a nullity; By Consent the Employment Tribunal is to consider the claimants complaints of unfair dismissal and disability discrimination made in case number 3323837/2016."*

4 The disability discrimination claims and issues to be considered by the Tribunal at this hearing were set out in an order made on the 26 January 2017.

5 The claimant complains of discrimination arising from disability, section 15 Equality Act 2010. The claimant claims that she was treated unfavourably by reason of something arising in consequence of her disability. The unfavourable treatment was the dismissal. The something arising in consequence of her disability was her sickness absence.

6 The claimant also complaints of a failure to make reasonable adjustments, section 20 Equality Act 2010. The claimant claims that the respondent was in breach of the duty to make reasonable adjustments. The first provision criterion or practice (PCP) that the claimant relies on is the requirement to work full time 5 days per week. The substantial disadvantage alleged is that she was unable to work full time 5 days per week due to her disability. The reasonable adjustment would have been to allow flexible working so she could work fewer hours and /or fewer days. The second PCP that the claimant relies on is the application of the sickness absence procedure. The substantial disadvantage that due to her disability she was often absent on sick leave and more likely to trigger the

procedure. The reasonable adjustment would have been to move the trigger points.

7 The Respondent resists all the above complaints and argues that some or all of them were presented out of time and the Tribunal has no jurisdiction to consider them.

8 The claimant gave evidence in support of her own case. The respondent relied on the evidence of Mr Tony Turnbull, Mr Ronald John Griffiths, Mrs Sarah Richards and Mr Roger Parkin. All the witnesses provided witness statements which were taken as the evidence in chief. The parties also provided to the Tribunal a trial bundle containing 263 pages of documents and a supplement of 47 pages.

9 The respondent made an application to rely on an additional witness statement from Sarah Ricketts. The claimant opposed the application. The Tribunal refused to allow the respondent to rely on the witness statement of Sarah Ricketts. The statement was produced at the hearing (on 4 October 2017) and had not been disclosed in accordance with the direction of Employment Judge Vowles made on 26 January 2017 or exchanged together with the parties' other witness statements. The matters contained in the witness statement were not new issues arising in the case they had been in scope throughout. The statement deals with redeployment which is a significant part of the case either as a claim for disability discrimination or as a claim about unfair dismissal. If the respondent was wanting to rely on the evidence of Sarah Ricketts it should have been disclosed at the same time as the other primary evidence relied on by the respondent. The claimant would not have an opportunity to cross examine Sarah Ricketts on her statement in circumstances where the claimant has challenged the respondent's efforts to find her work (see paragraph 112 of the claimant's witness statement). Introducing the statement had the appearance of a late attempt to plug perceived holes in the respondent's case as it had emerged before the Tribunal. We concluded that it was not in the interest of justice to allow the respondent to rely on the witness statement.

10 We made the following findings of fact.

11 On 12 August 2013 the claimant commenced 52 weeks maternity leave, she planned to return to work in September 2014. In April 2014 the claimant underwent carpel tunnel surgery on her left hand.

12 On 2 September 2014 the claimant and Mr Turnbull met to discuss the claimant's return to work. They discussed the impact that claimant's surgery and other health conditions had on the on her return to work and measures that would need to be put in place. It was agreed that the claimant would be referred to occupational health.

13 The claimant saw occupational health and a report was prepared that recommended a graduated return to work: 50% hours per day in week

one, 75% hours per days weeks two and three and normal hours thereafter. It was also recommended that there be regular reviews with manager for support and occupational health review in six weeks. The report included the comment: "*In the long term, it may be wise to consider 'flexible working' as an option but obviously this will depend on operational feasibility*".

14 On 15 September 2014, the claimant returned to work and the respondent acted on the recommendations from occupational health.

15 On 28 September 2014, a display screen assessment and an assessment by a member of the respondent's Health and Safety Team was undertaken. Recommendations were made to provide the claimant with a specialist chair, desk fan and a wrist gel mouse mat. The mouse mat was immediately provided and the specialist chair and the desk fan were ordered.

16 In late September 2014, the claimant was informed that she would be having further carpel tunnel surgery, on her other hand, to take place on the 3 October 2014. The claimant informed Mr Turnbull. From the 6 October 2014, the claimant was off work until 17 December 2014.

17 On 9 October 2014, Mr Turnbull received a further occupational health report, dated 26 September 2014, relating to the claimant. The report informed Mr Turnbull about the claimant's condition of fibromyalgia. The occupational health report included the following: *"Regarding the six week OH review, I advised this so that there was time to incorporate the graduated return programme and then see how Ms Raja managed, over a short time span, with her normal role and duties. She will need some time to get used to working normal hours before assessing if a permanent reduction in hours would be advisable*."

18 An occupational health review took place on the 14 November 2014. Mr Turnbull was informed that the claimant was unfit to return to work. It was also stated in the report: "*I did discuss possibly in the long-term full-time work, in her present role, due to demands involved, may aggravate her symptoms. However, we will have a better understanding of this when she returns for full-time work and recovers from the present operation.*"

19 On 2 December 2014 Mr Turnbull held a formal Stage 1 meeting under the respondent's Sickness Absence Policy. In cases of long term absence, any period of sickness four weeks or more is treated as long term sickness, the triggers for reviewing these cases include where absence is for four consecutive weeks or absences for a total of six weeks in a six month period. The policy states that a review is encouraged as soon as there are concerns about sickness absence. When an employee's sickness give cause for concern, a formal meeting stage one will be arranged. The objectives of the formal meeting are set out in paragraph 51 of the policy (p210). The action that the manager is to take after the meeting is set out in paragraph 52 of the policy.

20 The outcomes of the Formal Stage 1 meeting were to arrange a further review with occupational health prior to the claimant's return to work; to extend the review period for post Formal Stage 1 for three months so that the next meeting would be review meeting. Mr Turnbull decided that he would not move to Formal Stage 2. During the meeting the claimant asked if her hours could be reduced. Mr Turnbull told the claimant that the role was a full-time. The claimant was told that other roles could arise through secondments. The claimant stated that she was interested in any arising in the Neighbourhood Service.

21 Following the Formal Stage 1 meeting Mr Turnbull emailed the claimant a secondment opportunity as an Estate Service Monitoring Officer. The role was more focussed than the neighbourhood housing officer role. The role was less pressurised and stressful than her current role and gave greater flexibility about when she worked her 37 hours a week. The claimant chose not to pursue the opportunity.

22 On 12 December 2014 Mr Turnbull received advice from occupational health. The advice from occupational health was that there should be a graduated return to work with adjustments. The advice was that in week one and week two the claimant was to work three hours a day; in week three, for four days the claimant was to work four hours a day; in week four the claimant was to work for four hours a day; in week five the claimant was to work five days a week; and in week six normal hours. It was also stated that the DSE recommendations should be implemented and that an occupational health review should take place at the end of week five. The claimant returned to work on the 17 December 2014 and the advice was implemented, save for the specialist chair and desk fan that had still not been provided.

23 A Stage 1 First Interim Review meeting took place on the 12 January 2015. The claimant was told that the Formal Meeting Stage 2 had been triggered and that her manager, who at that time was Mr Maurice Njoku, would be taking this forward. The claimant was also told that the Stage 1 Interim Review meetings were going to continue and that the next Stage 1 Interim Review meeting was going to take place on the 9 February 2015.

24 The Sickness Policy provides: "If there is no improvement or no clear indication of an early return to work date, the manager / supervisor will arrange a formal meeting – stage two. This formal meeting – Stage Two can be brought forward if at the interim review meetings in Stage One it is clear that no satisfactory improvement is being made."

25 A report from occupational health dated 16 January 2015 (wrongly dated 2014) was received by Mr Turnbull. In this occupational health report it was stated that the claimant will not be able to sustain full time work in the long term and she was struggling in the short term. The letter stated: "she is only presently fit to carry out four hours per day Monday to Friday, as in

the long-term she asked to be considered for part-time work as this adjustment if granted will need to be put in place sooner rather than later."

26 On the 22 January 2015 the specialist chair arrived and by this point all the equipment recommended at the DSE and by the respondent's Health and Safety Team was now provided. The claimant had been at work a total of six weeks when the equipment recommended had not been provided.

27 On the 21 January 2015 the claimant was absent from work. The claimant had not return to work by 16 October 2015 when her case was referred to the Strategic Director for review of her employment status.

28 On 26 January 2015 the claimant made an application for flexible working. The claimant's request was that she work four hours a day from 10am to 2.45pm over four days Monday to Thursday.

29 On the 19 February 2015 Mr Turnbull wrote to the claimant inviting her to meet with him to discuss the flexible working application. Mr Turnbull also communicated with occupational health, described the claimant's role, expressed the view it was a stressful role, and explained why he considered that the role needed to be carried out by someone working on a full time basis. On 27 February 2018 the claimant had a consultation with occupational health. A report was prepared and sent to the claimant. The claimant exercised her right to refuse to have the report forwarded to the respondent.

30 On 3 March 2015 the claimant, accompanied by a union representative met with Mr Turnbull and Mr Njoku to discuss her flexible working application. Following the meeting there was further communication where Mr Turnbull set out his understanding of the claimant's request and the claimant responded with clarification as to what she was seeking and the reasons for it. In a letter dated 13 March 2015 Mr Turnbull set out his reasons for refusing the claimant's request.

31 The claimant met with Mr Njoku on the 12 March 2015 for a Stage 2 Absence Formal Review Meeting. In her witness statement the claimant states that she explained to Mr Njoku that she *"was absent from work not because I could not work at all, but in order to manage my sickness absence a reduction in my hours would be helpful."* In his letter to the claimant following the meeting Mr Njoku stated that he had set a review period of three months and notified the claimant of three dates for meetings to take place. The letter included the passage: *"I do need to advise you that failure to make a significant and satisfactory improvement within this period may result in your referral to a Strategic Director review. The outcome of a Strategic Director review could be termination of employment."*

32 The claimant appealed the decision to refuse her application for flexible working. On 13 April 2015 the claimant's Flexible working application

appeal was considered by Mr Griffiths. The claimant was notified of the outcome of her appeal on 22 April 2015. The appeal was refused.

33 In his letter informing the claimant that her appeal had been refused Mr Griffiths wrote:

> "*I have now considered your appeal against the decision to decline your flexible working request. Your flexible working request was made on the basis that reducing your hours would allow you to schedule more rest to manage your health condition and avoid over exertion.*
> *I'm afraid that I am left with little choice but to reject your appeal as there is insufficient current medical information available to support your request for flexible working at the present time."*

34 In his witness statement Mr Griffiths says that the hours and pattern that was proposed by the claimant was not a reasonable option for the neighbourhood services team as the work is responsive to circumstances of workload, has expectations of out of hours activity and in the case of the neighbourhood housing officer has responsibilities to a specific patch. Mr Griffiths says that he agreed with the reasons given by Mr Turnbull for refusing the flexible working application.

35 There is a difference in the reasons given to the claimant and the evidence given to the Tribunal for why the claimant's application was refused. In essence his evidence to the Tribunal was that it was a full time role that needed a full time person. When questioned about his letter of dismissal Mr Griffiths stated that: "*the letter could have been better written. I presume it was drafted for me by HR. The reasons I rejected it* [the claimant's appeal] *was because I had no further medical information to change the decision. Normally t would have support of occupational health report. I needed further evidence. The application was for flexible working in core hours. Nothing would make me change my mind."*

36 On 2 June 2015 the claimant had a Stage 2 Absence Interim Review 1 Meeting with Mr Njoku. Attempts had been made to have the meeting sooner, but this had not been possible. The purpose of the meeting was to review the claimant's sickness absence and look at necessary support. The claimant stated that she was rushed from Stage 1 of the process into Stage 2. The claimant stated that the respondent was not being reasonable in moving to Stage 2. There was discussion about the occupational health report and a report prepared by the claimant's GP that led to the decision that the meeting be adjourned to allow discussions to take place with occupational health about the claimant's GP report. It was intended that the meeting was reconvened urgently and a period of about a week was contemplated. Due to unforeseen difficulties relating to the availability of the relevant person from occupational health the meeting did not resume until 6 August 2015.

37 The claimant in her witness statement says that at the 2 June 2015 meeting she explained to Mr Njoku that: *"staying off from work like this was not benefitting anyone, I was getting worse and would rather be back at*

work but I could not risk working full time without support to reduce the inevitable impact on my health." The claimant says that in the period between the 2 June 2015 and the 6 August 2015 her "*symptoms were starting to spiral out of control".*

38 The notes of 6 August 2015 meeting include the following: *"It was agreed that NR would need to return to full time hours with a review to see if she could maintain that level of work with the correct support is in place. This support can only be determined once NR is back at work. Regular reviews would be set to see what was needed – SR advised that the service may not be able to accommodate dedicated full time admin support but any support would need to be reviewed and applied taking into account service needs."* It was agreed that an occupational health appointment would be requested before the end of the claimant's current doctor's note i.e. 23 August 2015.

39 Mr Njoku left the employment of the respondent and Mr Turnbull resumed the line management of the claimant. Mr Turnbull and the claimant exchanged emails about the claimant's return to work until on the 24 August 2015 Mr Turnbull received a further note from the claimant's doctor indicating she was unfit to work.

40 The claimant saw occupation health on 25 August 2015 who stated that the claimant was unfit for work and that on return to work the claimant would need to "*resume work on a graduated basis"* and that her hours could then be "*gradually increased depending on her progress".*

41 A Stage 2 Second Interim Review meeting was arranged. The meeting took place on the 29 September 2015. At the meeting the claimant accepted that she would not be able to return to her substantive role on a fulltime basis as this would make her ill. Mr Turnbull told the claimant that to move things forward he considered they had reached the point where he would be asking the Strategic Director to review the claimant's employment status and consider re-deployment opportunities.

42 On 6 October 2015, Mr Turnbull wrote to the claimant advising her that he was referring her case to the Strategic Director for review and decision on her future employment. At this stage Mr Turnbull considered that the cost to the respondent of covering the claimant's position with other staff was a factor that justified the action. There was additional staff cost in training and additional transport. While the cost has not been quantified we accept that there is a cost that the respondent as a public body could properly take account of.

43 On 16 November 2015, the claimant was written to by Ms Sarah Richards, Strategic Director Regeneration, Housing & Resources. Mrs Richards informed the claimant that she was to be dismissed by the respondent on the 8 January 2016.

44 Ms Sarah Richards was satisfied that the respondent's procedures had been adhered to, that the claimant had been given adequate warnings through formal interviews and offered reasonable assistance to improve attendance and that appropriate advice had been taken from the Occupational Health Service. Mrs Richards also considered whether the claimant's application for flexible working had been dealt with in a reasonable way and that alternative employment for the claimant had been considered. Mrs Richards was satisfied that the claimant's attendance did not demonstrate satisfactory attendance.

45 The claimant appealed the decision to dismiss her. In her appeal she stated that the respondent had ignored the Equality Act despite evidence that the claimant's health condition was chronic. The claimant stated a number of grounds of appeal: that the sickness absence procedure was not followed correctly or applied in a reasonable manner; there was a failure to understand the claimant's health condition and its impact on her attendance; that the respondent ignored information made available by the GP and occupational health; that the respondent took an unbalanced decision refusing her application for flexible working when refusing it for business/operational grounds; that the respondent refused the appeal on the flexible working appeal was refused because of insufficient medical evidence; that all possible options to support the claimant to return to work had not been exhausted; that the respondent failed to support the claimant's additional needs as an employee with disability and no performance issues.

46 The claimant's appeal against the decision to dismiss her took place on the 8 February 2016. The claimant was assisted by a trade union representative; Mrs Richards presented the management case. The chair of the appeal panel was Mr Roger Parkin, Strategic Director Customer and Community Services.

47 In the appeal, the reasons given by Mr Turnbull and Mr Griffiths refusing the claimant's application for flexible working in the role of Neighbourhood Housing Officer were accepted by the appeal panel. The panel agreed that the role required a full-time person in the post. The panel found that the respondent had a legitimate reason for terminating the claimant's employment, namely her sickness absence, a fair process was followed in dealing with the claimant's absence and that dismissal was reasonable.

48 Dismissing the claimant's appeal, the claimant was told that:

> *"In reaching a decision we considered the nature of your role of neighbourhood Housing Officer and the business requirements of the service to continue to have a full time person in this post.*
> *In light of the significant amount of sickness absence incurred over the last year, in our opinion management made some reasonable adjustments to accommodate your return to the workplace and sustained attendance however this did not result in your return to work."*

49 On 20 November 2015, the claimant was placed on the redeployment list. The claimant states in her evidence: *"I was disappointed that nothing came of the redeployment other than standard bulletins. No one contacted me from HR, to offer me any kind of additional support during my notice period."* The claimant did not make any enquiry or any application for any position once placed on the redeployment list.

50 The respondent's witnesses gave evidence that staff absences have a direct effect on service delivery to the people of Slough and represent a significant cost to the Council. All the respondent's vacancies are advertised on the Slough Borough Council website and the claimant would have been able to access the website during her sickness absence and after her dismissal and applied for any role.

Parties Submissions

51 We were provided with written submissions on behalf of the parties which we have taken in to account in arriving at our decision.

Law

52 The Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer (section 94). In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (section 98 (1).

53 A reason falls within the subsection (2) if it relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do. "Capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

54 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) 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.

55 The Tribunal must not substitute its views about the employee's capacity for that of the employer. It is impermissible for a Tribunal to do that since frequently the Tribunal is not in a position to assess work performance or decide whether it falls below the standard expected of employees in a particular job. The correct test of fairness is whether the employer honestly and reasonably held the belief that the employee was not competent and

whether there was a reasonable ground for that belief.[1] In a case about capacity, an employer will not act reasonably unless he gives the employee fair warning and an opportunity to mend her ways and show that she can do the job.[2] The employer must act reasonably when removing from a particular post an employee whom he considers to be unsatisfactory, it is important that the operation of unfair dismissal legislations should not impede employers unreasonably in the efficient management of their business.[3]

56 Section 15 Equality Act 2010 provides that A person (A) discriminates against a disabled person (B) if A treats B unfavourably 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. This does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability. To be legitimate, an aim must correspond to a real need on the part of the employer's business. To be proportionate, the measure must be (i) appropriate, i.e. capable of achieving the aim and, (ii) reasonably necessary in the light of all relevant factors, including the possibility of achieving the aim by other means. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, is justified objectively notwithstanding its discriminatory effect. There has to be a balance between the discriminatory effect of the employer's actions and the reasonable needs of the employer.

57 Section 20 (3) Equality Act 2010 provides that 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.

Conclusions

Unfair dismissal

58 The claimant states that the respondent has shown that the claimant's disability was not in the mind of the dismissing officer when she made the decision to dismiss. What is not expressed is what difference it would have made to any aspect of the case if such considerations been in her mind. The role of Mrs Richards was to review the decisions which had been taken and consider whether in the light of that the claimant's employment should continue.

59 The claimant states that the dismissing officer did not review the report made by Mr Turnbull. The Tribunal do not accept that this is a fair assessment of the role conducted by Mrs Richards. We accept the evidence given by Mrs Richards that she reviewed the report before

[1] Taylor v Alidair Ltd [1978] IRLR 82
[2] Polkey v A E Dayton Services Ltd [1987] IRLR 503
[3] Cook v Thomas Linnell & Sons Ltd [1977] IRLR 132

deciding to dismiss the claimant. There was a failing in the actions of Mrs Richards. The failing relates to her failure to address the problems which arise from the conduct of the flexible working appeal.

60 The claimant states that during the time that the claimant was off sick no one was actively looking for alternative employment for the claimant. This was not accepted by the respondent who stated that they continued to look for work for the claimant from December 2014. The claimant made it clear that she wanted to stay in a neighbourhood services role carrying out the role part time, but was willing to consider a role outside neighbourhood services.

61 The notes of the Stage 1 Formal Meeting on 2 December 2014 state: "*Previously NR asked if her hours could be reduced – TT stated this is a full-time role, however other alternatives will be coming up soon through secondments. NR was keen to be informed of these, so she can consider all available options."* When the claimant was told about a role[4] that had the potential to offer the claimant the type of flexible working she wanted (reduced hours) she declined to pursue the position. The claimant did not make any enquiries about roles in the entire period from December 2014 until her dismissal in January 2016.

62 In September 2015 Mr Turnbull raised the issue of redeployment with the claimant. The notes of the Stage 2 Sickness Absence Review Meeting on 29 September 2015 include: "*TT asked whether NR would now consider a role elsewhere on the council that was less physically demanding. NR asked for a review of the roles currently on offer within Neighbourhood Services and TT confirmed that this would be done."*

63 The claimant did not look for alternative work she might be interested in, even during the redeployment period. We also take into account that this was a period when the respondent was not necessarily filling roles as they arose and that there was *"a pressure not to fill posts when they became vacant. Churn in posts quite low particularly in the housing team."*

64 It was said on behalf of the claimant in closing submissions that *"it was clear what the claimant could do, she could do part-time work, that should have been looked at"*. The evidence does not substantiate this. The claimant was unfit to work from January 2015 and remained off work until her dismissal.

65 The claimant contends that lower grade roles on protected pay should have been offered to her and reliance is placed on a customer services role two grades lower than the claimant's role. However, such criticism of the respondent is unreasonable because the claimant never expressed an interest in the role and in any event, was unfit to work at the relevant time. It was not being said that the claimant was unfit to work as a neighbourhood housing officer but was fit to work in another role.

[4] Estate Service Monitoring Officer

66 Faced with the response that the claimant remained unfit for work from January 2015 it was asked rhetorically on behalf of the claimant, *"how can the claimant come back to work without a plan?"* Implicit in the question is that the claimant would not return to work unless there was a plan in place. The problem with this position is that there was a plan in place for the claimant's return, she was to "*resume work on a graduated basis"* and her hours could then be "*gradually increased depending on her progress".* The claimant throughout the period after January 2015 submitted fit notes which said that she was unfit to work without any qualification. The occupational health reports of that period all said that the claimant was unfit to work and only gave advice for what could be done following the claimant's return to work.

67 The claimant states that the respondent ought to have applied paragraph 37 of the respondent's Sickness Absence Policy and Procedure where it states: *"If the employee is unable to return to their contracted hours then employees hours will be varied on a permanent basis and their salary will be adjusted accordingly."* If the whole of paragraph 37 is considered, it can be seen that the respondent did apply it. The respondent had agreed that it would implement the recommendation of occupational health. The claimant never reported fit for work or fit for a graduated return to work after January 2015. For the employee's contracted hours to be varied on a permanent basis requires the employee to be available to return to work. The claimant never was. The claimant needed to return to work and her situation assessed then.

68 The claimant states that the application for flexible working was not dealt with properly considering the claimant's disability. It is said by the claimant that the application should have been read in line with legislation and treated as a reasonable adjustment. The respondent should have thought of other ways that the request could have been worked.

69 For the reasons set out below the claimant's complaint that in dealing with claimant's application for flexible working the respondent was in breach of the duty to make reasonable adjustments is not well founded.

70 The claimant complains that the respondent's procedure in dealing with the flexible working application was flawed. The claimant relies on the evidence that Mr Griffiths refused the appeal on the basis that there was a lack of medical evidence. The claimant says that the fact that the respondent concluded that the procedure was followed correctly leads to the conclusion that no one was reviewing anything, they just all agreed with each other.

71 Mrs Sarah Richards when considering whether to dismiss the claimant went through a process which required her to be satisfied that the respondent's procedures had been adhered to in all respects including the way that the claimant's application for flexible working was dealt with. Mrs Richards considered that the claimant's application for flexible working had

been dealt with in a reasonable way. The evidence she gave does not allow for such a conclusion.

72 There is a contrast between the account that was given by Mr Griffiths in the evidence to the Tribunal and the reasons he gave to the claimant in his appeal outcome letter (p69). Despite the attempt to reconcile the evidence given to the Tribunal and the content of the letter, the Tribunal does not consider that they are reconcilable. The letter is clear in its laconic reasoning that the appeal is rejected "as there is insufficient current medical information". In his evidence to the Tribunal Mr Griffiths stated that there was no medical evidence that could have been given which could have resulted in the appeal being granted in the claimant's favour. Mr Griffiths in evidence to the Tribunal said he agreed with the reasons for refusal given by Mr Turnbull, if those were his reasons he should have said in the letter instead of giving reasons which in fact in his view were irrelevant to the decision.

73 When considering whether the flexible working application had been properly dealt with Mrs Richards should have concluded that the flexible working application had not been properly considered by Mr Griffiths. Mrs Richards herself did not apply consideration to the question whether the application should have been granted only whether the procedure had been properly followed. It had not, the appeal was based on defective reasoning.

74 Had that question been properly addressed by Mrs Richards the correct action in our view would have been to seek clarification from Mr Griffiths or to reconsider the application on its merits and make a decision on it. Had that been done we are satisfied that the outcome would have been the same in respect of the claimant's application for flexible working, i.e. it would have been refused. We come to this conclusion because while we find defect in the process applied by the respondent arising from the decision letter on the appeal we are not persuaded that a different outcome on the application was possible on the basis of the facts before the respondent.

75 The claimant was unfairly dismissed by Mrs Richards on the 16 November 2015 because she failed follow the correct procedure and required the claimant's application for flexible working to be reconsidered at the appeal stage. Had this been done we consider that the claimant's dismissal would have taken place about four weeks later. We consider that it would have occurred about four weeks later because there was a period of about four weeks between the claimant appealing the decision on her flexible working application and the flexible working appeal outcome.

<u>Failure to make reasonable adjustments</u>

76 The duty to make reasonable adjustments relied on the by the claimant is set out in section 20 (3) Equality Act 2010:

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

77 The first PCP that the claimant relies on is the requirement to work full time five days per week. This PCP is made out in respect of the role of neighbourhood housing officer.

78 The claimant alleges that she had a substantial disadvantage arising from her disability in that she was unable to work full time five days per week due to her disability. This is made out on the basis that the claimant could not work at all in the period from January 2015 until her dismissal in January 2016.

79 Has the respondent failed to take such steps as it is reasonable to have to take to avoid the disadvantage? The claimant states in her closing submissions that: *"one of the key questions the Tribunal has to determine when considering reasonable adjustments is whether the adjustment would remove the substantial disadvantage the employee faces. The Tribunal has to consider whether the disadvantage would be removed by allowing the reasonable adjustment."*

80 The claimant was never able to return to work after January 2015 because she was not fit to work. The fact that the role was full-time in the end made no difference. The claimant was never fit to work. Had the claimant returned to work the issue of adjusting the role so that it was a part-time role could have been addressed in respect of the need to make adjustments for the claimant to allow her to work and address the disadvantage she faced in not being able to work.

81 The claimant has not accepted the respondent's case that the role of the neighbourhood housing officer is one that can only be done, so as to meet the respondent's aims for the role, as a full-time role. The respondent's witnesses, Mr Turnbull and Mr Griffiths, explained why the role needed to be a full-time role. The claimant in her evidence in fact does not gainsay any of the matters on which the respondent relies. The respondent has answered each of the matters put forward by the claimant explaining why the role needs to be a full-time role.

82 The claimant has not shown that the adjustment would have made it possible for her to return to work. There is no evidence that any adjustment by the respondent would have facilitated the claimant's return to work. There is no evidence that the claimant would have been fit to return to work if the respondent made an adjustment to her working hours or days.

83 The respondent did make adjustments for the claimant in that graduated working would have been adopted on her return. The respondent accepted

that the claimant would need to "*resume work on a graduated basis"* and that her hours could then be "*gradually increased depending on her progress".* Until the claimant returned to work there could be no assessment as to what if any level of reduction of hours could have made a difference and removed the substantial disadvantage.

84 The claimant's complaint that the respondent was in breach of the duty to make reasonable adjustments in respect of flexible working is in our view not well founded.

85 The second PCP that the claimant relies on is the application of the sickness absence procedure. The claimant states that she suffered a substantial disadvantage because due to her disability she was often absent on sick leave and more likely to trigger the procedure. The claimant states that a reasonable adjustment would have been to move the trigger points.

86 The claimant states that the trigger points were applied flatly and that there was no reasonable adjustment. The claimant states that she was not told what the triggers were or told that they were being adjusted. The claimant says that the triggers led to her suffering more flare ups and the whole procedure having a detrimental impact on her health. Stage 2 should not have been triggered on 12 January 2015.

87 The claimant's case on this in our view is not made out. The reasonable adjustment must be able to avoid the disadvantage. In the claimant's evidence, she relies on the contention that as a direct result of the application of the procedure, presumably the incorrect application of the sickness procedure, she in fact suffered flare ups which resulted in her being off sick. The claimant, beyond her assertion, presented no evidence at all in support of this proposition.

88 The respondent did move the trigger dates. The simple consideration of the bare evidence is that the claimant was off work for almost year after January 2015. In this time the claimant would have still been progressed under the procedure to Strategic Director Review unless the extensions were of such a length as to effectively ignore them. At the time that the claimant was dismissed the claimant's return to work could not be foreseen by the claimant or by the respondent. By the date of the claimant's appeal the claimant remained unfit to work, this was more than a year after January 2015. The claimant at the date of the Tribunal hearing (2 October 2017) remained unfit to work and states that there are sever limitations on her ability to return to work: "*I am not sure if I can ever hope to return to paid employment as a professional in the housing sector*." Adjusting the triggers would have been otiose, it would have no effect on the claimant's ability to return to work.

89 The claimant's complaint that the respondent was in breach of the duty to make reasonable adjustments in respect of application of the sickness absence procedure is in our view not well founded.

Discrimination arising from disability

90 Section 15 Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably 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. This does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

91 The respondent accepts that the claimant had a disability and knew that the claimant had a disability.

92 The claimant contends that she suffered unfavourable treatment by being dismissed.

93 The claimant states that the something arising in consequence of her disability is her sickness.

94 The claimant's case is that neighbourhood housing officers are required to work full time five days a week. The claimant cannot due to her disability and this put her at a substantial disadvantage when compared to non-disabled employees. She was dismissed due to her sickness absence.

95 The respondent has to show that the treatment is a proportionate means of achieving a legitimate aim otherwise the claimant must succeed on this part of the claim.

96 Staff absences have a direct effect on service delivery to the people of Slough and represent a significant cost to the respondent. The respondent's sickness absence policy aims to provide a frame work which enables the respondent to deal effectively, fairly and equitably with sickness absence and to provide a process for the proactive reviewing of absence.

97 The policy takes the employee through various stages permitting the employee the opportunity to improve, providing a period of review, and allows the employee to fully engage and participate in a dialogue with the manager. The policy as drafted, fairly applied, in our view achieves a balance between the needs of the service and the circumstances of the employee.

98 In our view having considered the overall application of the sickness absence policy in the claimant's case we are satisfied that it was applied fairly to the claimant. In the circumstances we are satisfied that the dismissal of the claimant after following the sickness absence policy in the claimant's case was a proportionate means of achieving a legitimate aim.

99 At the point that Mr Turnbull made the decision to refer the claimant to the Strategic Director the claimant had been off work for a long time and had

given no indication of when she would be able to return. The indication was that the claimant's condition was worsening. The Tribunal accepts the evidence given by Mr Turnbull as to the cost to the respondent as a result of the claimant's continuing absence from work.

100 The conclusion of the Tribunal is that the claimant's complaint of discrimination arising from disability is not well founded and is dismissed.

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Employment Judge Gumbiti-Zimuto

Date: 6 February 2018…….

Sent to the parties on: .....

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For the Tribunals Office