EMPLOYMENT TRIBUNALS

Claimant Ms C. Slaven

Respondent British Airways Plc

v

Heard at: Watford

On: 17 to 19 July 2017 and 21 May 2018

Before: Employment Judge Heal
Mr. W. Dykes
Mr J. Appleton

Appearances
For the Claimant: in person
For the Respondent: Ms G. Hicks, counsel

RESERVED JUDGMENT

The complaints of unfair dismissal and disability discrimination are not well founded and are dismissed.

REASONS

1. By a claim form presented on 12 August 2016 the claimant made complaints of unfair dismissal and disability discrimination.

2. We have had the benefit of an agreed bundle running to 440 pages. The following pages were also added by consent at the beginning of the hearing: 110 A-D, 255 A-D, 256 A-B and 279 A-E.

3. We have heard evidence from the following witnesses in this order:

Ms Carrie-Anne Slaven, the claimant,
Mr Paul Oliver, In-flight Business Manager, and
Ms Linda Bartlett, Area Manager (on 21 May 2018).

4. We were provided with a witness statement from Ms Linda Bartlett, Customer Service Manager. Before this hearing the respondent applied for a postponement on medical grounds because of Ms Bartlett's unavailability. The tribunal declined this application because it would take until June 2018 to relist a

five-day hearing. We decided to wait until we had heard some of the evidence and had seen how the issues unfolded before we made a decision as to whether we would postpone part heard in order to hear Ms Bartlett's evidence or accept her witness statement without her being called.

5. In the event, we did postpone the hearing part heard, with the consent of both parties, so that we could hear from Ms Bartlett in person. At the end of the evidence on 19 July 2017, we agreed a further hearing date with the parties of 5 September 2017 so that we could hear the evidence of Ms Bartlett.

6. However, that date was set without input from Ms Bartlett herself. On the respondent's application and with the claimant's consent, the tribunal postponed the hearing listed on that date. Given the availability of both parties and tribunal, the earliest date that could be found was 21 May 2018. Accordingly, we continued with this hearing on that date.

Issues

7. At a preliminary hearing on 16 November 2016 parties agreed a list of issues which was adopted by the tribunal. By reference to that list of issues and with the assistance of the parties at the outset of this hearing, we have identified the issues as follows:

Unfair dismissal

8. The respondent agrees that complaint of unfair dismissal is in time, the claimant qualifies to claim unfair dismissal and she was dismissed.

9. Therefore, the burden lies upon the respondent to prove its reason for the dismissal, which it says was capability. It says that it dismissed the claimant because she was not capable of fulfilling her contractual role for 2.5 years. It did offer her Group Income Protection ('GIP') as an alternative to dismissal, but the claimant's refusal of GIP was not the reason why she was dismissed.

10. The claimant does not positively assert an ulterior motive for the dismissal but she puts the respondent to proof of its reason for dismissing her. She said that she had an injury at work and it was possible the dismissal was linked to that, but she also thinks that the respondent dismissed her because she was not capable of doing her job.

11. Was the decision fair or unfair within the meaning of section 98(4) of the Employment Rights 1996?

12. In particular, the claimant said that the decision was flawed because no reasonable employer could have concluded that she was incapable of flying duties. She said that the respondent failed to make reasonable adjustments and failed to explore or implement alternative options. She said that the decision to dismiss was outside the range of reasonable responses in the circumstances of this case.

13. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

14. Does the respondent prove that there was a percentage chance of a fair dismissal in any event? If so, what is the percentage and when would dismissal have taken place?

Disability discrimination

15. The respondent accepted that because of a combination of chronic migraine, cluster headaches, depressive disorder and post-traumatic stress disorder the claimant was a person with a disability within the meaning of the Equality Act 2010.

Section 15

16. The "something arising in consequence of the claimant's disability" is the claimant did not accept 'GIP'. No comparator is needed.

17. Was the claimant's non-acceptance of 'GIP' something that arose in consequence of the disability?

18. The respondent accepts that it dismissed the claimant.

19. Did the respondent dismiss the claimant because of the "something arising" in consequence of the disability? The respondent says that it dismissed the claimant because she was not capable of fulfilling her contractual role for 2.5 years. It did offer her GIP as an alternative to dismissal but it did not dismiss her because she refused to accept it.

20. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Sections 20 and 21

21. Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely:

21.1.1 Giving the claimant an ultimatum of accepting the GIP or being dismissed;
21.1.2 not offering any suitable alternative positions;
21.1.3 requiring regular medical assessments if the claimant were to accept the GIP plan;
21.1.4 Not allowing the claimant to remain on sick leave until a position became available for her.

22. Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

23. Did the respondent take such steps as were reasonable to avoid the disadvantage? The adjustments relied on by the claimant are:

23.1.1 Being put in an office based role with no computer work, such as basic administration tasks;
23.1.2 allowing the claimant to return to work lighter and shorter duties;
23.1.3 allowing the claimant to work part-time;
23.1.4 splitting a full-time job into a job share for the claimant to have a part-time position;
23.1.5 not requiring the claimant to undergo medical assessments under the GIP plan;
23.1.6 allowing the claimant to remain on sick leave until the position arose.

24. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

Facts

25. We have made findings of fact on the balance of probability.

26. On 4 August 2008 the claimant began work with the respondent as a cabin crew team member.

The initial injury

27. On 20 January 2014 the claimant sustained a head injury while at work. This took place - according to the claimant's evidence about which we do not have to make any conclusive findings - as she was seated on her crew seat after the 'doors to manual' call was made. She suffered an injury that required her to be taken to hospital which was where she returned to consciousness.

28. Mr Oliver, who is the in-flight business manager with responsibility for the claimant, attended Hillingdon Hospital. He arranged for a possible flight for the claimant's family to travel from Scotland to be with her. In fact, when he asked the claimant whether she wanted her family there, at first, she said 'no'. Therefore, he did not make those arrangements for them. Later it appears that the claimant changed her mind but by that time the opportunity to fly the family down had been lost.

29. On 24 January 2014 Mr Oliver made the first referral of the claimant to the respondent's occupational health services, known as BAHS. BAHS responded on 7 February, saying that the claimant was unfit to return to work after the incident and could remain on sick leave for a few more weeks while she continued to recover. At that stage BAHS anticipated a return to the claimant's normal flying duties.

30. From 27 January to 4 March 2014 the claimant was signed off by her GP as unfit to work for 2 weekly periods and the diagnosis was, 'post head injury'.

31. During this period, it began to emerge, at least from the point of view of the claimant and her GP, that the lasting effects of her head injury were likely to be more serious than had originally been hoped. The claimant moved home to Scotland, urged by her housemates, so that she would have more physical and emotional support. She attempted to use a service called 'Simply Health' through the respondent to seek neurological treatment, but without success.

Section 4 process begins

32. The respondent has a contractual absence management policy known as 'EG300'. Section 4 of that policy deals with the procedure for managing absences which exceed 21 consecutive days, or absences which affect an employee's ability to work for medical reasons.

33. As the start of the respondent's 'section 4 process', a telephone conference call took place between the claimant, Mr Oliver, a notetaker and the claimant's trade union support on 21 February 2014. The claimant was told that Sue Persaud would take over as lead BAHS support.

34. The claimant had been sent copies of the EG300 policy. She was told that her position would be reviewed within section 4 at regular intervals over the coming months, she was told where to find help, and was told that when she was fit to work she would be supported through BAHS who would assess the next course of action and how to support her back into the workplace with a view to attending the back to work course when she was fit to fly.

35. On 26 February 2014 Sue Persaud of BAHS wrote to the claimant saying that she would make a referral that day for a neurologist's opinion.

36. On 4 March 2014 the claimant's GP signed her unfit for work for 4 weeks because of 'cluster headaches awaiting further investigations as per neurology'.

37. On 10 June 2014 the claimant met with Mr Oliver and Neil Blackburn, the claimant's trade union support, at the Crew Thistle Hotel in Glasgow. This was the first section 4 review meeting. They discussed the claimant's absence from work and that she was signed off work sick until 10 July. The claimant was awaiting appropriate medical referrals which could take up to one year.

38. The subsequent letter records that the meeting discussed the 3 possible outcomes of being managed through section 4: rehabilitation to the claimant's contractual role as cabin crew, suitable alternative employment within the respondent, or medical incapacity and subsequent termination of employment. The claimant was told that the respondent would look at her rehabilitation through a possible period of placement on the ground when she was medically fit and that BAHS would review medical updates and from their information, management might consider placing the claimant in 'career link' with a possible termination date being set which could be reviewed at every stage.

39. The letter also recorded that Mr Oliver asked the claimant what was stopping her from returning to her flying role at present and she told him that she

was awaiting a referral which her GP had said could take up to a year. The claimant said that she would consider ground duties.

40. We think that the claimant did tell Mr Oliver that she had impaired vision in part of one eye. He recorded this as blind in part of one eye which we do not consider was materially inaccurate to the issues we have to decide. The claimant also described other symptoms: a numb jaw which might be due to a frozen shoulder, and cerebral fluid coming from her ear.

41. On 9 July 2014 the claimant's GP signed a certificate giving a diagnosis of headaches following head injury. The GP advised the claimant that she might be fit for work for the period 9 July to 23 July with altered hours and amended duties. The doctor commented, '*please amend hours and duties to allow increasing return to work as tolerated by Miss Slaven*.' This note does not mention that the claimant was unable to do computer facing duties.

First ground duties placement

42. By email dated 10 July 2014 the claimant notified Mr Oliver that she had been signed as fit for ground duties for 1 to 2 days per week until she could get her care transferred down to London and appointments arranged. She was still awaiting the appropriate BAHS referral. We note that the claimant does not mention that she is unfit for computer facing duties.

43. On 16 July 2014 Sue Persaud referred the claimant to BAHS. The claimant was seen therefore in a clinic that day and the resulting report said that the claimant was fit for ground duties only. She had made a good improvement overall in her condition; there were still a few treatment sessions outstanding at present and it was likely that she might be able to return to her flying duties when these were completed. It was anticipated that she would return to flying in 12 to 14 weeks and meanwhile she was fit to undertake ground duties. The report continued that she could return to work in an office based role on 18 July to work for 4 hours daily for 3 days a week for 3 weeks and then increasing to 5 hours daily for 4 days a week for 3 weeks. The report made no mention of the need to avoid a computer facing role.

44. By email dated 16 July 2014 the claimant wrote to Mr Oliver saying that she had met with Ms Persaud that morning and would start ground duties on 18 July at the hours already set out above. The claimant said that she was meeting her neurologist in Scotland on 6 August and her GP had cleared her to fly but would prefer to speak to a neurologist first. The claimant too made no mention of the need to avoid a computer facing role.

45. By letter dated 17 July 2014, the Policy Implementation Executive formally notified the claimant that she had been allocated temporary ground duties with the Cargo Customer Data and her start date was Monday, 21 July 2014. Her host manager was Dominic Tong. The letter told the claimant of her BAHS restrictions, in particular, the number of hours per day and days per week together with increases set out above. No mention was made of a need to avoid computer facing.

The letter also does not warn the claimant of any special rules relating to annual leave.

46. The claimant's ground placement lasted for 10 days until 31 July. On 1 August 2014 the claimant's GP signed her unfit for work because of cluster headaches until 18 August 2014. Although the claimant tells us in evidence that the reason she could not complete this ground placement was because dealing with computers exacerbated her condition, she did not say that to the respondent at the time in correspondence, and her GP's statement of fitness for work makes no mention of it.

47. By email dated 19 August 2014 the claimant told Mr Oliver that she remained off work until 1 September 2014 following a relapse of symptoms from her head injury. She said that things were moving forward 'appointment wise now' so she expected to see permanent improvements in the following weeks.

48. In what appears to be a response to the claimant's email, Mr Oliver tells the claimant that he is aware that the PC screens may have contributed to her relapse, although he is not aware to what extent. He asks whether a non-PC, non-customer facing role would be better suited to her rehabilitation. The respondent had become aware of the possible involvement of computer use in the exacerbation of the claimant's condition.

Section 4 process continues

49. On 21 August 2014 a further section 4 review took place. The review was conducted by Tracey Walters in Mr Oliver's absence on sick leave. The claimant was present with her union representative Mr Blackburn and respondent had a notetaker. No notes have been provided by the respondent. We have a record of the meeting provided by the claimant.

50. The claimant told Ms Walters that the computer screens gave her headaches and so she relapsed. Therefore, her ground placement lasted only 2 weeks. Ms Walters appeared to place blame on the claimant for failing to chase BAHS after she had not heard from them for some time. The claimant told Ms Walters that she had a further medical appointment on 28 October which was a check-up about her headaches. Ms Walters told the claimant that the respondent might also need to be looking into setting a termination date. This deeply upset the claimant and her representative accused Ms Walters of lack of compassion. Ms Walters noted that 'we' had been given an instruction that 10 months was a guideline limit for all employees in section 4.

51. By email dated 22 August from the claimant to Mr Oliver, the claimant updated Mr Oliver about her position with appointments and reiterated that she was confident that with the right support she would be back in her contractual role. She was more than happy to do ground duties assuming that she did not remain on strong painkillers. No mention is made in this letter of avoiding computers.

52. Ms Persaud replied to the above email (into which she had been copied) saying that she was happy to support a request for additional physiotherapy

sessions but she would also like to understand the long-term prognosis and the impact of the physiotherapy sessions thus far. Therefore, she had requested a neurologist's report. She said that the claimant's return to ground duties had been unsuccessful and the report would help her to understand if there were any further considerations that she needed to take into account in the claimant's rehabilitation plan if and when she was to return to work.

53. She then asked the claimant a number of questions and although we do not have the reply to this email, it appears that the claimant did reply.

54. By email dated 10 September 2014 the claimant wrote to Dominic Tong, with a copy to Mr Oliver, saying that she was more than happy to come back to a noncustomer/non-computer facing role but had not yet been given such a position and therefore remained signed off all duties until 22 September. The claimant anticipated return to her contractual role on reduced hours, depending on how her recovery developed in the next couple of weeks.

55. A section 4 meeting was scheduled for 21 October 2014 but did not take place.

Second ground duties placement

56. The claimant saw BAHS on 23 October 2014 and was cleared to return to work on a ground placement. The claimant's GP confirmed this on the same day. It was anticipated that the claimant would return to work on 3 November.

57. By email dated 24 October Sue Persaud wrote to the claimant, '*I will advise your return to work date as 03/11 working 3 days a wk. All other recommendations will be outlined in the Ess response to Tracy*'.

58. An internal document records that the claimant was to return on 3 November in a non-customer facing role and that she was unable to work on computers at present. She was to work 3 days a week at 5 hours daily for 3 weeks and then increased to 4 days a week at 6 hours daily for 3 weeks and then increased to full-time for 6 weeks, working days and times to be discussed and agreed locally with management with a review in 3 months.

59. By letter dated 31 October 2014 respondent attempted to tell claimant formally that she had been allocated temporary ground duties at Cranebank starting on 4 November. That letter set out the hours and increases set out above. However, this letter was addressed to number 4 Mossgiel Road, but the claimant lived at number 14. Therefore, she did not receive it. (She did however know somehow, where to attend for work).

60. The claimant did receive a letter dated 31 October 2014, correctly addressed, formally notifying her of her grounded status.

61. In order to take up her ground placement, the claimant moved back south and changed GP. On 1 November 2014 she filled in a consent form consenting to the release of medical information/report by her GP to BAHS. This form recorded

that the claimant understood that the information was for BAHS use, protected by medical confidentiality.

62. It appears that the claimant was psychologically at risk during this period. On 14 November 2014 she wrote to Sue Persaud asking for confirmation of the hours she would be doing. She said that she was aware that she had to make appointments outside her duty days. She mentioned that the Ealing Crisis Team had discharged her but her counselling team felt that she was at a high level of risk. She was awaiting an appointment with a psychologist. She was also waiting for a neurologist's report and she looked forward to calling in fit on Monday.

63. GP's notes show that the claimant was diagnosed with depression as well as headaches during this period.

64. By email dated 17 November, the claimant wrote to Sue Persaud updating Ms Persaud on the whereabouts of her medical information. The neurologist's report had not yet been sent to the claimant's GP but the claimant had taken steps to chase this. Notes from an EEG would be sent to the claimant's GP's file. The claimant had posted a consent form to Ms Persaud consenting to release of these notes. The claimant was expecting a copy of the notes from the neurologist from an appointment of 28th of October and would forward them on receipt.

65. On 18 November the claimant started this ground role, in an office position doing administration. The role involved collecting in old manuals and issuing new ones. It did not involve the use of computers.

66. On or before 8 December 2014 Mr Oliver himself returned from sick leave. On that day he wrote to the claimant asking for an update about her situation and asking for a section 4 review meeting.

67. The claimant attended Dr Lambru, consultant neurologist at St Thomas' Hospital, on 27 February. She had been having nerve block injections which had been effective. It was proposed that such injections would be carried out every 10 to 12 weeks as required. On the basis that that treatment had been successful, Dr Lambru apparently cleared the claimant as fit to fly, subject to unspecified restrictions. We have not seen any information from Dr Lambru confirming that he cleared the claimant as fit to fly on 27 February: this is the claimant's account of her discussion with him.

68. The claimant passed on this information to Sue Persaud by email dated 3 March 2015. She told Sue Persaud that counselling and physiotherapy were still outstanding. The claimant asked to reduce her contract to enable her to book dates for the nerve block injections in advance and to allow for recovery time. She said that she tired easily since the accident. The claimant also stressed how much the situation affected her: the thought of spending another 6 to 8 weeks on the ground when she had been cleared as fit to fly was upsetting and did nothing to help her mental state. She did not spell out what were the restrictions placed by Dr Lambru on her fitness to fly.

69. Sue Persaud replied to the claimant that she was pleased that the claimant was certified fit for flying duties and she would like to see the claimant for a consultation on 6 March for a possible return to flying duties. In the circumstances Sue Persaud delayed requesting a further medical report.

70. In a further email in reply to the claimant, Sue Persaud said that a report would be obtained from the claimant's neurologist before a decision was made about the claimant's fitness and ability to sustain regular attendance was made. The information from the claimant was limited and verbal so that BAHS felt the need to request further reports.

71. On 12 March Mr Oliver referred the claimant to BAHS. Sue Persaud replied on 17 March that the claimant was fit for restricted flying duties. The text in the report recorded that the claimant remained under the care of her specialist but there had been a marked improvement overall in her symptoms and she now felt able to consider a return to restricted flying duties. The claimant reported that her specialist had recommended a reduction in her contract to 75%. BAHS were happy to make that recommendation subject to the final decision being made by management. Based on the information given by the claimant, Sue Persaud gave the opinion that the claimant was fit to return to restricted flying duties with a 75% reduction in contract a maximum of 2 sectors only for 3 months and return to full-time flying duties thereafter. No other adjustments were necessary and no further review had been arranged.

72. On 16 March 2015 the claimant met with Mr Oliver together with her union representative and a notetaker, for a section 4 review.

73. At this point the above BAHS report was not yet available. Mr Oliver reviewed the claimant's sick absence of 313 sick days in the last 2 years. The claimant said that she was 'pretty well', despite stress. Mr Oliver said that the respondent needed to make sure that the claimant was 'OK' to return to flying. He said that they needed to make sure that the rehabilitation plan had been followed. The claimant asked what was the rehabilitation plan. It appeared that the plan of 3 days at 4 hours a day and then an increase to 4 days at 6 hours a day had not taken place. The claimant did not say that she did not know about the proposed increases but did say that, '*we reviewed it'*.

74. In any event, Mr Oliver realised for the first time that the rehabilitation plan had not been followed. Therefore, he saw the need to return to Sue Persaud with this information. Although the claimant insisted that she was fit enough to fly, he did not want to find that she had started a flight and then could not do it. The claimant said that she had a specialist who said that she could get back to flying. Mr Oliver wanted to make sure.

75. He said that he would set up a return to work course for 20 April but there was no course available earlier. He said that the claimant needed to fulfil her rehabilitation plan. The claimant was upset at this, and said that it was '*a complete shambles*' and she felt that she had done something wrong. There was then a discussion about her timesheets, which had gone missing. The claimant believed that she was being accused of not sending them in.

76. The respondent took the view that if a person in the claimant's situation, who was actually working 3 out of 5 days, but took those 3 days off, then they should actually take 5 days as leave. The respondent also preferred that a person in the claimant's position should not take leave during rehabilitation, but should complete their rehabilitation programme as it had been planned. The claimant had not understood this, particularly since she had been told that she had to take her leave before the end of the leave year. The result was a certain amount of confusion, which deeply upset the claimant.

77. Mr Oliver confirmed this meeting to the claimant by letter dated 11 May 2015.

78. On 17 March 2015 the claimant signed a consent form consenting to the release of medical information/report by Dr Lambru, consultant neurologist at St Thomas's Hospital. The form records that she understood that that information was for the BAHS use, protected by medical confidentiality.

79. By letter dated 23 March 2015 the claimant asked Mr Oliver whether her grounded placement was to make up for the misunderstanding about annual leave.

80. Mr Oliver replied on the same day that she would continue to work full-time on the ground, which was supported by Sue Persaud. This was not to make up for any confusion about annual leave.

81. By further email on 23 March, the claimant wrote to Mr Oliver that she had not called in sick because she was not sick for her duties. She said that she was extremely upset at the accusation of not meeting her ground placement when the agreement was for 3 days per week at 4 hours which could be reviewed. She said she never received that review despite regular communications with Sue Persaud.

82. On 7 April 2015 Sue Persaud wrote to Dr Lambru asking him to provide with information on the following questions:

'what is her diagnosis
what has been her management plan to date
what further treatment is planned?
What is the prognosis for a successful return to work in the longer term?
What are the risks of incapacitation in the future?'

83. On 17 April 2015 the claimant did call in sick and in a certificate dated 20 April 2015, her GP diagnosed depression/PTSD saying that this would be the case for 4 weeks. It appears that the recovery she had been making had been set back.

84. The claimant did not undertake a return to flying course and did not return to work of any kind.

85. The claimant told us in oral evidence that during this period she had a 'breakdown'.

86. Consistent with this is an email from the claimant to Mr Oliver and Sue Persaud saying that she had been discharged from the home crisis team to the recovery team. She had had an assessment with the community mental health nurses and her medication would be monitored by a psychiatrist. The specialist therapy would take up to 18 months.

87. By email dated 19 May 2015 the claimant sent Mr Oliver an update, with a copy to Sue Persaud. She said that she had been signed off work until 30 June when her GP would sign her fit for flying duties on a 75% contract. She gave a list of the appointments she had scheduled. She had been chasing up the report from Dr Lambru. She asked to speak to Mr Oliver and told Ms Persaud that she had some letters to hand in from the neurology team.

The medical situation and prognosis

88. By letter dated 26 May 2015 Dr Lambru answered the questions he had been sent by the respondent. He gave the diagnosis as post traumatic cluster headache. He said that this was one of the most disabling pain disorders known to mankind, characterised by pain on one side of the head, excruciating in severity and occurring multiple times per day.

89. In answer to the question about prognosis, he said that this was difficult to anticipate because this headache condition is very rare, the response to treatment is variable and the temporal pattern not always predictable. He said that there are some cases of post-traumatic cluster headache that spontaneously improve after 1 or 2 years. However, there are other cases in which the headache becomes chronic for several years, causing severe disability to sufferers. If medications significantly helped to improve the claimant's headache, then he expected that she would be able to return to work. At present he was still in the process of trying the first line treatments. He thought that the risks of incapacitation in the future were extremely low. (This document was only seen by BAHS and not by management.)

The decision to dismiss

90. By letter dated 10 June Mr Oliver invited the claimant to a section 4 meeting on 16 June 2015. He told claimant that this was a formal meeting so she may, if she wished, be accompanied by a person who was a trade union representative. He said that during the meeting they would discuss the following:

- returning to her contractual role
- suitable alternative employment
- any reasonable adjustments that may be applicable
- termination of contract of employment

91. He said that British Airways wished to support the claimant back to work however this was dependent on the advice received from BAHS.

92. He emphasised that the letter was not intended to cause her any added stress and that the respondent was keen to support the claimant during the ongoing sick absence.

93. At the meeting on 16 June Mr Oliver met with the claimant and a union representative together with a note taker. He said that the claimant had had 222 days absence since 20 January 2015. He asked whether her consultant had given her any timescales. She said her neurologist had said two years. She later said that the neurologist could not be certain and it may be that she would suffer for the rest of her life. The psychological position was complex. Mr Oliver noted that it had been 18 months (since the accident) and that they had reached a point at which they should look at the options. He stressed that this was reviewable. He said that he was going to register the claimant with career transition and give her a termination date for 4 months' time, on 16 October 2015. The claimant said that she did not feel she had been supported fully by management and BAHS. She could not work with computers because of how she felt. Mr Oliver said that the majority (of jobs) were computer facing. The claimant said that she had been about to come back to work but she had a meltdown and her doctor had said 'no'.

94. On 19 June 2015 the claimant was referred again to BAHS. The response from Sue Persaud, on the same day, was that she had requested a medical report from the claimant's specialist to understand her long-term prognosis. The report had now arrived and Ms Persaud had contacted the claimant on 19 June to discuss her advice to management. Ms Persaud said that she was '*unable to give any timescales for when a return to flying duties can be anticipated'*. She told Mr Oliver that he might wish to consider the disability discrimination provisions of the 2010 Act which were likely to apply because it was unclear when the claimant's symptoms were likely to improve.

95. By letter dated 1 July 2015 Mr Oliver wrote to the claimant confirming the decision taken on 16 June 2015. This letter is very lengthy and has been written by means of a pre-drafted template into which he has added the specific details of the claimant's case and he has selected particular paragraphs. The result of this approach is that not every paragraph of the letter is consistent with every other paragraph.

96. Even though this letter expressly states that the claimant was unable to return to work in any capacity, the sense of the letter as a whole is that in fact there was some possibility that the claimant could return to work in some capacity and therefore Mr Oliver set in train a search for alternative work. In reality, he did not hold out much hope that the claimant would find such work, not least because she was unable to work with computers.

97. Mr Oliver took into account that at the time of his meeting with the claimant on 16 June, she had been absent from work almost 18 months, with the exception of 2 brief periods. The rehabilitation plans, which included alternative duties and reduced hours, had been unsuccessful. He considered that there were no adjustments which might reasonably have been made in order to help the claimant to return to work. Nor were there any suitable alternative positions available to her. He considered that the respondent had taken all reasonable steps to support the claimant and he could not see what future support might be offered which would enable her to return to work.

98. By email dated 6 July 2015 the claimant appealed Mr Oliver's decision. She said that she found the decision letter contradictory in that it said both that she was unable to return to work in any capacity and that Mr Oliver expected her to be successful in finding an alternative job. She said that she had not been given the chance to apply for other jobs or to talk of the career transition team. She wanted to discuss BAHS speaking to all of her consultants without her knowledge. She did not feel that reasonable adjustments had been made and the agreement about increasing her hours when on the ground have not taken place. She urged the respondent to consider the Equality Act. She said that her injury had taken place in the workplace through no fault of her own.

Alternative positions and GIP

99. By email dated 15 July 2015 Tracey Webster contacted the claimant to introduce herself as the Career Transition Service Adviser. She said that she was able to help and support the claimant with CV preparation, applications and interview skills. The respondent did not receive a response to this email.

100. The appeal took place on 21 July and was heard by Linda Bartlett. The claimant attended the hearing together with a union representative.

101. In particular the claimant said that she needed extra time to try to get a job. She said that no reasonable adjustments had been made.

102. By email dated 13 August, Tracey Webster reminded the claimant that she was available to help her with her CV, applications and interview skills or general career coaching. She invited the claimant to make contact.

103. The claimant did make contact, asking for a telephone appointment to discuss what support services were offered.

104. Ms Webster replied by email attaching CV preparation documents to help her collate her CV. She said that she was happy to help the claimant put a CV together and then they could move on to application and interview skills.

105. By email dated 19 August, Ms Bartlett sent the claimant a link to some GIP information. The claimant replied saying that she would like to be considered for it and asked Ms Bartlett to apply for it, on her behalf.

106. GIP is an insurance policy through which an employee who is unable to work by reason of incapacity receives income protection benefits on the terms and the amounts determined by the third-party insurer. During the time while the employee is in receipt of the benefits, he or she remains an employee of the respondent.

107. The claimant sent an email to Louise Burns of IBM Eurofleet dated 25 August saying that she had been checking the intranet but so far, no suitable jobs had come up.

108. By letter dated 25 August 2015 Linda Bartlett sent the claimant details of the GIP. She explained that employees who were unable to work due to incapacity might be eligible for GIP benefit to provide a regular income once company sick pay had been exhausted. Ms Bartlett thought that the claimant might be eligible. The benefit was provided through an insurance company who was solely responsible for all decisions relating to eligibility. This was not a decision in which the respondent had any involvement.

109. To be eligible for GIP benefit, amongst other things, the claimant had to be assessed by the insurer to meet the insured definition of incapacity which is, '*the total incapacity of a member by reason of injury or illness rendering them unable to carry out the material and substantial duties of his own occupation, or any other occupation for which they are suited by reason of education, training or experience. In order for this definition to be satisfied, the member must not be following any other occupation*."

110. Ms Bartlett asked the claimant to carefully read, complete and return the enclosed employee claim form and declaration and consent form.

111. On 24 September 2015 the claimant was informed by the respondent that her appeal was put on hold while she made a GIP application. However, her termination date was still set for 16 October. That could be reviewed if the information from her GIP application had not been concluded.

112. The claimant continued to check the respondent's internal vacancies but nothing came up which she thought was suitable.

113. By letter dated 9 October 2015 Linda Bartlett extended the claimant's termination date to 16 December to allow time for her GIP application to be completed.

114. The claimant submitted a grievance on 12 October 2015. The claimant makes no complaint about the grievance and therefore we will not set out the details of it here.

115. The claimant continued to check the intranet regularly for alternative roles. By email dated 16 November 2015, she told Tracey Webster that there seemed to be between 40 and 55 jobs available, most of which were at management or executive level. She said that she had made enquiries for 'A5' roles but they were focused around computer work and she had problems with computers.

116. By further email dated 30 November the claimant said that she was still continuing to check the intranet as often as she could. She had severe difficulties even leaving the house and asked for advice about attending interviews in those circumstances.

117. The claimant continued to find that most available posts were graduate, senior management or executive roles, or crew roles at other airports. None of these were suitable for her. She did not think that she would receive medical support to return to full-time work.

118. As at 27 January 2016, the claimant had not submitted any applications for jobs because there had been no suitable positions for her.

119. As at 17 March 2016, she continued to struggle to find any internal part time roles which were suitable. Vacancies were extremely limited and most were at management or executive level. The claimant expressed some possible interest in a team leader role but then decided against it on medical advice.

120. Throughout this period, the claimant's termination date was repeatedly extended.

121. A possible role arose at the end of April 2016, however the claimant pointed out that it was a solely computer-based role which would not be suitable for her.

The GIP offer.

122. By letter dated 4 May 2016 the respondent wrote to the claimant saying that the insurance company had accepted her claim to GIP benefit. The claimant was told that if she accepted the offer, GIP benefit would continue until she no longer met the definition of incapacity, made a full recovery, returned to any form of work, or reached the 'insurance cease' age. The letter reiterated that the respondent had no responsibility for any decisions taken by the insurer about the claimant's eligibility or otherwise for this benefit. The letter said that once the claimant was receiving payments, the insurer would review her claim from time to time in order to obtain evidence of continued incapacity. This might include medical reports, an independent medical examination, physical evaluation or a home visit. If it was found that the claimant no longer satisfied the insured definition of incapacity or she failed to provide the information requested or to fully cooperate with the assessment process then benefit payments would discontinue. The claimant was told that she would cease to be employed as cabin crew but would remain employed by British Airways.

123. If the claimant declined the offer of GIP benefit, she would continue to be managed in accordance with the relevant absence management policy which would result in her employment being terminated on grounds of medical incapacity on 31 May 2016.

124. By email dated 20 May 2016 the claimant asked Mr Oliver how often the insurers would require an employee to attend a medical examination. She also asked whether income payments and benefits would cease if she needed to retrain in a college or university before commencing further employment. Mr Oliver replied that the insurers might complete ad hoc medical assessments at any time. Having taken advice about the claimant's query about college or university, he said that should her circumstances change so that she was able to undertake a role of any description then she would be required to inform the insurers about any changes to her personal circumstances.

125. On 23 May 2016 the claimant declined the offer of GIP benefit. She did not at the time give a reason for this decision. In her witness statement she says that

she refused GIP because she did not want to submit to medical assessments. In oral evidence she disowned this explanation and said that it was reasonable to require her to submit to regular assessments. The more nuanced answer she later gave in evidence is that she did not want to submit to *ad hoc* assessments, the idea of which she found very unsettling. She told us further that she did not accept GIP because she wanted more information about the assessments: would they be weekly or monthly? Could she attend an educational course, say, one evening a week? She said too that she did not feel able to sign a document saying that she was completely incapacitated when her GP and neurologist said that she had some working capacity. She did not raise all these concerns with the respondent at the time.

Appeal decision

126. By email dated 26 May, Ms Bartlett notified the claimant of her appeal decision. She upheld Mr Oliver's decision and confirmed this by detailed letter on 30 June 2016.

127. Ms Bartlett had reviewed the detailed history of the claimant's situation. She noted that the medical advice said that the claimant was unable to return to her contractual role and that BAHS were unable to give any timescales as to when the claimant might be able to return to work or when her symptoms were likely to improve. The claimant had been absent from her contractual role for well over 2 years and it was clear that she was unable to return to her contractual duties or indeed any other duties within a reasonable timescale.

128. Ms Bartlett did not uphold Mr Oliver's decision *because* the claimant had refused the GIP offer. However, the fact that GIP had been offered was an indicator that the claimant was indeed unable to return to work within a reasonably foreseeable timeframe.

129. Although the claimant had raised a number of different issues in her appeal, the main point of it was that she did not feel she had been given enough time to recover so as to be able to return to work either in her contractual or in an alternative role.

130. At appeal, the claimant had asked for a further 3 months employment (that is until January 2016). At the time Ms Bartlett was considering the situation, in May 2016, the claimant had had the benefit of this 3 month extension and considerably more, owing to the delay in receiving the GIP decision. There had nonetheless been no improvement in the claimant's condition so as to enable her to return to her contractual or any other role. Ms Bartlett saw no evidence that the position was likely to change within a reasonable timescale. For those reasons, she confirmed Mr Oliver's decision to dismiss. The contract terminated on 31 May 2016.

Concise statement of the law

Unfair dismissal

131. Ill health can provide grounds for the dismissal of an employee either because of a single extended absence or because of persistent intermittent absences or a combination of the two. In any case, depending on the circumstances, there may come a point when the employer can dismiss fairly.

132. The starting point for analysing whether or not an ill health capability dismissal is fair is the EAT decision in *Spencer v Paragon Wallpapers Ltd* [1976] IRLR 373. In that case Phillips J emphasised the importance of scrutinising all the relevant factors.

"*Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer*?"

133. There is a conflict between the needs of the employer and those of the employee, and a tribunal must be satisfied that the employer has sought to resolve that conflict in a manner which a reasonable employer might have adopted: was it within the reasonable range of responses? In the course of doing this the tribunal will enquire whether the employer carried out an investigation which meant that he was sufficiently informed of the medical position.

134. The significance of consultation emerges from the following passage from the judgment of the EAT in *East Lindsey District Council v Daubney* [1977] IRLR 181:

"*Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done."*

Section 15 discrimination

135. Section 15 of the 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. Section 15(2) makes it clear that the prohibition from discrimination arising from disability 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'*.

136. First, we must identify whether there was unfavourable treatment and by whom: in other words, we must ask whether A (the respondent) treated B (the claimant) unfavourably in the respects relied on by B. No question of comparison

arises. We must determine what caused the treatment complained of, or what was the reason for it. The focus at this stage is on the reason in the mind of the respondent. There may be more than one reason in a section 15 case. The “something” that causes the unfavourable treatment need not be the main or sole reason, but it must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. Motives are irrelevant.

137. We must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. There may be more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact in each case whether something can properly be said to arise in consequence of disability. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

138. This stage of the causation analysis involves an objective question and does not depend on the thought processes of the alleged discriminator. It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why the respondent treated the claimant in the unfavourable way alleged, in order to answer the question whether it was because of “something arising in consequence of the claimant's disability”. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to “something” that caused the unfavourable treatment."

Reasonable adjustments

139. In order to determine a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination, an employment tribunal must ask whether there is a provision, criterion or practice (‘PCP’) which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial in comparison with persons who are not disabled.

140. It is necessary to take a broad and not unduly restrictive approach to defining a ‘PCP’. It is unlikely however to be something that arises on a one-off basis, for example the application of a flawed disciplinary procedure on a one-off basis (see *Nottingham City Transport Ltd v Harvey [2013] EqLR 4*, *EAT* which states that *'practice connotes something which occurs more than on a one-off occasion and which has an element of repetition about it*.')

141. It is only when the 'provision, criterion or practice' has been identified that it is possible to define the 'pool' of comparators for the purpose of seeing whether there has been the requisite substantial disadvantage of the disabled person in comparison to the non-disabled.

142. In many cases the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the relevant provision, criterion or practice. The proper comparator can be identified only by reference to the disadvantage caused by the arrangements that are questioned.

143. A disabled employee whose disability increases the likelihood of absence from work is disadvantaged when compared to non-disabled employees as she is at greater risk of being absent on grounds of ill health.

144. The content of the obligation is that the employer must take such steps as it is reasonable, in all the circumstances of the case, for it to take in order to prevent the PCP having that effect. It follows that it is only if the adjustment concerned would remove the disadvantage from the employee that the duty will arise to make it.

145. The Disability Discrimination Act 1995 section 18B(1) gave guidance as to the kind of considerations which will be relevant in deciding whether it is reasonable for a person to have to take a particular step in order to comply with the duty to make reasonable adjustments. Section 18B was not re-enacted in the Equality Act 2010. However, the matters listed therein are largely reproduced in Chapter 6 of the statutory code (Code of Practice on Employment (2011), and HHJ Richardson in *Carranza v General Dynamics Information Technology Ltd* [2015] IRLR 43 said that he had no doubt that the same approach applied to the Equality Act 2010. It is often useful therefore to remind ourselves of those matters.

'*18B Reasonable adjustments: supplementary*

(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to—

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable for him to take the step;

(c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;

(d) the extent of his financial and other resources;

(e) the availability to him of financial or other assistance with respect to taking the step;

(f) the nature of his activities and the size of his undertaking;

(g) …(not relevant).'

146. It may be a reasonable adjustment not to dismiss a disabled employee. The duty to make adjustments is, as a matter of policy, to enable employees to remain in employment, or to have access to employment. The duty will not extend to matters which would not assist in preserving the employment relationship.

147. The duty to make adjustment arises by operation of law—it is not essential for the claimant himself or herself to identify what should have been done. It is important however to identify precisely what constituted the 'step' which could remove the substantial disadvantage complained of.

148. The test of 'reasonableness', requires us to apply an objective standard.

Analysis

149. We found it helpful to analyse this matter using the structure of the issues set out above.

Unfair dismissal

The burden lies upon the respondent to prove its reason for the dismissal, which it says was capability.

The claimant does not positively assert an ulterior motive for the dismissal but she puts the respondent to proof of its reason for dismissing her.

150. We consider on the facts that the respondent has proved that its reason for the dismissal was capability. Indeed, as the hearing turned out, the claimant has not contested this. Dismissal by reason of capability is a potentially fair reason for the purposes of section 98(2) of the 1996 Act.

Was the decision fair or unfair within the meaning of section 98(4) of the Employment Rights Act 1996?

In particular, the claimant said that the decision was flawed because no reasonable employer could have concluded that she was incapable of flying duties. She said that the respondent failed to make reasonable adjustments and failed to explore or implement alternative options. She said that the decision to dismiss was outside the range of reasonable responses in the circumstances of this case.

151. The latest medical evidence dated 26 May 2015 from Dr. Lambru, which had been sent to the respondent's occupational health service, was wholly unable to give any prognosis for a successful return to work. On the medical evidence the claimant was unable, by reason of her very painful and debilitating condition, to carry out her contractual role.

152. Although Dr. Lambru appeared to have told the claimant on 27 February 2015 that she was fit to fly, the respondent only had the claimant's verbal account of that and there were unknown restrictions. It was within the reasonable range of responses for the respondent in those circumstances, to seek an expert opinion.

153. Although the claimant had insisted in March 2015, to Mr. Oliver, but she was fit to fly, it was within the reasonable range of responses for Mr. Oliver to be concerned that she had not in fact worked through her rehabilitation plan. It was within the reasonable range of responses for Mr. Oliver to be worried about what would happen if the claimant started to fly, committed herself to a flight, and then found that it was impossible to continue. In these circumstances it cannot be said that no reasonable employer would have concluded that she was unfit to fly.

154. The respondent had consulted with the claimant on a regular basis about the situation and, in particular did so before it took its decision to dismiss. The respondent had also taken reasonable steps to inform itself of the medical situation. It consulted with its own occupational health service and that service was itself informed by Dr. Lambru, a consultant neurologist who had examined the claimant. The claimant was given reasonable support in her search for alternative roles within the respondent over many months, but there was nothing suitable available. Taking all that into account we consider that the dismissal was within the reasonable range of responses and was fair.

If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

Does the respondent prove that there was a percentage chance of a fair dismissal in any event? If so, what is the percentage and when would dismissal have taken place?

155. These issues do not now arise.

Disability discrimination

156. The respondent accepted that because of a combination of chronic migraine, cluster headaches, depressive disorder and post-traumatic stress disorder claimant was a person with a disability within the meaning of the Equality Act 2010.

Section 15

The "something arising in consequence of the claimant's disability" is the claimant did not accept 'GIP'. No comparator is needed.

Was the claimant's non-acceptance of 'GIP' something that arose in consequence of the disability?

157. The respondent accepts that it dismissed the claimant. This was unfavourable treatment.

158. The claimant's *eligibility* for GIP was something arising in consequence of her disability. However, her *non-acceptance of it* did not arise in consequence of her disability. She did not accept because she was unsettled by a number of private anxieties and uncertainties of her own, which she did not share with the respondent. This was her choice. It was not a simple matter of not wishing to submit to medical assessment, but of more complicated private anxieties which it has taken time, even during this hearing, for the claimant to identify and articulate to us, and which seem to have inhibited a decision to accept. We think the decision to refuse arose in consequence of something within the claimant: it was, we think, her own choice and perhaps a not wholly rational decision, the real cause of which is impossible on the evidence to pin down.

Did the respondent dismiss the claimant because of the "something arising" in consequence of the disability? The respondent says that it dismissed the claimant because she was not capable of fulfilling her contractual role for 2.5 years. It did offer her GIP as an alternative to dismissal but it did not dismiss her because she refused to accept it.

159. The non-acceptance of the GIP was not the main reason for the dismissal. The principal reason was the claimant's inability to work for 2.5 years and the lack of any prognosis as to when she might return. 'But for' the refusal of GIP, however the claimant would have continued in employment. The refusal did therefore have a more than trivial, and therefore significant, effect on the decision to dismiss.

160. However, as we have said above, we think the claimant has not shown that the refusal to accept the GIP arose in consequence of the disability. This is where the chain of causation broke. It was some lack of rationality or confusion in the claimant's own mind that caused her to refuse to accept.

Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

161. The respondent has advanced no positive case on this issue, but in any event, it does not arise on our findings above.

Reasonable adjustments

Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely:

Giving the claimant an ultimatum of accepting the GIP or being dismissed;

162. As the respondent accepts, it did have a practice of dismissing employees who were unable to work by reason of ill health for long periods and who did not accept GIP. This was a 'PCP'.

not offering any suitable alternative positions;

163. This was not a provision, criterion or practice: it was a situation that arose in the claimant's specific circumstances: that, because of her inability to work with computers, do a customer facing role and because of her particular level of seniority and qualifications, there were no roles available which she could be offered.

requiring regular medical assessments if the claimant were to accept the GIP plan;

164. This was a PCP, but it was not applied by the respondent. It was applied by a third party, the insurer who provided the GIP.

Not allowing the claimant to remain on sick leave until the position became available for her.

165. The respondent says that this was not a PCP because it only applied to the claimant. We disagree. Given that the respondent had a PCP of dismissing employees who were absent sick long term and who did not accept GIP, it must follow that it also had a PCP of not allowing employees who did not accept GIP to remain on long term sick absence until a position became available.

Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

166. We are left with two PCPs applied by the respondent: of giving the claimant an ultimatum that if she did not accept GIP she would be dismissed and (what is really the reverse side of the same PCP) not allowing her to remain on sick leave until a position became available. The practical effect was that the respondent dismissed her.

167. Persons who did not have a disability were considerably less likely to be on long term sick absence. A disabled employee whose disability increases the likelihood of absence from work is disadvantaged when compared to non-disabled employees as they are obviously at greater risk of being absent on grounds of ill health. So, we think that the claimant was at a disadvantage compared to non-disabled employees in the application of those two PCPs.

Did the respondent take such steps as were reasonable to avoid the disadvantage? The adjustments relied on by the claimant are:

Being put in an office-based role with no computer work, such as basic administration tasks;

168. No such role arose during the months when the claimant was seeking an alternative role. The claimant acknowledged that she did not put in any applications for jobs because none arose that she could do. She emphasised to us that it was not her case that a role should be fabricated for her.

169. It would have avoided the disadvantage of dismissal for the claimant to be placed in an office role with no computer tasks (and also no customer facing duties). This would have been a reasonable adjustment had such a role existed. When one existed, the claimant was given it: this was the role which she performed from 18 November 2014. This role suited the claimant, but it was time limited. No other such role arose.

170. In those circumstances, the respondent is not on breach of its duty in failing to offer the claimant a role that did not exist.

allowing the claimant to return to work lighter and shorter duties;

171. The respondent did make this adjustment in relation to the two short-lived ground based roles when they became available, however from April 2015 onwards that claimant was too ill to perform any role. There has been no evidence of any other such role becoming available. We consider that the respondent was not unreasonable in failing to make an adjustment that could not possibly have brought the claimant back to work in the circumstances.

allowing the claimant to work part-time;

splitting a full-time job into a job share for the claimant to have a part-time position;

172. The same reasoning applies to these two adjustments: given that the claimant was too ill to undertake any role it was not unreasonable for this respondent to fail to make adjustments that could not have returned her to work.

not requiring the claimant to undergo medical assessments under the GIP plan;

173. This was outside the respondent's power: this requirement was imposed by a third party, the insurer. In any event, before us, the claimant accepted the reasonableness of requiring medical assessments. So there was no breach of the duty.

allowing the claimant to remain on sick leave until a position arose.

174. The respondent made this adjustment from 16 June 2015, initially for 4 months. It was then extended repeatedly while the application was made for GIP. The claimant had the entire period from 16 June 2015 to 31 May 2016 remaining on sick leave and seeking an alternative position. In all this time, no position had arisen for which the claimant could reasonably apply. Had the claimant accepted GIP this very adjustment would have been made indefinitely because the claimant had to be an employee to qualify for GIP.

175. However, the history had shown that there was no realistic likelihood of any position arising which the claimant could perform. GIP gave the respondent a legal necessity to retain an employee in employment. Had the claimant chosen, she could have availed herself of this very adjustment. However, without the GIP reason to retain the claimant in employment, there was no reasonable basis for the respondent retaining the claimant in employment. There was no realistic likelihood of finding an alternative role and so returning the claimant to work, so making this adjustment would have been keeping the claimant on the respondent's books without a valid reason. We do not think it a failure to make a reasonable adjustment to fail to do that.

Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

176. This issue now becomes academic.

177. For all those reasons, the claims of unfair dismissal and disability discrimination are not well founded and are dismissed.

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Employment Judge Heal

Date: 30 July 2018……..…..

Sent to the parties on: 1 August 2018..

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For the Tribunal Office