EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: B

HELD AT: Manchester **ON:** 16, 17, 18, 19, 20, 23 April 2018
24 April 2018
(In Chambers)

BEFORE: Employment Judge Ross
Mrs L A Buxton
Mr S T Anslow

REPRESENTATION:

Claimant: Claimant's Husband
Respondent: Mr C Taft, Counsel

JUDGMENT

1. The claimant's claim that she was discriminated against by the respondent because of her disability, pursuant to s.13 Equality Act 2010 is not well founded and fails.

2. The claimant's claim that she was unfavourably treated by the respondent because of something arising in consequence of her disability pursuant to s.15 Equality Act 2010 is not well founded and fails.

3. The claimant's claim that the respondent failed in its duty to make reasonable adjustments pursuant to s20-22 Equality Act 2010 is not well founded and fails.

REASONS

1. The claimant was employed by the respondent as a Paralegal Assistant in the Crown Prosecution Service. She worked for the respondent from 2004. She was absent from work on maternity leave. Following the birth of her child she returned to work. She was absent from work from October – December 2014 following a miscarriage. The reason for her absence changed to stress at work and latterly also depression. She never returned to work. Sadly, she suffered further miscarriages during this period of absence. Her employment was terminated by reason of her inability to return to work due to her health by letter dated 8 November 2016.

2. The claimant brought a claim for unfair dismissal and disability discrimination to this Tribunal. The case was subject to two case management hearings. The second hearing was conducted by Judge Ryan on 12 December 2017 and followed the claimant's replies to further particulars which are found at pages 39 to 54 of the bundle. The respondent filed an amended response which is at pages 74 to 83 of the bundle.

3. We heard from the claimant. For the respondent we heard from witness E who managed the claimant's absence from work during the majority of her period of ill health, witness F who was the line manager of witness E, witness G who was the manager who took the decision to dismiss the claimant and the Appeal Officer witness H.

4. At the outset of the hearing the Tribunal noted that this case had been subject to two Case Management Hearings. The second Case Management Hearing took place because the further particulars supplied by the claimant were not capable of being clearly understood as specific legal allegations. At the Case Management Conference Employment Judge Ryan clarified the claimant's claims. There was no objection following that Case Management Hearing of the way the claims had been clarified. At the outset of this hearing Employment Judge Ross explained that the Tribunal would be considering the allegations and issues as clarified by Employment Judge Ryan.

5. During the course of giving her evidence the claimant became very distressed. The Tribunal held frequent breaks. Time was given to allow the claimant to recover herself to be well enough to proceed.

6. The Tribunal extends its sympathy to the claimant for the personal situation in relation to the recurrent miscarriages she has suffered.

7. The Tribunal's task is to consider legal allegations brought by the claimant against the respondent, to find the relevant facts and then apply the law to the facts to reach a decision. That is what we have done.

The Issues

8. The issues in the claim for unfair dismissal, disability discrimination, breach of contract and unlawful deduction from wages are found at paragraphs 11-17.4 of EJ Ryan's case management note of 12 December 2017 at p 66-69 of the bundle.

The Law

Discrimination

9. The relevant law is found in the Equality Act 2010 Section 13 (Direct Discrimination), Sections 20 to 22 (Duty to make reasonable adjustments), Section 15 (Discrimination arising from disability). The burden of proof provisions are relevant, Section 136 and time limit provisions, Section 123.

10. We reminded ourselves of the principles in Igen Limited & others v Wong [2005] ICR 931 CA; Anya v The University of Oxford [2001] IRLR 377; Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL; Barton v Investec Securities [2003] ICR 1205; Madarassy v Nomura International PLC [2007] ICR 867; Laing v Manchester City Council [2006] ICR 1519; and Nagarajan v London Regional Transport [1999] ICR 877 HL.

11. In the reasonable adjustments claim the Tribunal had regard to the principles in Environment Agency –v- Rowan 2008 ICR 218 EAT, Project Management –v- Latif 2007 IRLR 579 and Smith –v- Churchills Stair Lifts Plc 2006 … 524 CA. The parties drew our attention to the Secretary of State for Work and Pensions (Job Centre Plus) –v- Higgins UKEAT/579/12 2014.

12. The Tribunal also had regard to the EHRC Code of Practice and in particular paragraphs 6.1, 6.10, 6.16, 6.28 and 6.29.

13. In the Section 15 claim (Discrimination arising from disability) the Tribunal had regard to Pnaiser –v- NHS England and Another 2016 IRLR 170 EAT. The Tribunal also had regard to para 5.9 EHRC Code of Practice.

14. In the direct discrimination claim the Tribunal had regard to Section 23(1) Equality Act 2010 and the principle in High Quality Life Style Limited –v- Watts 2006 IRLR 850 and Stockton on Tees Borough Council –v- Aylott 2010 ICR 1278 CA.

Unfair dismissal

15. The relevant law is at s94,95 and s 98 Employment Rights Act 1996. The case of East Lindsey District Council v Daubney 1977 ICR 566 is relevant.

Unlawful deduction from wages/breach of contract

16. The Employment Rights act 1996 Part II, Section 13 is relevant as is s27(2). For the breach of contract claim we must consider contract principles.

Facts

17. We find the following facts.

18. The claimant previously worked for the respondent in the Organised Crime Division. That department transferred to Warrington as part of a re-organisation. The claimant had been absent on maternity leave and she explained to the respondent it was not possible for her to travel to Warrington. In a letter of 21 March

2014, she was offered a transfer to the Specialised Fraud Division ("SFD") in Manchester, see page 1596.

19. The claimant was then absent from work on sick leave from 6 January 2014 until she returned to work in April 2014.

20. Prior to the claimant's transfer to SFD in April 2014 all parties agree there was an informal meeting in Starbucks where the claimant was given information about the position in that department. The precise details of the conversation are disputed but these are not necessary for the Tribunal to determine.

21. During the claimant's absent from work from 6 January 2014 until April 2014 an occupational health report was obtained (see page 114A and B). The claimant was referred for an updated report in July 2014 by her manager at that time C H. (see page 117 to 118). That report concluded that the claimant's stress condition was unlikely to be considered a disability under the Equality Act 2010 but her back condition was likely to be considered a disability. The report stated "her stress appears to have settled and she reports her residual symptoms are manageable, they are likely to be ongoing while the contributing factors are present".

22. In October 2014 the claimant's line manager C H decided she wanted to return to work as a Paralegal. Therefore, the respondent invited expressions of interest in CH's Administrative Manager post.

23. There is no dispute there was a meeting on Friday 24 October 2015 between the claimant and witness E, the Paralegal Business Manager.

24. It is not disputed that at this discussion the claimant expressed her concern that another employee in the department CC could become her manager and that she could not work with that individual as her line manager.

25. We find that witness E sought advice from HR and her manager witness F, (see paragraph 21 of her statement) before sending an email to the claimant at page 128 of the bundle on 29 October 2014. It explained that although she understood the claimant had concerns about working with CC in a previous department, the claimant had confirmed there had been no issues in the current department and therefore the respondent could not see a basis to deny CC the opportunity to manage the team but witness E invited the claimant to contact her if she still had concerns.

26. We find the claimant did not see that email until some considerable time later because the claimant was absent from work by reason of a sickness. (See self-certification on Wednesday 29 October 2014 to 31 October 2014.P 1148). The claimant later sent in a sick note dated 4 November 2014 (see page 121). The reason for absence was miscarriage. Further sick notes followed-see pages 122, 129. The claimant was certified absent due to her miscarriage until the beginning of January 2015. On 2 January 2015 the reason for the absence changed to work related stress (see page 133).

27. We also accept the evidence of witness E that she did not know at the point she sent the email on 29 October 2014 that the claimant was absent from work. At this time witness E was not the claimant's line manager, CH was. We also rely on the evidence of witness E that even if she had known the claimant was absent from work at this point she would not have forwarded a work email to an individual's home email when they were absent from work sick, particularly when the reason was miscarriage.

28. By email dated 27 November 2014 page 125 CH, with whom the claimant had a good working relationship, sent an email to the claimant at home to confirm that she was "stepping down as Admin Manager and moving over to the Paralegal side as of Monday 1 December 2014". She confirmed she would no longer be the claimant's manager. She also confirmed that CC had been successful in the sift and would be taking on the role as of Monday.

29. The respondent's witnesses confirmed that CC was the only applicant for the position. We find it understandable witness E did not send the email of 29 October 2014 to the claimant at home once she realised the claimant was absent on sick leave given the reason for the absence.

30. We find on 3 December 2014 the claimant contacted witness E asking for an update in relation to the working environment and CC becoming her manager and any job alternatives.

31. Witness E replied promptly within the hour. We find her tone is sympathetic and she alludes to the sad situation in relation to miscarriage "I can't begin to imagine how upsetting it's been for you and *X"*(the claimant's husband). She went on to explain that she has contacted HR and looked for alternative roles but unfortunately "there are no other positions within the office at A2 grade and as a result you will have to remain a Paralegal Assistant on the Admin Team". She goes on to acknowledge this will not be good news: "I know it's not the update you were hoping for". She invited the claimant to contact her

32. We find at this stage the claimant's sick notes state that she is absent by reason of miscarriage. Accordingly, we find at this point in time GN has no actual or constructive knowledge that the claimant is a disabled person by reason of stress/anxiety or depression. The OH report in their possession from earlier that year does not say the claimant is disabled by reason of stress/ depression. The claimant had not been absent from work since that report until October 2014 when the reason was miscarriage.

33. We find there was a meeting between the claimant's representative from the union M S and witness F on 5 December 2014. Witness F confirmed in writing to Mr S that the team was small and there was only one manager. She explained it was not possible for the next manager up who was witness E to line manage the claimant on a daily basis as this was not practical see page 130. In evidence Witness F also told us that in accordance with the respondent's procedures a manager should not manage more than a certain number of individuals and if Witness E had taken on day to day responsibility for the claimant that would have taken her over the limit.

34. We find at this stage there was a lack of clarity so far as the respondents were concerned as to why the claimant was so unwilling to have CC as her line manager. We find Witness F asked Mr S if the claimant would "provide her reasons for feeling unable to work with CC". See page 130. There is no dispute the claimant had never presented a grievance or formal complaint against CC. The claimant and CC had both worked in SFO for the previous few months without apparent difficulty.

35. On 14 January 2015 Witness E contacted HR and Witness F to explain she had received the claimant's sick note for two weeks until 16/1/15 and it now stated "work related stress". We find that Witness E invited the claimant to an informal meeting on 6 February 2015. The claimant asked for the meeting to be in Starbucks. See page 136. Witness E responded that it would be inappropriate to hold the meeting in Starbucks "as it is not a suitable venue to be discussing very personal information".

36. Witness E offered a meeting on a different floor away from the office or a meeting over the telephone.

37. The claimant chose to meet over the telephone. The meeting took place on 6 February 2015 see page 152.

38. At this meeting the claimant explained that the reason she felt stressed at work and was unable to come to the office was "because CC had become her new line manager", page 152. The claimant gave some details as to why she could not work with CC namely that the claimant had provided Paralegal assistance support on one of CC's cases and had been left to do all the work in the case. Whilst lifting the boxes of files the claimant had injured her back and held CC responsible.

39. Witness E explained she had "looked to see what options were available however there were currently no admin vacancies within the office at Paralegal Assistant grade or at a lower admin grade". She also advised it was not possible for the claimant to be managed by someone else as it would "cause a variety of problems for the admin team as a whole and disrupt its ability to function". She suggested the claimant returned to work to "give it a go" with CC but the claimant explained she was unable to do this and was unable to give a return to work date. It was agreed the claimant would be referred to occupational health.

40. The respondent invited the claimant to a formal meeting on 5 March 2015. See pages 166 to 167. The claimant requested a postponement, see page 168. A meeting took place on 11 March 2015, see meeting notes at page 197 to 200 with amendments at page 229, consent form for occupational health referral is brought by the claimant to the meeting on 11 March as suggested by Witness E, see page 176.

41. The outcome of the meeting was sent by letter to the claimant on 24 March 2015 at pages 207 and 208.

42. The letter summarises the position as the manager understood it. The claimant was not given a warning under the Attendance Management Policy. It is confirmed that any further decision will await the outcome of the occupational health report. Witness E confirmed that given the claimant was concerned her absence

records would not remain confidential and she did not want CC to have access to them, Witness E was willing to hold the claimant's absence records.

43. In fact, Witness E rather than CC managed the claimant's absence throughout.

44. The claimant objected to the letter summarising the outcome of the meeting on 30 March 2015, see pages 219 to 221 and enclosed an appeal at page 216. We find the claimant misunderstood the process. By email of 1 April 2015 Witness E wrote to her to correct her misunderstanding and confirmed no decision has been made in relation to her case and so no appeal was necessary.

45. The claimant's letter of objection at page 220 states "in the informal meeting, formal meeting and outcome letter there has been an over emphasis on CC and my discomfort working with her as my line manager. The meetings have been almost solely based around CC. I feel you have over simplified my illness as you have deemed this as the barrier to my returning to work. The issue with CC is an additional contributory factor. She then goes on to say, "the incidents were often subtle and hard to convey to management".

46. In that letter the claimant also stated at page 221 "this is not the only major contributing factor however and there has been no recognition so far in this process to the three miscarriages during this three-year period and the impact this has had on my mental health".

47. The OH referral is found at page 264 to 268.

48. We rely on the evidence of Witness E in her statement that she referred the OH referral form to HR on 18 March 2015, see 1158 her statement and p 204 where she confirmed this to the claimant.

49. We find that on 25 March the claimant contacted Witness E, chasing up OH because she had not heard from them. page 210.

50. On 22 April 2015 the claimant confirmed that she had spoken to occupational health and had an appointment in two weeks' time, see page 234.

51. There is no dispute that the claimant's appointment with occupational health on 11 May 2015 was cancelled on the day, fifty minutes before the appointment, due to the ill health of the doctor. Understandably the claimant was frustrated.

52. The appointment was re-arranged and took place on 2 June 2015. The report is at page 269 to 271. The report concluded the claimant was unfit for work in any capacity at the present time as a result of her ongoing symptoms of anxiety and depression. It stated "the recurrent miscarriages have contributed to this however unresolved work place issues are also a strong maintaining factor to her illness. If she were to attempt a return to work before these issues are addressed it is foreseeably going to worsen her anxiety and depression". The prognosis was "there was no medical reason the claimant is unlikely to be able to carry out the tasks of her job description in the long term. The prognosis in terms of regular and effective

service in this case depends mainly on the timing and extent to which work place issues can be resolved. If they can be resolved she is likely to recover from anxiety and depression and be able to give regular and effective service".

53. We find on 24 June 2015 there is a meeting between the claimant, her union representative, and Witness E. Given the contents of the OH report the respondent specifically asked the claimant "what is it within the work place that is causing her illness". The union representative stated that there were issues around her line management. He acknowledged that a meeting or mediation between CC and the claimant had been offered. Witness E stated that this was still available and she would do anything she could to support the process.

54. The respondent asked again if there is anything they could do in relation to matters within SFD causing her stress.

55. Towards the end of the meeting the claimant's union representative explained that the claimant is "a long way from returning to work and that she needs to deal with her depression relating to her miscarriages and issues away from the work place before she can consider dealing with any issues she may have within SFD". He went on to state "there is no prospect of returning to work in the near future", and said the claimant is unable to give an appropriate time scale. He said, "As such it is best for this to go forward to formal proceedings and to the last stage".

56. We find that after the meeting on 24 June 2015 there appeared to be a significant discrepancy between the OH Assist Report which appeared to be positive in terms of the claimant's return to work if workplace issues were resolved and what the respondent was told at the meeting on 24 June which suggested the claimant was very unwell due to the non-work-related issues and needed to sort those out before she could ever consider any return to work. There was no indication of what the employer could do to help in relation to the work-related issues. There was also a request in the meeting by the union representative that the respondent move to the last stage ie towards dismissal. An outcome letter summarising the position was sent dated 13 July 2015 at page 302 to 303.

57. The claimant's representative wrote a letter dated 17 July 2015 objecting to that summary of the outcome. See p 300 to 301.

58. The respondent wanted to re-refer the claimant to OH given the discrepancy between the June OH report and the 24 June meeting. The claimant gave her consent to attend OH on 30 July 2015 at page 314. She also informed the respondent at that stage she had been referred to a Cardiologist.

59. In the letter of 30 July, the claimant asked for a case conference as a matter of urgency and a formal meeting to take place as soon as possible. She states this was because of the impact the proceedings were having on her health, both physically and mentally. See page 315. By email of 30 July Witness E said she would get the OH appointment booked urgently, see page 316.

60. Witness E sent the claimant a copy of her OH referral page 329.

61. The claimant viewed this development as sinister. She withdrew her consent to be referred to occupational health, see page 344. The reason given by the claimant is puzzling. She says she does not agree to the request for an additional referral because it took the respondent six months to obtain the first referral and she has already attended one appointment in June with Dr Archer. She also complains that she was not given sight of the first OH referral. She goes on to say she thinks the referral is unnecessary.

62. On 26 August (Witness E having gone on annual leave) the union representative wrote to Witness F stating he was formally requesting that all communications in respect of this matter going forward were sent to him instead of the claimant. The claimant agreed in cross examination that she requested this, page 352 to 353.

63. Throughout this period of time the claimant was submitting monthly sick notes. From 13 April 2015 page 230 the sick notes stated stress at work, depression (previously they had stated stress at work only). What was on the sick note did not change up to and including the termination of employment and expiry of the notice period.

64. On 1 September 2015 Witness E contacted the union representative copying in witness F stating "we need further engagement to provide us with the clarity for the exact reason for A's absence to enable us to help and support her now and in her eventual return to SFDA. A case conference will help us gain a better understanding of the current position and how best to move forward". No reply was received to this email. The claimant said in cross examination she was not given this information by her union rep.

65. The claimant told us when giving her evidence that during this period of time her union representative Mr S disappeared and she did not have any contact with him.

66. We find that on 21 October 2015 see page 370 to 371, Witness E, having not heard anything from Mr S or the claimant sent a letter to him by email see page 369 copying the claimant in and explaining that she wanted to set up a formal meeting on 13 October at 10.30 so they could explore further the specific factors preventing the claimant from returning to work.

67. The claimant requested a postponement of the meeting, see page 372.

68. On 27 October Caroline Turner from the union informed Witness E that the claimant had a new trade union representative NM. Witness E agreed to re-schedule the meeting to the 12 November re-iterating that the purpose of the meeting was to explore further with the claimant if there was anything they could do to assist her back to work and in particular what support Witness E or the respondent could give her. A letter was sent dated 4 November 2015, page 378 to 379 confirming the purpose of the meeting.

69. A further postponement was sought by the union representative Mr M on 6 November 2015 due to the complexity of the case, see page 386. An email with all

the documentation was sent to Mr M later on the 6 November, see page 388 to 390 and the meeting was then re-scheduled to 12 November 2015 p.376 to 378.

70. A long-term absence review meeting was held on 12 November 2015, see page 438 to 451. In attendance were witness E, DA from HR, the claimant and Mr M trade union representative. AB was present as a note taker (corrected version at page 445 to 451).

71. We find in this meeting the claimant agreed to be referred to occupational health. She asked that the referral form included the three consultants who now had responsibility for her.

72. In the meeting the respondent tried to engage by asking what reasonable adjustments could be made. The respondent asked if the claimant would consider an alternative role but there was no clear answer from the claimant. Mediation was also raised, see page 450. Towards the end of the meeting the claimant stated that she has "lost all faith and trust and she can't trust anything". Earlier in the meeting when asked about reasonable adjustments the claimant stated "there was nothing at the moment and was not currently able to think about that". In relation to a phased return her union representative said this could not be discussed until her doctor's sick note ran out and would have to see what her GP advised before agreeing to a phased return. The outcome of this meeting is at page 464 to 465. It confirms that communication will be through her union representative NM. It confirms there will be a second referral to OH which will include a case conference which may or may not be held on the same date. It confirms the claimant had agreed to be referred again to occupational health.

73. The occupational health consent form is found at page 452 to 453.

74. By email dated 17 December 2015 witness E informed the claimant's union representative that an appointment had been offered for the claimant at occupational health on 7 January from 10.30 until approximately 11.30. The email explained there would be fifteen minutes for the first case conference, thirty minutes for face to face assessment and fifteen minutes for the second case conference. The union representative confirmed he had sent the email to the claimant, page 514. On 18 December he confirmed the claimant could attend, see page 513.

75. The Tribunal reminds itself that at this stage the claimant had requested all contact should be through her union representative. On 4 January witness requested if her manager witness F could attend the meeting as an observer, see page 516. The union representative responded explaining that the claimant had become anxious and distressed about being informed at short notice about the manager witness F attending.

76. The claimant also raised concerns with her union representative that she did not know who would be present at the case conference as she had not received a copy of the referral.

77. The union representative confirmed in his next email that the referral had been received by the claimant in November. In the meanwhile, on 6 January witness

E informed the union representative that her line manager witness F was no longer available due to other work commitments and would not be attending the case conference. In response the union representative explained that the claimant was pregnant again, her doctor was explicit she must not incur unnecessary stress or pressure and that her husband would be accompanying her.

78. Witness E sought advice from HR about this as she was concerned that the claimant would have both her husband and her union representative with her.

79. We find that as set out in her witness statement at paragraph 121 witness E set up the OH assessment and case conference on 7 January 2016 so that the case conference part was conducted by telephone conference call. We rely on the evidence at page 561 and 562 where witness E asked if the venue would have conference dial in facilities. We find HR flagged to OH Assist that a speakerphone would be required. The response from OH Assist was that the respondent would usually provide a dial in details and we accept witness E's evidence that a dial in telephone number was provided. Confirmation that DA from HR and the manager witness E would be attending via telephone was sent to the union representative on 6 January 2016 at 15.55. The claimant told us in evidence that her trade union representative did not inform her of this. We accept her evidence.

80. It is not disputed that the meeting of the claimant and the OH doctor went ahead. The case conference did not. The OH report is dated 7 January 2016 and is found at page 530 to 532. In the last paragraph of the report the doctor said the case conference following the consultation was "not technically possible today".

81. We find Dr McCarthy said that the reason for this was partly because no speakerphone had been provided and he was not willing to use the speaker on his mobile phone.

82. We accept the evidence of witness E that she had dialled in, as had DA from HR but they were not connected to the planned case conference. It was her assumption at the time that the OH meeting had overrun which we find was a reasonable assumption but we find the real reason was as suggested by the occupational health doctor namely there was no speakerphone available and Dr McCarthy was unwilling to use his mobile phone so it was not technologically possible to hold the telephone case conference

83. Dr McCarthy, stated very clearly in his report that the claimant had "significant persisting symptoms of anxiety and depression and as a result is unfit for any work". He expressly stated there were no adjustments that would allow a return to work. He repeatedly stated, "she is unfit for work for the foreseeable future".

84. In relation to what measures could be considered by her employer to resolve these and allow a return i.e. a stress risk assessment, redeployment to a different manager or work area for example he specifically stated, "it appears the relationship of trust in management and her employer has broken down to an irretrievable degree and in my opinion, it is unlikely not withstanding any adjustments that she will be able to resume work for the *respondent* in future". He stated the claimant had been absent from work for over a year.

85. The claimant complained about the conduct of the meeting, see page 600. She complained that HR and the respondent's management made their "own decision to conduct this meeting via telephone". She complained it was done at a late stage. She explained that she was pregnant and wanted the meeting to be as stress free as possible and "for nobody to turn up was unacceptable". She was also unhappy that she had been asked two days before the meeting if witness E's line manager could attend to observe. She concluded by saying "I feel I have been forced into a position where I am not medically able to personally attend any further meetings". She asked for the proposed conference meeting and all future meetings of any nature to go ahead without her attendance with her union representative present.

86. By a letter of 16 March 2016, she was invited to a meeting on 24 March to discuss the outcome of the OH referral dated 7 January 2016, see page 627. The letter acknowledged the claimant had indicated she wanted her union representative to attend.

87. On 21 March 2016 we find witness E was communicating with her line manager witness F in relation to alternatives to the claimant's current role as a Paralegal Assistant, page 628. Further internal discussions took place- see page 630 to 631.

88. Meanwhile during this time, the respondent was sending the claimant information so she could consider ill health retirement, see page 565 – 99. There was never a positive response to this proposal.

89. The minutes of the meeting on 24 March are at p 653 to 655. Present was witness E, the claimant's union representative and a note taker. The meeting was conducted via telephone.

90. The trade union representative informed the employer that unfortunately the claimant had lost her baby. Witness E enquired if the claimant was still receiving counselling. She then enquired what can be done to help and support the claimant back to work, page 654.

91. The union representative indicated that he was having discussions with the claimant prior to the meeting on "numerous occasions" and was keeping her updated. When asked what can be done, what steps can the employer take to help and support the claimant back to work, the union representative stated "he has asked the claimant and nothing can be done".

92. The union representative advised that the claimant's condition had worsened. He couldn't indicate whether the claimant would be able to return to different role. He stated that the occupational health report was that the claimant was not fit to return. There was a discussion about ill health retirement.

93. The outcome of the meeting was summarised in a letter to the claimant dated 4 April 2016, pages 663 to 664. A number of options were mentioned in that letter including redeployment, ill health retirement, other roles and VER.

94. We find that in or around April 2016 there was an office refurbishment. We find that pedestals which contained staff belongings were being replaced by lockers. On 6 April 2016 (page 671) witness E contacted the claimant's union representative to explain the claimant had a two-drawer pedestal in the office which needed to be emptied as all the pedestals were being replaced by lockers the following day as part of the refurbishment. She asked, "please would you ask the claimant what she would like me to do with the contents of her pedestal i.e. dispose or place contents in boxes and forward to her via courier". She indicated that it was her intention to empty the pedestal herself although if the claimant preferred a "named individual who was the SFD security advisor would empty it and secure contents to maintain privacy and confidentiality". She stated "would you please indicate what A would prefer by 5pm today? If I do not hear from you it will be assumed A does not want anything back and the contents will be disposed of".

95. We find that the union representative responded promptly. He explained that the claimant had requested that the contents be kept as there were items of a personal nature among them. He asked for them to be boxed and sent to her and asked that the suggestion of a third party boxing the contents be taken up. Witness E confirmed this and said the items would be sent to the claimant via City Sprint for arrival the following day.

96. In cross examination the claimant said she felt this was discriminatory and the contents should have been moved to a locker.

97. On 16 May 2016 further advice was provided by Dr McCarthy following a telephone conference call with the claimant, her union representative and witness E. He confirmed the claimant remained off work and was not likely to be able to return to work for the respondent in the future. He also said it was appropriate to refer her case to an Advice Provider for Ill Health Retirement for a definitive opinion on whether she satisfied the criteria.

98. This case conference had originally been planned for the 25 April. It was cancelled at short notice because OH Assist advised on 22 April that Dr McCarthy was no longer available and Dr Wright would attend in his place. The claimant was unwilling to have a different doctor and wanted the conference moved to a date when Dr McCarthy would be available. (Dr McCarthy had provided the occupational health report from January 2016). As a result, we find the conference was moved to 16 May 2016 -see pages 704, 705, 1012 to 1018, 1052**.** We find that the May letter from Dr McCarthy was received by the respondent on 22 June, see page 1134**.**

99. Regarding ill health retirement the Tribunal finds that the claimant never responded to this suggestion.

100. By letter dated 17 May 2016 witness E wrote to the claimant summarising the position i.e. that the OH report was that the claimant was unfit for work for the foreseeable future, her condition had not improved, that a referral for ill health retirement should be made for consideration and that the claimant needed to do that herself if she wished to pursue it.

101. Given the claimant had now been absent from work since November 2014 witness E indicated she was referring the claimant's case to witness G an Area Business Manager who would decide whether or not she should be redeployed or dismissed, see page 1099 to 1100 (We find there is a typographical error in this letter stating it was sent May 2015 when it was clearly 17 May 2016).

102. By letter 8 July 2016 witness E sent the documentation to witness G concerning the claimant at page 1142 to 1203. On 16 August 2016 the claimant submitted grievances against witness E and DA of HR dated 14 August 2016. The grievance against DA is page 1211 to 1216. The grievance against witness E is 1217 to 1221. Both grievances concerned the way her absence from work had been managed.

103. By letter of 16 August 2016 the claimant was invited to a formal meeting to decide whether she should be redeployed or dismissed or whether her sickness absence level should continue to be supported. The meeting was due to take place on 25 August 2016, page 1226 to 1227. The same day the respondent informed the claimant that the claimant's grievances would be considered at the forthcoming meeting in accordance with the respondent's policies: We find the respondent's grievance policy and procedure at Section 2 clearly states that the respondent's grievance policy and procedure should not be used to raise complaints that an employee may have about ongoing attendance management action".

104. We find that the claimant's union representative contacted the respondent to seek a postponement of the meeting because he was unavailable and then on leave. He gave a list of alternative dates. We find that the respondent agreed to the postponement. We accept the evidence of witness G to find that she was aware that a delay of more than five days was outside procedure but believed it was in the claimant's best interests, given that she was suffering from stress/depression, to be represented by the union official of her choice and accordingly she postponed the meeting to the next date when both she was available and the claimant's union representative had indicated he was available which was 6 October 2016.

105. We find that DA from HR noted that the respondent's policy recommends that a Decision Maker should have a recent OH referral and highlights this as being within three months. She indicates that the deferred date of 6 October 2016 would mean that the OH report was outside the three months (given that it was obtained in May 2016). In the circumstances the respondent asked for confirmation that there was no change in the claimant's health since the report and that the union and the claimant were content for the recent OH to be considered at the meeting on 6 October although that would be now outside the timescale suggested for an OH report in the procedure. The response from the union representative was positive to this although he explained that he told the claimant "I have told her that if she is happy to use this report we would be agreeing to working outside the policy. If her circumstances have changed and she feels she wants another OH referral I have said it would require the meeting to be cancelled".

106. By further email at page 1236 on 4 October the union representative NM explained that he had been contacted on annual leave and contact had been made with a full-time officer. Despite the efforts of both NM the trade union representative

and the full-time trade union officer to "resolve any fears or concerns that the claimant may have" they were awaiting her response. He stated at the time of writing this email "I do not know if she is happy to use the existing OH report or not".

107. On 5 October NM forwarded the claimant's response to HR. She confirmed, see page 1245 "my medical condition has not improved since the OH report though a new OH report would simply state changes from the previous one in that I have had yet another miscarriage, the rash on my body has increased and my state of stress and anxiety has not improved and the likely medical response is that it has worsened".

108. Despite this the claimant goes on to say that she is concerned to proceed outside official policy guidelines. She states, "it is my feeling that proceedings should be done correctly and to the rules and I do not agree to any further proceedings taking place outside of the policy guidelines". She then states, "if that results in management deciding to go ahead with Thursday's meeting the knowledge that I disagree to working outside the policy guidelines or them organising another OHA and then postponing Thursday's meeting I believe that is their decision to make".

109. The meeting was then cancelled 1246.

110. We find that witness G considered the matter carefully. We find she explained to the claimant by letter dated 11 October 2016 re scheduling the meeting that "the policy referred to was an advice for managers and decision makers document". See page 1861. She explained "the three-month time frame is a guide for managers and decision makers and it is best practice guidance rather than policy as each case would be assessed on its own merits". She went on to explain that the original meeting would have meant that the OH report was in the three-month period and that the claimant had confirmed to HR that there had been no improvement in her condition and that she remained unfit for work as certified by her doctor. She was therefore satisfied that she had suitable medical information to enable her to proceed. The meeting was re-arranged for a telephone meeting on 2 November 2016.

111. The notes of the meeting which took place on 2 November are at 1270. In attendance was the claimant, witness G, the claimant's union representative and a note taker.

112. We find witness G sought to engage with the claimant. She asked if the claimant had any prospect of returning to work and if there was anything the claimant would like her to consider. The response was that the claimant did not understood. She noted the claimant's medical certificate and asked if there was anything she would like her to consider. The claimant said she did not understand. She asked the claimant if there was any likelihood of her returning to work. The claimant said she did not understand and referred to the occasion when management had boxed up her stuff and sent it to her by courier. She was asked about re-deployment. She said she did not understand. She was asked about ill health retirement and whether this was something she had considered. In response the claimant said she was "sick of this". She felt failed by management. We find that the notes of this meeting

accord with witness G's recollection in evidence that the claimant did not actively engage in this meeting. The Tribunal is aware that the claimant was very ill at this stage. The Tribunal notes the claimant was represented throughout by her trade union representative.

113. The claimant was sent an outcome letter dated 8 November 2016, page 1283 and 1284. This confirmed she had decided that the claimant's employment with the respondent must be terminated "because you have been unable to return to work within a timescale that I consider reasonable and the evidence shows there is no likelihood of this changing in the foreseeable future therefore redeployment is not a viable option".

114. There was no dispute that the claimant had been continuously absent from work by this stage for two years. The occupational health report stated the claimant was not fit for work in the foreseeable future and no adjustments were possible. The claimant agreed with that report and said her situation had deteriorated since the report. At the recent meeting with the claimant she had not made any suggestions in relation to returning to work.

115. Unfortunately, the letter dated 8 November 2016 included a paragraph dealing with the notice period which we find to be inaccurate. It stated "if you are sick during the notice period you must submit medical certificates to cover your absence until your last day of service or you will not be paid".

116. There was no dispute that the claimant had been entitled to six months half pay, six months full pay whilst she was absent on sick leave, which had been exhausted for some considerable time earlier. When asked about this paragraph witness G could not explain it. She agreed the letter was a proforma.

117. The Tribunal finds it is overwhelmingly likely that this is a proforma which has been inappropriately edited. There was no entitlement in the claimant' contract of employment to be paid during the notice period when absent on sick leave in circumstances where entitlement to sick pay had expired. There is no dispute that the claimant's employment was terminated with notice.

118. We find that witness G sought to consider the matters raised by the claimant in her grievance and within her outcome letter, 1310.

119. The claimant presented an appeal on 18 November 2016, see page 1305 to 1310. It was acknowledged on 30 November 2016, 1370 and 1371. The Appeal Officer invited the claimant to a meeting on 9 December 2016. The appeal meeting commenced on 9 December 2016. The claimant had been notified that the HR representative for the meeting would be Delores Springer.

120. We find that in the letter of invitation to the meeting p 1370 the claimant was informed "DS will be present at the meeting". In advance of the meeting the claimant did not object to the presence of DS. At the outset of the meeting the notes record "the appeal manager asked the claimant if she was "content" with the note taker and D.S as the person from HR. C confirmed that she was.

121. There then became an issue in relation to a document provided by the claimant. The Appeal Manager was unsure that she had all of the documentation the claimant wanted her to consider, in particular the claimant's chronology. For that reason, she postponed the hearing. Given that she was postponing the hearing for that reason she decided that it would be absolutely best practice to have an HR person attending the appeal who had not previously been involved. She took the opportunity therefore to arrange for a different HR representative to attend the resumed hearing. (In fact, at the resumed hearing it transpired that the missing document was amongst the extensive papers which had been provided to the Appeal Manager.)

122. The Tribunal found the Appeal Manager to be a clear, cogent and impressive witness.

123. The Tribunal finds that the Appeal Officer was not conducting a fresh investigation. We find she was reviewing the decision made on the available evidence by the previous decision maker.

124. The appeal resumed on 16 December 2016. The outcome which was that the appeal was unsuccessful is at page 1547 to 1553.

125. On the termination of her employment the claimant received a payment under the Civil Service Efficiency Benefit as referred to in the amended response. In her evidence she confirmed she made no claim in relation to that benefit.

Applying the law to the facts

Unfair dismissal pursuant to s.98 Employment Rights Act 1996

126. The Tribunal turns to the first claim which is a claim for unfair dismissal. The first question is what was the reason for dismissal? The respondent asserts that it was a reason relating to capability which is a potentially fair reason for Section 98(2) Employment Rights Act 1996.

127. There is no dispute in this case that the claimant was dismissed for capability. She was suffering from depression and stress at work at the time of her dismissal and had been absent from work for a period of two years at the point of dismissal.

128. The Tribunal turns to the next issue was the dismissal fair or unfair within the meaning of Section 98(4). The Tribunal reminds itself that it is not for us to substitute our view as to whether or not we would have dismissed the claimant. The test is whether a reasonable employer of this size and undertaking could have dismissed this claimant for this reason at this stage.

129. The Tribunal finds that the respondent adopted a very thorough approach. The claimant was absent from work for a period of two years. The respondent obtained advice from the occupational health doctor and acted upon it. The Tribunal finds that it is irrelevant that most recent report relied upon at the time of dismissal was obtained 3 months before the meeting which led to the claimant's dismissal. The

Tribunal finds that the reason the respondent's guidance suggests a recent OH report is so that an employee is not dismissed on the basis of out of date and thus inaccurate medical information.

130. In this case OH report was an accurate report, even though it had been obtained some months earlier. It stated the claimant was unfit for any work and there was no prospect of the claimant returning to work for the respondent. The claimant herself agreed the OH report was accurate. In fact, the claimant also stated her health had deteriorated even further from that time.

131. In considering whether an employer has acted fairly the Tribunal must consider whether alternative work was considered. The Tribunal refers to its findings of fact. The respondent did consider alternative work and raised the issue with the claimant on a number of occasions. However unfortunately the occupational health report made it clear from January 2016 the claimant was not fit to return to any kind of work. Therefore, whether or not any alternative work was available was academic.

132. In terms of procedure the Tribunal is satisfied that this employer followed a fair procedure. It referred the claimant to occupational health. It held meetings with the claimant. At the claimant's request from time to time it communicated directly with the claimant's union representative rather than with the claimant in person. It agreed to hold a meeting on the telephone rather than in person when the claimant did not wish to attend the respondent's premises. The claimant had the opportunity to attend a final hearing and to bring an appeal.

133. For the avoidance of doubt the Tribunal attaches no significance to the fact that the employer did not wish to hold a meeting in Starbucks as requested by the claimant in the early part of her absence. The Tribunal finds that it is not appropriate to hold a meeting concerning an employee's future where personal medical evidence can be discussed in a coffee shop where these matters can be overheard by others.

134. Accordingly, the Tribunal turns to the next question was the dismissal within the band of reasonable responses of a reasonable employer? The Tribunal finds that it was. The Tribunal finds that many large employers of this size and undertaking would have dismissed the claimant at an earlier stage, indeed the claimant's union representative Mr S at an earlier stage suggested given the nature of the medical evidence that the respondent move at an early stage to the formal procedure to dismiss. The respondent did not do this. Instead it agreed to support the absence for a further period of time and obtained further evidence before moving to dismiss. The Tribunal is satisfied this was a reasonable response. Sometimes an employee recovers sufficiently to return to work.

135. However, there comes a point when an employee has been absent for a period of time when the employer is entitled to consider whether it can retain the employee any longer. Given there was no prospect of a return to work based on the medical evidence before it and the claimant had been absent for 2 years, dismissal was within the band of reasonable responses of a reasonable employer.

136. The Tribunal finds that the dismissal was procedurally fair for the reasons stated above. Accordingly, this claim for unfair dismissal fails

Unfavourable treatment because of something arising in consequence of disability discrimination-s15 Equality Act 2010.

Allegation One Allegation One – Requiring the claimant to work under CC whose earlier treatment of the claimant is alleged to have caused the disability

137. This was an allegation of unfavourable treatment because of something arising in consequence of disability. The respondent did require the claimant to work under CC in the sense that CC was appointed the Administrative Manager from December 2014. The claimant viewed this as unfavourable treatment because she blamed CC for her back injury. The Tribunal finds at this stage, December 2014, the respondent did not have knowledge that the claimant was a disabled person within the meaning of the Equality Act 2010 by reason of the claimant's relevant disability of stress/depression. The claimant prior to 2 January 2015 was absent from work from Oct 2014 by reason of miscarriage. Although there was an earlier occupational health report which noted the claimant was a disabled person by reason of her back that report specifically stated that the claimant was not disabled by reason of stress, neither did that report mention CC.

138. The Tribunal is not satisfied that requiring the claimant to work under CC is unfavourable treatment in consequence of the disability. The claimant noted on her sick note at this stage as suffering from miscarriage. There is no dispute that the claimant had a back injury, however it was not consequences of her back injury was preventing the claimant working with CC. It was a psychological issue namely that she blamed CC for the fact that she had developed a work related back problem.

139. Therefore, this allegation fails because firstly at the time the respondent originally required the claimant to work under CC the respondent did not know that she was a disabled person within the meaning of the Equality Act by reason of stress and depression. Secondly, the Tribunal is not satisfied that the disability the claimant did have at that time (a back condition) was the reason why the claimant was unable to work under CC. Accordingly, it is not satisfied that the respondent treated the claimant unfavourably because of something arising in consequence of the disability.

140. The Tribunal considers the position after January 2015 until her employment ended. The respondent never actually required the claimant to work under CC. Once the respondent knew that the claimant was disabled within the meaning of the Equality Act by reason of stress/depression when it was alerted by the OH report of May 2015 specifically stating this, it sought to obtain further information from the claimant and enquired about mediation and alternative work. It also took into account the claimant's concerns and continued to permit witness E to manage the claimant's absence so that CC did not manage her. The claimant was never well enough to actively engage with the suggestions of the respondent for alternative work or mediation. Accordingly, the Tribunal is not satisfied that the respondent treated the claimant unfavourably because of something arising in consequence of the disability in the period after 2015, this allegation fails.

Allegation Two – Not redeploying the claimant to a role where she would not be managed by CC

141. It is a matter of fact the respondent did not redeploy the claimant to a role where she would be managed by another manager. The Tribunal relies on its evidence that the claimant was absent from work due to stress/depression from January 2015 and its finding that her absence was a consequence of her disability of stress/depression.

142. However, the reason why the respondent was not able to redeploy the claimant was because she was never well enough to return to work or consider any form of adjustment. Neither was there any existing vacancy at her level. Accordingly, the Tribunal is not satisfied that the respondent treated the claimant unfavourably because of something arising in consequence of the claimant's disability.

143. However, if the Tribunal is wrong about that the Tribunal turns to the next issue: was the treatment a proportionate means of achieving a legitimate aim? The Tribunal must identify the legitimate aim which we find was to manage the business effectively. The respondent adopted a proportionate means of doing this. It considered a report from occupational health saying that from June 2015 the claimant was unfit for work in any capacity although it expressed the view that workplace factors were a factor in her absence and they would need to be addressed before a return to work. We find the respondent tried to engage with the claimant to address those factors but the claimant was very unwell and there was no clear identification of an alternative role or adjustment to enable her to return. By Jan 2016 the OH report confirmed no there were no adjustments of any sort which would enable the claimant to return to work. Accordingly, the Tribunal finds the respondent acted proportionately by seeking to consult with the claimant and her representative, obtaining OH advice and making its own internal enquiries.

144. Accordingly, this claim fails.

Allegation Three – Not being referred to occupational health timeously.

145. The Tribunal relies on its findings of fact that the claimant was referred to occupational health on 18 March 2015 by Witness E.

146. The Tribunal relies on its findings of fact that Witness E did not receive the claimant's sick note until 14 January 2015 which was for the period to 16 January 2015. She also received a further sick note dated 19 January 2015 for 28 days. We find she sought advice from HR which was received on 21 January 2015 see page 135. The advice was to hold an informal meeting with the claimant. This is as suggested by the policy in accordance with paragraph 139 at page 160 which suggests that when an employee has been absent from work for a period of 20 working days and there is no prospect of a return to work within a reasonable time frame a case conference should be arranged.

147. There is no dispute that at the discussion on 26 February 2015 both parties agreed the claimant should be referred to occupational health. The Tribunal therefore finds that referral to occupational health which took place on 18 March 2015 was done timeously once the respondent received a sick note giving the reason for absence as work related stress rather than miscarriage.

148. We find there was a delay in receiving the report. This was not the fault of the respondent. There was a delay in OH Assist arranging the appointment for the claimant and then the first appointment was cancelled by the doctor on the day due to the doctor becoming ill. Accordingly, the Tribunal finds that this allegation fails at this stage because the claimant was referred to occupational health timeously.

149. If the Tribunal is wrong about that and the claimant can show that she was not referred timeously to occupational health we turn to the next issue. Was the failure because of something arising in consequence of the claimant's disability? The Tribunal is not satisfied there is anything to suggest that any delay in referral to OH was connected to the claimant's disability. Accordingly, this allegation fails.

Allegation Four

150. There is no allegation four listed in the case management note.

Allegation Five – Adopting a strict application of the sickness absence procedures and triggers

151. The Tribunal refers to the respondent's policy. The respondent has a detailed attendance management procedure. The relevant procedure at this time was for November 2014 and is found in the bundle from p656 to 1702.

152. Long term absence is defined as "one which reaches 28 consecutive calendar days." See paragraph 131.

153. Accordingly, at the time the letter was sent to the claimant on 27 February 2015 it was noted "you have been absent for 24 of your working days from 2 January". The Tribunal finds therefore that the employer did not take into account the claimant's pregnancy related absence due to miscarriage which had occurred from October 2014 until 1 January 2015 in terms of calculating days absent from work for the purposes of the managing absence procedure.

154. The respondent's policy for short term absence relates to trigger points. Paragraph 82 explains that breaching or exceeding the trigger point will normally result in a formal attendance meeting being held to discuss attendance in accordance with the procedures, paragraph 82. The trigger point for the claimant is noted to be six days which is pro-rata the full time ten days trigger in a rolling twelve-month period (the claimant worked three days a week).

155. Although the claimant was invited to a formal meeting under the short-term attendance management policy she was never issued with any warning under the attendance improvement notice as referred to under the policy at paragraph 83. At

a meeting on 11 March, page 197, the claimant was not informed she was being issued with such a sanction and neither did the outcome letter sent 24 March 2015. The claimant and her union representative said they were confused by that letter. Further clarification was provided by Witness E who expressly stated that such a sanction had not been issued. At no further point was the claimant ever issued with an Attendance Improvement Notice and in fact as her absence continued and exceeded 28 days she was dealt with under the long-term absence policy.

156. Accordingly, the Tribunal finds that this allegation is factually incorrect. The respondent did not adopt a strict application of the sickness absence policy and triggers because no action was taken against the claimant whilst she was absent for her pregnancy related illness. The respondent properly and fairly adopted the policy. There was no unfavourable treatment of the claimant. If anythig, the claimant was on occasion treated more favourably than the policy suggests e.g. no action taken during the pregnancy related absence in October and November 2014.

Allegation Six – Ms DA and Witness E failed to attend the Case Conference on 7 January 2016

157. The Tribunal relies on its findings of fact. The Tribunal finds that DA who is based in London and Witness E who is based in Manchester both attempted to attend the telephone case management conference. The Tribunal finds that the claimant's union representative was well aware that they were attending by telephone because Witness E informed him of this fact on 6 Jan 2016 although we accept the claimant's recollection that he had not informed her. We find there was no requirement or obligation for DA or Witness E to attend in person. Indeed, an earlier meeting with Witness E had been conducted by telephone at the claimant's request. The Tribunal relies on its findings of fact that Witness E had made every effort to set up the conference properly with OH Assist. The Tribunal finds that and Witness E and DA dialled in and attempted to join the telephone conference. The Tribunal finds they were unable to do so because of the technological failure reported by Dr McCarthy, OH doctor.

158. The Tribunal turns to consider whether this is unfavourable treatment and if so whether it arises in consequence of the claimant's disability.

159. The Tribunal finds the failure of Witness E and DA to attend the case conference on 7 January 2016 amounts to unfavourable treatment but it did not arise because of something in consequence of the claimant's disability. We find the reason the case conference did not take place was due to a failure of technology.

160. Accordingly, this allegation fails.

Allegation Seven – Delay in re-scheduling the case conference

161. There was a delay in re-arranging the case conference from 7 January 2016 to 25 April 2016. The 25 April 16 was cancelled at short notice and OH Assist advised on 22 April that Dr McCarthy was no longer available and Dr Wright would take his place. The claimant preferred to have Dr McCathy attend and accordingly the case conference was moved back to 16 May 2016.

162. The Tribunal accepts the evidence of Witness E in her statement at pages 31 to 37. We rely on it to find there were administrative and other reasons why the case conference was delayed.

163. The Tribunal turns to the first issue. We are satisfied that from the claimant's perspective the delay amounted to unfavourable treatment.

164. The Tribunal turns to the second issue: was the unfavourable treatment, namely the delay in a case conference occurring because of something arising in consequence of the claimant's disability. The answer to this question is no. The claimant was suffering from a back problem and from stress at work and depression. There was no evidence that any of the reasons for the delay in arranging this meeting which the respondent attempted to re-arrange from January 2016 were in any way a consequence of the claimant's disability. This allegation fails.

Allegation Eight – Failing to deal with the claimant's personal effects appropriately

165. The Tribunal relies on its findings of fact. We find that pedestals which contained staff belongings were being replaced by lockers. We find the respondent contacted the claimant via her union representative and asked if she wanted the items and if so they could be packed and returned to her. If a response was not received the items would be destroyed. When the claimant asked for the items they were promptly packed up and returned to her by courier. The respondent offered for a third party rather than GN to pack the items and the claimant accepted that offer.

166. The Tribunal is not satisfied that the way the respondent dealt with the matter amounts to unfavourable treatment. The claimant had the opportunity to decide what to do with her belongings when an office refurbishment took place. Although the request asking her what to do with her belongings was made at short notice, she had an opportunity to respond and the belongings returned to her as she requested.

167. If, however, the Tribunal is wrong about this and asking the claimant at short notice how the respondent should deal with her belongings in an office refurbishment is unfavourable treatment because colleagues in work transferred their belongings from a pedestal to a locker then we turn to the next issue. Was it unfavourable treatment because of something arising in consequence of disability? The answer to this question is yes because the reason the claimant was treated differently to other employees was because of a consequence of her disability, namely her absence from work on sick leave.

168. However, the Tribunal must turn to the next question which is was the treatment a proportionate means of achieving a legitimate aim? The Tribunal finds that it was. The respondent was dealing with an office refurbishment. We rely on Witness E's evidence that this was a busy time. She sought the claimant's views via her union representative and arranged to return her personal items as requested. The fact that there was a third alternative namely to place the claimant's items in a new locker is not directly relevant because the treatment of returning the items is a proportionate means of achieving a legitimate aim. The legitimate aim is ensuring

that the office refurbishment takes place smoothly without personal items being lost. Accordingly, this allegation fails.

Allegation Nine – Failing to seal the envelope of a letter sent to the claimant which contained confidential information

169. The Tribunal relies on its findings of fact.

170. The Tribunal found Witness E to be a careful and conscientious witness. She told us that she sealed the relevant envelope and we accept her evidence and find she did that. We find there is no obligation to write "private and confidential"l on an envelope which was being sent to a named individual by post at their personal address and we find that it was sent special next day delivery which required a signature.

171. We entirely accept the claimant's evidence that when it was delivered to her it had been opened and she was very distressed as a result. However, the fact that once in the hands of Royal Mail the package became opened is not a problem which can be laid at the door of the respondent.

172. The first question for us was: was the claimant treated unfavourably by the respondent in failing to seal the envelope of a letter sent to the claimant which contained confidential information. The answer is no because there is no evidence that the respondent was responsible for the envelope being unsealed.

173. In case we are wrong about that we have considered the next issue which is was the envelope unopened because of something arising in consequence of the claimant's disability? The answer is no. There is nothing to suggest that the envelope being open when it reached the claimant was anything to do with her disability. Therefore, this allegation fails.

Allegation Ten – Failing to deal with the claimant's grievances under the grievance policy

174. The Tribunal finds that this allegation fails. We find this statement is factually incorrect. The claimant was not entitled to have her grievances heard under the grievance policy because the grievance the policy expressly says where the complaint relates to attendance management it is not to be dealt with under the grievance policy. There is no dispute the claimant's grievances related to her attendance and the way it was managed.

175. In any event the Tribunal finds that the claimant's grievances were considered at the dismissal stage by the dismissing officer and dealt with in her outcome letter. Accordingly, we find there was no unfavourable treatment this allegation fails.

Allegation Eleven - Dismissing the claimant

176. The first issue is: was the claimant treated unfavourably by the respondent. There is no dispute that the answer to this is yes because the respondent dismissed

the claimant. We turn to the next issue. Was this because of something arising in consequence of the claimant's disability. There is no dispute that the answer is yes. The reason she was dismissed was because she was absent from work for two years and that absence was as a consequence of her disability of stress/depression.

177. The Tribunal turns to the next issue: was the dismissal a proportionate means of achieving a legitimate aim. The Tribunal must identify the legitimate aim. The respondent is a large public-sector organisation. Its legitimate aim is to run its organisation successfully and efficiently. The respondent had supported the claimant's absence for two years. It could not keep her on its books indefinitely. It had occupational health advice (which the claimant agreed with) stating that she was unfit to return to any form of work for the foreseeable future and no reasonable adjustments were possible.

178. During the two years the claimant was absent her work had been done by other members of her team. Whilst they had been able to absorb this workload, the respondent could not be expected to continue with this situation indefinitely particularly in light of the occupational health advice which said there was no foreseeable return to work and no adjustments could be made to allow the claimant to return. In these circumstances at this stage dismissal was a proportionate means of achieving a legitimate aim.

Allegation 12 – Failing to uphold the claimant's appeal against dismissal

179. The Tribunal relies on its finding of fact. It was true that the claimant's appeal against dismissal failed and she might consider this amount to unfavourable treatment although the Tribunal finds it was not. The Tribunal finds that the appeal was fairly conducted by the appeal manager who was both fair and thorough.

180. However, in case we are wrong about that and the fact that the appeal was rejected is sufficient to amount to unfavourable treatment, we turn to the next issue: whether the treatment was because of something arising in consequence of the claimant's disability. We find it was not. The reason the appeal was rejected was because the appeal officer found there were no grounds to overturn the decision to dismiss.

181. The appeal officer conducted a fair appeal. The Tribunal refers to the nature of the appeal process. See page 1684 to 1686. The Tribunal accepts the evidence of the Appeal Manager to find that the appeal is not a re-hearing, it is a review of the existing decision to dismiss. We find the appeal officer was very conscientious in the way she conducted the appeal. She adjourned the hearing when she thought she may not have all the documents the claimant wanted to rely on. She even arranged for an HR representative who had not previously been involved to attend the postponed hearing to reassure the claimant that the matter was being dealt with independently. We find the respondent dealt with the appeal on its merits and that was why it was rejected. Accordingly, this allegation fails.

Failure to make reasonable adjustments s20-22 Equality Act 2010

182. The Tribunal turned to the reasonable adjustments claim. The first requirement in a reasonable adjustments claim is: what is the provision, criterion or practice "PCP"? The second question is: did the "PCP" put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. The third question is: did the respondents take such steps as it was reasonable to take to avoid the disadvantageous effect of the "PCP" on the claimant.

Allegation One Requiring members of staff to work under the management of CC.

183. The Tribunal turns to the first issue. The Tribunal finds there was a requirement for members of staff to work under the management of CC from when she was successful in obtaining the Admin Manager post in December 2015.This was the "PCP". The next issue is: did it put the claimant at a disadvantage in relation to a relevant matter in comparison with persons who are not disabled.

184. The Tribunal is not satisfied that this requirement is fulfilled because the claimant was never actually required to work under CC because she was never well enough to return to work after the date CC was appointed.

185. However, in case the Tribunal is wrong about this and the fact that CC was the line manager for the claimant's team means the PCP did apply to her we have considered the next issue of whether it put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This is not an easy question to answer. The claimant was not absent from work because of stress/depression until Jan 2015 onwards. The precise reason why she did not want to work under CC was not easy for the respondent to understand. The claimant had never made a formal complaint or brought a grievance against CC. There was a lack of clarity about why the claimant could not work under CC. Eventually she explained she blamed CC for her back condition which developed when working in another department with CC and she had required the claimant to lift heavy files At some early meetings in 2015 the claimant did suggest that her relationship with CC was a barrier to her returning to work which suggests that having CC as her line manager did put her at a disadvantage compared to people who were not disabled because it impacted on her stress/depression. However later she suggested that the issue with CC was not significant in terms of what was preventing her returning to work.

186. The Tribunal has assumed that this PCP did put the claimant at a disadvantage in relation to a relevant matter in comparison with persons who are not disabled given her disability of stress/depression and that she stated she could not work with CC. We have gone on to consider the last step which is did the respondent take such steps as is reasonable to avoid the disadvantage. We find the respondent did take such steps as was reasonable to take.

187. The Tribunal finds that witness E took on responsibility for managing the claimant's sickness absence so that CC did not do this and thus CC had no access

to the claimant's medical records and therefore the claimant had no contact with CC during her absence. The respondent offered mediation. The possibility of alternative work was also raised in a different environment but the claimant was never well enough to engage with any of these suggestions. Accordingly, we are satisfied the respondent took such steps it was reasonable to take to avoid the substantial disadvantage and this allegation fails.

Allegation 2 - not redeploying the claimant to a role where she would not be managed by CC

188. The Tribunal finds that the claimant was not re-deployed to a role where she could be managed by someone other than CC and accordingly this is capable of being a "PCP".

189. There is a lack of clarity as to precisely how this put the claimant at a substantial disadvantage in relation to a relevant matter. The Tribunal relies on its fact finding to state there were some contradictions in the claimant's evidence in relation to CC. Initially she suggested that working with CC was a significant reason why she could not return to work but later she suggested this was not really the case: "in the informal meeting, formal meeting and outcome letter there has been an over emphasis on CC and my discomfort working with her as my line manager. The meetings have been almost solely based around CC. I feel you have over simplified my illness as you have deemed this as the barrier to my returning to work. The issue with CC is an additional contributory factor".

190. However, if the failure to redeploying the claimant to a role did put the claimant at a substantial disadvantage the Tribunal finds that the respondent made such adjustments as it was reasonable to make. The respondent raised the suggestion of alternative roles but the claimant was never well enough to return to work, not even to an adjusted role in another team. The occupational health doctor specifically stated that there were no adjustments that were reasonable from January 2016 onwards.

191. Prior to that time the claimant was unable to engage with the respondents in terms of alternative work. Accordingly, this allegation fails.

Allegation Three - Failing to refer staff to occupational health timeously

192. The Tribunal heard no evidence that the respondents adopted a practice of failing to refer staff to occupational health timeously. The Tribunal only heard evidence in relation to this specific case. The Tribunal is not satisfied this is factually accurate and accordingly this allegation must fail.

Allegation Four – Failing to train management and HR personnel so that they might be aware when employees were disabled

193. The Tribunal relies on the evidence of Witness E and Witness F and the dismissing officer that they received regular training from the respondent in equality issues including disability.

194. The Tribunal finds respondent's policies which advise managers to refer to occupational health.The Tribunal finds in this case there was a prompt referral to OH once the claimant's sick note indicated a psychological issue "stress at work". The Tribunal finds the respondent took into account the guidance of OH doctor that C was disabled. The Tribunal is not satisfied that it is factually correct to state that the respondent failed to train management and HR personnel so they might be aware when employees are disabled. Accordingly, this allegation fails.

Allegation Five – Adopting a strict application of the sickness absence procedures and triggers

195. The Tribunal only heard evidence about the claimant's case. The Tribunal is not satisfied the respondent adopted a policy of a strict application of the sickness absence procedures and triggers. The Tribunal relies on its findings of fact in this case that no action was taken in relation to the claimant's absence prior to January 2015. If the respondent had been strictly applying its policy to the letter action would have been taken under the short-term absence policy.

Allegation Six – Requiring managers to attend case conferences

196. Although this allegation doesn't expressly say so, it was implicit that the claimant meant that the respondent applied a practice of managers attending case conferences by tele conference. The claimant wanted an adjustment of this practice certainly at the meeting in January 2016, so the managers attended in person.

197. The Tribunal is not satisfied there was evidence to suggest that there was a practice for managers to attend case conferences in person or on the telephone.

198. The Tribunal is not satisfied in any event if there was a requirement for the managers to attend by telephone that this put the claimant at a substantial disadvantage in relation to a relevant matter. The claimant had asked for a number of her meetings to be conducted only by her trade union representative. On occasion she had been content for meetings to be conducted by telephone because it avoided the need for her to come in to the respondent's premises. The claimant never clearly suggested to the respondents that she would prefer to attend in person. Accordingly, the claim fails at this stage.

Allegation Seven – Delays in holding case conferences

199. The Tribunal is not satisfied that the claimant can show that there was a practice of the respondent delaying in holding case conferences.

200. The Tribunal only heard evidence in relation to this case. The Tribunal finds there was a delay between January 2016 until May 2016 in a case conference being held for reasons explained in our fact finding and in the statement of witness E.

201. The Tribunal turns to the next stage. Did it put the claimant at a substantial disadvantage in relation to a relevant matter? The Tribunal cannot identify how the

claimant was put at any disadvantage in relation to a relevant matter by a delay holding the case conference. Even if the delay did put the claimant at a disadvantage there is no evidence the claimant was disadvantaged in comparison with persons who were not disabled. It arose initially because a failure of technology at the meeting in January and a further delay was due to the unavailability of the OH doctor, Dr McCarthy. Although a different OH doctor was available the claimant wished to see Dr McCarthy who had previously been involved. Thus, this allegation fails.

Allegation Eight – No PCP could be identified and thus this allegation fails

Allegation Nine – Failing to seal correspondence generally

202. The Tribunal is not satisfied there was a failure to seal correspondence generally. The Tribunal only heard evidence in relation to one envelope which related to one document sent to the claimant at home. The Tribunal relies on its finding of fact that Witness E did seal that correspondence. Accordingly, the Tribunal is not satisfied there is a provision, criterion or practice of failing to seal correspondence generally, this allegation must fail at this stage. Even if the claimant could show there was a failure to seal correspondence generally there is no evidence to suggest it put her at a substantial disadvantage in relation to a relevant matter in comparison to a non-disabled comparator.

Allegation Ten – Addressing grievances by way of final review

203. The Tribunal finds that there was a PCP of addressing grievances which related to an absence management procedure by way of final review.

204. The next question is: did this put the claimant at a substantial disadvantage in relation to a relevant matter? It is entirely unclear as to how this put the claimant at a substantial disadvantage. The Tribunal finds the content of her grievances was considered and taken into account by the dismissing officer. Accordingly, the Tribunal is not satisfied there was any substantial disadvantage and so this allegation must fail.

Allegation Eleven – Assigning Witness G to chair final outcome meetings

205. The Tribunal is satisfied that the respondent did assign Witness G to chair the claimant's final outcome meeting and that this is a practice of the respondent.

206. The Tribunal turns to the next question which is: did this put the claimant at a substantial disadvantage, as a disabled person in relation to a relevant matter? The Tribunal finds there is no evidence of substantial disadvantage. Witness G had not been previously involved in the matter. We rely on our findings of fact that she dealt with the final outcome hearing fairly and impartially. Accordingly, this allegation fails.

Allegation Twelve – Assigning Witness H to chair appeal hearings

207. The Tribunal finds it was a practice of the respondent to assign Witness H to chair appeal hearings including the claimant's appeal hearing. The Tribunal turns to the next question: did this put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with someone who is not disabled. The Tribunal finds no evidence to suggest that Witness H put the claimant at any disadvantage. In fact, we find Witness H was scrupulously fair and adjourned the appeal hearing when she was concerned she did not have a piece of documentation and in ensuring that there was a new HR representative in attendance at the resumed hearing. Accordingly, this allegation fails.

Allegation Thirteen – Delaying the resolution of capability procedures

208. The Tribunal is not satisfied there was a practice of delaying the resolution of capability procedures. The Tribunal heard evidence only in relation to this case. Accordingly, there is no "PCP".

209. In case we are wrong about that the Tribunal turns to the next question: did the delay in the resolution of the capability procedure put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with someone who is not disabled. The Tribunal is unclear what was the substantial disadvantage to the claimant caused by the delay in the procedure. The Tribunal struggles to understand the claimant's document at page 53 of the bundle where she suggests that the "lengthy and wholly unreasonable time frame was a deliberate attempt to force the employee to resign and avoid incurring financial obligations arising from the claimant's dismissal". The facts are in this case that the respondent did not resign, she was dismissed. The Tribunal does not know what the claimant is referring to when she refers to financial obligations arising from the claimant's dismissal. There is no dispute that the claimant received a payment under the respondent's efficiency scheme.

210. It took some time from when the claimant first went absent from work on sick leave until she was dismissed (two years). During the time the procedure was ongoing, the claimant remained in employment with the respondent. There was during that time a possibility that the claimant's medical condition might improve so a return to work could occur. Unfortunately, apart from the first OH medical report there were no adjustments the OH doctor considered possible for the foreseeable future.

211. The Tribunal is not satisfied that if the procedure had been applied more quickly the outcome would have been different. We find the reasons for the delay to the process adopted by the respondent, who was following their long-term absence procedure, were for a variety of reasons including the claimant's union representative being able to attend meetings and/or the union representative changed or delays by the OH Assist occupational health department (for example the doctor becoming unwell on one occasion). We find the claimant was not well enough to inform the respondent at any time of a specific adjustment she would like

in relation to alternative work to enable her to return to work although the respond sought to engage with her and her trade union representative on this issue.

212. Accordingly, the Tribunal finds that any delay in the resolution of the capability procedure did not put the claimant at a substantial disadvantage in relation to a relevant matter and this allegation fails.

Time/ Limitation Issues

213. The Tribunal has not needed to deal with these issues as the allegations raised above were not successful.

Unpaid Wages

214. The Tribunal finds that the claimant was paid in accordance with her contract of employment, see pages 1577 to 1588. The Tribunal relies on the provision in relation to sickness at p.1578 which entitles the claimant "sick absence on full pay less any social security benefit received may be allowed for up to six months in any period of twelve months thereafter on half pay subject to a maximum of twelve months paid sick absence in any period of four years or less".

215. There was no dispute that the claimant received the sick pay she was entitled to under her contract. Accordingly, there is no claim for unpaid wages because the claimant has received the sums due to her.

Breach of contract

216. The claimant brings a claim that she was entitled to payment in lieu of notice of dismissal or damages for breach of contract.

217. The claimant's contract states at page 1581 at paragraph 19 that due to the constitutional position of the crown, crown employees cannot demand a period of notice as of right when their employments are terminated. However, the contract states that the following minimum periods of notice will normally apply "four years or more continuous service – not less than one week for each year of continuous service plus one week up a maximum of thirteen weeks".

218. The Tribunal relies on its finding of fact that the claimant did receive proper notice under the terms of her contract. Notice was given in the letter sent to her dismissing her by SB on 8 November 2016 "you are entitled to thirteen weeks' notice and you are dismissed with effect from 8 February 2017". Accordingly, because the claimant was by this stage in a no pay situation and was given thirteen weeks' notice of her dismissal she was not entitled to receive any payment during the notice period.

219. Unfortunately for the claimant there is an error in the letter at page 1284 which was confusing for her. It states, "if you are sick during the notice period you must

submit medical certificates to cover your absence up until your last day of service or you will not be paid". The claimant interpreted this to mean that if she sent medical certificates during her notice period she would receive payment. It is understandable that the claimant thought this from the way the letter is worded. However, there is no legal basis for that paragraph in the letter. The claimant's contract only entitled her to be given notice. The claimant was in a no pay situation. She received thirteen weeks' notice of her dismissal. The Tribunal finds it is overwhelmingly likely that this is a pro forma letter which has been edited incorrectly (an employee who was dismissed whilst still receiving sick pay would have been entitled to be paid during their notice period).

220. Accordingly, the claim for breach of contract/payment in lieu of notice fails.

221. The claimant was ably represented by her husband. She made enquiries as to who was present in the Tribunal room and was anxious about confidentiality. The Tribunal raised the issue of an Anonymity Order. A request for an Anonymity Order was made. The respondent had no objection. Accordingly, the Tribunal considered the matter carefully and Anonymity Order was made.

Employment Judge Ross

Date 24 May 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

5 June 2018

FOR THE TRIBUNAL OFFICE