EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **MR D CARTER**
MS P BRESLIN

CLAIMANT **Ms A Willis**

RESPONDENT **National Westminster Bank plc**

ON: **9 – 13 November 2021 and 17 – 19 January 2022**

Appearances:

For the Claimant: Mr P Gilroy QC, counsel
For the Respondent: Mr C Crow, counsel

This hearing was carried out on CVP (Cloud Video Platform). The parties did not object to it being conducted in this way. It was not possible to conduct the hearing in person and all issues could be resolved using CVP

JUDGMENT

The Judgment of the Tribunal is that

1. The Claimant was unfairly dismissed.

2. The Claimant's claim that the Respondent discriminated against her contrary to section 15 of the Equality Act is successful in part.

3. The claims of failure to make reasonable adjustments and indirect discrimination are dismissed.

4. The issue of the appropriate remedy for the successful parts of the Claimant's claim will be heard on 25th and 26 April 2022.

REASONS

1. The Claimant was employed by the Respondent from 9 September 2013 until 4 April 2020. The facts and the legal position in this case have been complicated. The Respondent's evidence has been unclear at times which has led us to have some difficulties in making our findings of fact.

2. The Claimant was diagnosed with cancer in early August 2019. It is not now disputed that she was, at the material times, a disabled person for the purposes of the Equality Act 2010. She claims unfair dismissal, and disability discrimination (discrimination arising from disability, indirect disability discrimination, and failure to make reasonable adjustments.) The agreed issues are set out in the schedule to this judgment.

3. The Tribunal heard evidence from the Claimant and, on her behalf, from Ms Sullivan, a friend and fellow employee, Ms Levitson (who was formerly her direct report) and from Mr Jetuah, who was the Claimant's successor in her role.

4. For the Respondent we heard from Ms Mary Pragnell, who was the Claimant's line manager until early September 2019, from Ms Lucinda Lambourne, who managed the Claimant from September 2019, from Ms Katie Steele, HR Business Partner and from Ms Anitha Baliga, a Program Manager for the Respondent.

5. We had several bundles of documents in total amounting to over a thousand pages.

Findings of relevant fact

6. The Claimant describes herself as a senior risk and compliance professional. She was employed by the Respondent from September 2013. From June 2017 until 31st March 2018 worked in the Bank's ICB team and from about September or October 2017 was managed by Ms Lambourne. In December 2018 the Claimant was given notice to terminate her employment on grounds of redundancy with effect from 28 February 2019. She does not challenge this decision.

7. The Claimant sought redeployment opportunities within the bank. Ms Lambourne, who had moved to a new role within the Treasury department as head of the Resolution Planning Program, notified the Claimant of a vacant position in Ms Pragnell's team as Head of OCiR (Operational Continuity in Resolution). This was a new role that had recently been approved by the Respondent at grade ICM4/Upper Manager (the same grade as the Claimant's) and based in Edinburgh. The role was to put in place compliance with new regulations imposed by the Bank of England from 1 January 2019. An offer had been made to an interested candidate based in Edinburgh in January, but he had turned it down.

8. Ms Pragnell and Ms Lambourne were both based in London, but the majority of the team were based in Edinburgh. We accept that, within the Respondent, there is a presumption against roles being in London and that it has a decentralising agenda.

9. The advertised role was at the Claimant's grade but was in Edinburgh whereas the Claimant herself had been based in London and her remuneration package was significantly higher than the salary advertised for the post at £160,000.

10. The Claimant enquired about the role on 12 February. Ms Pragnell responded that the role was "currently an Edinburgh-based role but I am finding out if it can be switched to London based." (252). Ms Pragnell followed this up on 21st February to tell the Claimant that she was "*just looking at the process for switching the role from Edinburgh to London and it's not quick. Therefore, the only option would be to do a secondment for 3 months to the role whilst I try and get the approval switched."*

11. At this stage there was considerable time pressure because the Claimant was due to leave the Bank in one week's time. Ms Pragnell says that when she refers to switching the role from Edinburgh to London in these emails, she means switching the role for secondment purposes as they did not require a permanent position in London. We do not accept that; the email refers to switching "the role" and to the secondment option being as an alternative "whilst I try and get the approval switched". We conclude that at that stage Ms Pragnell thought that there was a realistic prospect that the role could be switched to London.

12. By 27 February Ms Pragnell understood that she may not get authorisation to transfer the role (256) but authorisation for a 3-month secondment was obtained at the very last moment and the Claimant's exit date cancelled. She was sent a new notice of termination stating that she had secured secondment to a temporary role and that her last day with the Respondent would be May 31, 2019 (283). In the meantime, she remained on her existing remuneration package.

13. The role was as we have said classified as ICM4- which was equivalent to the Claimant's previous role. The role profile (304) states that it reported to Ms Pragnell. The Claimant settled into her new role and authority was given for her to recruit an OCR analyst to report to the Claimant.

14. On 2nd May Ms Pragnell spoke to the Claimant about extending the secondment (327) to a full year. This was approved in June on the basis that it could not be extended beyond 4 March 2020 (344).

15. The Respondent secondment policy was that secondments should not extend beyond 12 months "save in exceptional circumstances". An individual could have a transfer from a secondment role and become permanent in that post, as the Claimant herself had experienced when her secondment to her previous post in ICB had become permanent. The level

of remuneration that the Claimant was enjoying compared to the remuneration for the advertised role was likely to be a significant difficulty.

16. In the meantime, however no attempt had been made to advertise the role for a permanent position in Edinburgh. The application for the extension of the secondment makes no reference to a search for other candidates (beyond the one candidate who declined the role before the Claimant started).

17. A mid-year review meeting was held in mid-June. (350) Ms Pragnell tells us that she had not been impressed by the level of progress that the Claimant had made, and that the mid-year review involved a frank conversation. She says that they had to hold an OCiR focus session in early July, and such sessions are only held where there is concern about the work progress. The Claimant, on the other hand, says that she had a glowing review. She accepts that there was a focus meeting and that there were concerns but she says that they were concerns about the programme and were not concerns about her performance in the role.

18. The contemporaneous written evidence supports the Claimant's position. Ms Pragnell's summary of the Claimant's performance is clearly positive. She refers to the Claimant having made a "really strong start" and having made "huge progress" in developing relationships with the stakeholders. The reference to the Claimant needing to "ensure that she works on being structured in her delivery approach and communications to ensure successful delivery" does not suggest a negative view, as Ms Pragnell suggests. We also note that later, in September, Ms Pragnell refers to the Claimant as being "really valuable" and to her "subject matter expertise in a complex area". (SB59). We have not been referred to any contemporaneous evidence which is critical of the Claimant's performance.

19. The Claimant's mid-year review was signed off on 1 July. The Respondent rated employees each year on a scale of 1 to 5 with 5 being the highest. 3 is a rating of good, 4 is excellent and 5 is outstanding. The majority of the employees receive a 3 rating. Ms Pragnell said that 65% of the UK based Treasury team received a 3 rating. A rating is only given to the employee at the end of the year but, at the midyear review, Ms Pragnell awarded the Claimant a performance rating of 3 – although this was only provided to the business management team and not to the Claimant at the time.

20. During the mid year performance review, Ms Pragnell noted that the Claimant had not had a Personal Development Plan for 5 years and suggested they would work together "on developing a detailed plan that will support you for years to come. This will be input into the system as soon as possible." The PDP sets out longer term goals and objectives for the employee. Prior to the mid year review the Claimant had produced a very brief PDP consisting of 4 short lines (340) stating that she wanted to secure permanent role with the bank, attract sponsors and become a mentor. The PDP is primarily the responsibility of the employee. The Claimant complains that after the meeting Ms Pragnell did not work with

her to complete the PDP but there was no evidence before us to indicate that the Claimant had produced a further PDP for Ms Pragnell to review and to discuss.

21. Shortly after the Claimant's mid-year review the Claimant asked Ms Pragnell for an update on her efforts to move the role to London and being made permanent. Ms Pragnell told the Claimant that she did not have that approval but was "working on it**".** She gave the Claimant the general expectation that efforts were being made to make the role permanent or to extend her secondment. Ms Pragnell said in evidence that she did not seek approval for a permanent role London because they "*we still did not have a plan to have an OCiR role in London permanently so did not seek approval for a role in London"*. However, Ms Pragnell had not taken any steps to recruit into the post in Edinburgh.

22. In early August 2019 the Claimant was diagnosed with colon cancer and she informed both Ms Pragnell and Ms Lambourne. At this stage the Claimant did not take any significant periods of time off work but would generally come into the office about twice a week and she would work from home when she had to attend hospital to have scans or to have radiotherapy, and she would make up the time. It was understood that she may need to have an operation depending on the outcome of the earlier treatment.

23. On 3rd September Ms Pragnell told the Claimant that she wanted her to report to Ms Lambourne as Ms Lambourne would have more time to support the Claimant during treatment. The Claimant understood this to be a temporary measure just during her treatment. Ms Lambourne was at a grade higher than the Claimant and at the same grade as Ms Pragnell, and she reported to Ms Pragnell. Ms Lambourne was also an independent contractor rather than a direct employee of the Respondent.

24. On 10th September Ms Pragnell and her line manager Ms Williams spoke to a representative of HR, Ms McCallum, to discuss the Claimant. Although the Claimant had notified the Respondent on 8th August about her diagnosis, Ms Pragnell had only found out about her treatment plan the week before. They now understood that the Claimant was to have chemotherapy and radiotherapy every day followed by surgery in January, and this appears to have triggered the call.

25. It is apparent from the transcript (SB 56) that Ms Pragnell and her line manager Ms Williams are seeking advice on terminating the Claimant's secondment early. Ms Pragnell speaks of the Claimant having a critical piece of work to deliver and that she has to "replace her" because she cannot rely on her. "*While she is travelling hopefully and thinks she is going to be completely functional until the end of the year I still in my mind got to replace her because I just can't rely on it it's too critical. She manages the teams well so….*" Ms Williams adds that the Claimant is serving notice "so at the end of the secondment there is no role for her." There is a discussion about whether they could ask for an Occupational

Health appointment to understand about the Claimant's prognosis and treatment. Ms Pragnell is concerned. She notes that the Claimant is "*really very valuable in her subject area"*, that while she does not want to stress the Claimant out "*purely selfishly really really I've just got a lot to deliver, and I need to deliver it."* Ms Williams asks about options around terminating the secondment early. Despite the various supportive emails sent to the Claimant at the time it is apparent at this stage that Ms Pragnell and Ms Williams are seeking authority to terminate the Claimant's employment because she is likely to be absent from work for a period of time. We note that Ms Pragnell's witness statement, prepared before the transcript was disclosed, makes no mention of that aspect of the discussion, and suggests that the call with HR was to "discuss the support we were putting in place for Adeline." That was not the purpose of the call.

26. In the event no action was taken to terminate the Claimant's secondment early. In fact, the Claimant did not take any time off, largely working from home on the days when she had hospital appointments and dialing into Monday morning team calls. The Claimant had a telephone call with occupational health on 3rd October and OH recommended some temporary adjustments to manage her symptoms including a reduced workload, supportive management, flexibility with working hours and an allocated desk. There is no evidence of any follow-up with the Claimant following the OH report.

27. During that autumn the Claimant's brother and mother were also diagnosed with cancer and, in the Claimant's mother's case, this was diagnosed as terminal.

28. The team had weekly Monday morning meetings which the Claimant had continued to attend during her treatment by dialing in from home. On 28th October, which was the Claimant's first Monday in the office following her chemotherapy and radiotherapy treatment, she attended the routine Monday team meeting but was told by Ms Pragnell in front of others that she was not needed - and that she was being given back "an hour of her day". The Claimant felt surprised and humiliated by this statement. (417). The Claimant asked for a one-to-one with Ms Lambourne to query her reporting line, saying that she had understood that the change to Ms Lambourne was temporary. However, Ms Lambourne told the Claimant that the change in reporting line was permanent. The Claimant told Ms Lambourne that she viewed it as a demotion.

29. The Respondent's case is that Ms Pragnell told the Claimant that she was not needed because the meeting was for Ms Pragnell's direct reports and, the Claimant was no longer a direct report of Ms Pragnell. The Respondent also contends that this was a supportive measure, designed to reduce the Claimant workload but we do not accept this. As to the change of line manager the Claimant had been attending Monday meetings remotely since the change of line manager in early September. Secondly If the Respondent was simply seeking to reduce the Claimant's workload as a supportive measure, then the first step would have been to

have discussed this with the Claimant in advance and sought her views as to whether or not she should attend. We also note that Ms Lambourne was not employed directly by the Respondent but was an independent contractor and so, as she told the Tribunal, it was for Ms Pragnell and not for her to seek any relevant advice and authorisations from HR.

30. The Tribunal does not accept that the change in manager was a de facto demotion, given that the Claimant retained her grade and salary. However, we do accept that it was unfavourable treatment. We consider that an employee who is asked to report to a manager at a lower point in the management hierarchy than the manager to whom she has previously reported would reasonably regard that as reducing their influence, especially when that individual is not directly employed by the Respondent.

31. The Respondent accepts that the work that the Claimant was doing remained. In October the Respondent had recruited Deloitte LLP at considerable cost to help the Respondent complete some OCiR work, given impending deadlines.

32. The Claimant and Ms Pragnell met in November. Ms Pragnell told the Claimant that she wanted to extend the Claimant's secondment to allow her time to recover from surgery and that she would explore this with HR. The Claimant was aware that the extension to her secondment was not guaranteed, but Ms Pragnell encouraged her to believe that there was a good chance of an extension.

33. It is surprising that even at this late stage Ms Pragnell had not discussed with the Claimant her options if the secondment was not extended. Ms Pragnell says that she did not ever seek to make the role permanent because she did not require the role in London or at her salary and did not have any business justification for a London role. She knew it would be rejected. However, we do not accept this. If that was the case, she would have told the Claimant. Ms Pragnell accepts that she had never asked the Claimant her views on applying for the permanent position, whether she would be prepared to accept a role in Edinburgh or a lower salary. We conclude that this must be because until the Claimant's diagnosis she thought it remained possible that the Claimant could be extended or made permanent in the role.

34. On 10 December 2019 Ms Pragnell told the Claimant that she would not be given a year end performance review because she had better things to concentrate on. The Claimant considers that this was unfavourable treatment related to her cancer. The Respondent accepts that the decision was taken because the Claimant had cancer but says it was not unfavourable treatment and was a supportive measure. Ms Pragnell says it was not unfavourable to the Claimant because "it would not have been an easy conversation" and that there were performance issues. Ms Pragnell sought advice from HR as to the need to have a year end review noting that she would have some challenging messages to give the Claimant and

that it all "seemed completely irrelevant". HR advised that that would be OK, with the Claimant's agreement.

35. In a subsequent conversation with Ms Lambourne the Claimant said that if she wasn't having a year end review, she should get a 4 rating. If a review is not held then the practice of the bank is for an employee to default to the previous rating. Ms Lambourne responded to the Claimant that the reason she wasn't having a year end review was because it would be a "bad number". The Claimant says that she understood that to mean that she would have got a 2, while Ms Lambourne says that she said this in response to the Claimant saying that she would get a 4 and that what she meant was that the Claimant would have got a 3.

36. We are satisfied that the Respondent treated the Claimant unfavourably by not giving her a year end review. First, it would not be realistic to say that the Claimant agreed. We accept that it was put to her as a statement rather than a question – and while the Claimant did not object, she was not asked openly if she would be happy without a review. Secondly it should have been made clear to the Claimant what the consequences, in terms of bonus and rating, were for her in not having a review. In fact, in the event, the Claimant was given a 3 rating by default, as this had been the rating given to her at the midyear performance review.

37. We also accept that when Ms Lambourne told the Claimant that she would have got "a bad number" this was also unfavourable treatment. The Respondent's case has always been that the majority of the Respondent employees are given a 3, and that 3 is a good rather than a bad rating. If Ms Lambourne told the Claimant she would have got a bad number this could only have meant a 2.

38. In January 2020 the Claimant spoke to a colleague Ms Baliga. The Claimant told Ms Baliga that she was at risk of redundancy and asked whether she should apply for roles in her team. It is the Claimant's case that Ms Baliga told her that she should not apply for the roles and that she should concentrate on getting better. Ms Baliga denies this. She says that while she was concerned for the Claimant's health, she did not tell her that she should not be looking at other roles. On the balance of probabilities, we prefer the evidence of Ms Baliga.

39. The Claimant also complains that she had been shut out of, and kept in the dark about, recruitment for 2 OCiR analyst roles, and that unbeknown to her in January Ms Lambourne and Ms Pragnell had been recruiting for a role which should have reported to her. Ms Lambourne says that the Claimant was aware that they were recruiting for these roles, and that she had told the Claimant that she would deal with it. She had done so in an effort to be supportive and to reduce the Claimant's workload (although she did not recall if she told the Claimant that this was the reason that she was dealing with it.).

40. We do not accept that the Claimant was kept in the dark about recruitment for these roles. In an email of 31 October 2019 (SB55) Ms Lambourne forwarded the Claimant an email from a potential candidate who had been looking at the job advert for the OCiR Analyst role, to ask the Claimant if she knew him. This clearly suggests that the Claimant was aware of the recruitment. The interviews then took place in January and February at a time when the Claimant was about to go into or was in hospital.

41. On 10th February the Claimant met with Ms Pragnell to update her on her diagnosis and treatment plan. She told Ms Pragnell that surgery had been recommended for February or March and, given that she would need 4 - 8 weeks time off work and possibly more, she was worried that she would not be successful in getting another job within the Respondent. The Claimant asked formally for an extension to her secondment as a "reasonable adjustment" under the Equality Act. Ms Pragnell told the Claimant that she should not be looking for other roles; that it was "ridiculous", and she would talk to HR and request an extension."

42. Ms Pragnell met with HR on 11th February to discuss the Claimant – though there are no notes (576). The Claimant's surgery was fixed for 26th February 2020

43. On 14 February Ms Pragnell told the Claimant that she would not be given a salary increase and that her bonus would be £3500. This was the lowest bonus she had ever received with the bank. The Claimant's direct report Ms Levitson was given a pay rise of £1,850 and £4,000 bonus.

44. On 17th February Ms Khan of HR Policy emailed Ms Williams following their meeting on 11th February and said that the options were limited. (575) "The softer approach would be to consider extending secondment accommodating sickness and taught treatment ends" or no extension "as you have set clear expectations that the end of March is the end date, and the role is no longer required." She advised that ultimately "it has to be a business decision."

45. The role that is being referred to here appears to be the Claimant's role as head of OCiR. However, the role and the work did still exist. We conclude that the business (Ms Pragnell and Ms Williams) had by then decided that the Claimant would not be returning to her role after her sick leave. Thus, the understanding by all is that the extension is being sought on compassionate grounds only and while she is ill; and that the business was not seeking to confirm her post or to extend her secondment once she was back at work. We infer that this was a decision taken on or around the 10th September once the Claimant's treatment plan was known.

46. On 20th February the Claimant met Ms Pragnell again. By this time the Claimant had a date for her surgery. She said that that she would need sometime off before the surgery to prep, and then after the surgery she would need a minimum of 8 weeks off work. If the results were good and she didn't need any further chemotherapy, there would be reversal surgery

for a stoma requiring 2 to 4 weeks in hospital. If the Claimant did require chemotherapy and she might need some 6 months off work (SB 46). Ms Pragnell told the Claimant that the secondment application was in hand and that while she had not heard from HR she had "no reason to believe it won't all be fine". Ms Pragnell accepts that she did think the secondment would be extended "by 6, 9, 12 months, I can't recall." What she did not make clear to the Claimant is that she was pushing for an extension on compassionate grounds only.

47. In evidence Ms Pragnell was unclear about exactly what was being sought from HR. There is no clear single document sent to HR which outlines what she is seeking approval for or why. The notes of the 11th February meeting, if there were any, were not produced. An email from Ms Morgan (585) records that Ms Pragnell and Ms Williams had asked HR for approval for a year's extension which they would then manage on a 12-week rolling basis *"i.e., tell AW that she has an extension of 12 weeks and then review as to whether she was still undergoing treatment and then extend if she was".*

48. However, the email trail above leads us to conclude that what Ms Williams and Ms Pragnell were seeking was an extension on compassionate grounds only, and that they did not wish, or make a business case for, the Claimant to return to the role at the end of her treatment. It is notable that neither Ms Pragnell nor Ms Willimas made it clear to HR that the role and the work was still there. Ms Morgan's email continues that the extension request *"carries a lot of risk, as the business would be making a judgment as to whether she's still sick which doesn't feel right and sets an expectation that the 12 weeks keep rolling."* Ms Morgan of HR recommends a 6-month extension to enable her to have her operation and recover on the Bank's healthcare but that "*the risk of course is that the operation itself is successful and she doesn't need any follow-up treatment, or the follow-up treatment can be done on the NHS."* In other words, there was a risk that the Claimant would be able to return to work. In a subsequent email Ms Morgan notes her understanding that the business had asked "if they can extend her exit to help with her health." (581).

49. Ms Pragnell went on holiday on 21st February. In the week that she was away there was some intense email exchange between the various members of HR as to whether or not there could be an extension to the Claimant secondment on compassionate grounds. Ms Morgan recommended a 6-month extension, an approach which was initially supported by Ms Steele (584). However, Ms Turkington was not supportive. She said she would not support an open-ended obligation if it meant retaining a person in employment for a further 6 months "when there is no role there" (583).

50. There was considerable correspondence between Ms Williams and HR, and between various members of HR in which permission was sought to extend the Claimant's secondment. In the week commencing 21st

February. In all of those discussions the extension is being discussed as an extension on purely compassionate grounds - and also because (i) the Claimant had been given an expectation of an extension and (ii) because she had referred to the bank's duty of care.

51. HR understood that there was no role for the Claimant following the end of her secondment and that "the work had gone" (662) and that it was not expected that she would ever come back to work (603). This was plainly poor information, which must have been provided by the business, as the Claimant's role had not disappeared although her secondment was coming to an end.

52. In the end Ms Highway HR director reluctantly authorised a one-month extension "purely out of concern for well-being for the individual given the way it appears it has been managed." She was evidentially angry that it appeared that expectations had been set with the Claimant that there would be an extension.

53. The Claimant was notified on 28th February 2020 that the Respondent had agreed a one-month extension and her employment would terminate on 4 April 2020. This was confirmed in writing on 5th March (625).

54. The business, Ms Pragnell Ms Williams and Mr Quaid, considered that this was not the right decision. When Ms Pragnell returned from holiday she met with HR to explore the decision. Ms Steele referred to the Respondent policy of not extending secondments beyond 12 months and to the fact that that the work had gone and there was no commercial reason to extend. Ms Pragnell said that she had not been given the context to come up with options e.g., looking to see if the role could be signed off as a London headcount (rather than Edinburgh) – although she recognised she may have not got to a different outcome. (662). The tribunal was surprised that Ms Pragnell appeared not to have understood that she could have initiated a discussion about signing off the role as London headcount much earlier in the year.

55. On 11 March 2020 the Claimant emailed the Chief Executive Ms Rose and asked for her to intervene to extend her secondment beyond the 4 weeks that had been granted. A short briefing note was provided to Ms Rose who refused the request some 14 minutes later saying only "no-- stick to advice by HR". A letter was sent to the Claimant on 13th March to inform her of Ms Rose's decision.

<u>Alternative employment</u>

56. Once the Claimant was told that her employment would come to an end on 4 April 2020, and while she was recuperating from her operation, she began to look for other roles. On 6th March the Claimant asked Ms Lambourne about the possibility of applying for a vacant role of Business Leader for Continuity of Financial Contracts in Resolution. Ms Lambourne told the Claimant that she was welcome to apply but she did not have the

necessary skills for the role. We accept Ms Lambourne's evidence that this particular role required deep technical knowledge which the Claimant did not have.

57. The Claimant spent much of her sick leave applying for jobs within the Bank and a list of those applications appears at paragraph 219 of her witness statement. We looked at each of these roles during the course of the Claimant's cross examination and we accept the Respondent's position that the Claimant did not meet the essential requirements of any of those roles.

58. The Claimant's employment with the bank terminated on 4 April 2020. She received an enhanced redundancy payment.

59. After the Claimant had left, in late April 2020, the Respondent applied for approval for the replacement to the Claimant's role. The job title was to be OCiR Manager rather than Head of OCiR, and was to be based in Edinburgh. Mr Jetuah was hired into that role on a permanent contract on a salary of 62,840 and began in the role in August 2020. Due to the pandemic he worked in that role from home at all times until he left the Respondent in June 2021.

60. Extensive submissions were made on the facts and on the law in writing and orally which we do not repeat here.

The law

Unfair dismissal

61. Section 94 of the Employment Rights Act 1996 provides that it is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1) and (2). In this case the Respondent submits that the reason for the Claimant's dismissal was redundancy or, in the alternative, some other substantial reason.

62. If the Respondent can establish that the principal reason for the Claimant's dismissal was a potentially fair reason, then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

63. Section 139(1)(b) of the ERA provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind, or to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."

64. In considering reasonableness in cases of redundancy, an employer will not normally have acted reasonably unless it warns and consults employees affected and takes reasonable steps to find another role for that employee. Equally in considering reasonableness it is not for the tribunal to substitute its own view for that of the employer, rather the tribunal has to determine whether the decision of the employer fell within the range of reasonable responses for a reasonable employer to take.

Disability discrimination

65. Time limits Section 123 of the Equality Act 2010 provides that (subject to extensions to allow for early conciliation), complaints of discrimination may not be brought after the end of –

"(a) the period of three months starting with the date of the act to which the complaint relates, or
(b) such other period as the Tribunal thinks just and equitable. of."

66. Section 123 (3) provides that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it. Section 123 (4) further provides that in the absence of evidence to the contrary a person is to be taken to decide on a failure to do something when he does an act inconsistent with the doing of it or on the expiry of the period in which the person might reasonably have been expected to do it.

67. Section 15 of the Equality Act 2010 provides that

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

68. In Psainer v NHS England 2016 IRLR 170 EAT Simler J said

"A *Tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises. The Tribunal must determine what caused the impugned treatment, or what was the reason for It. The focus at this stage is on the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required. The something that causes the unfavourable treatment need not be the main or sole reason, but must have a significant (or more then trivial) influence of the*

unfavourable treatment and so be an effective reason or cause for it."

69. Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage.

70. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.

71. The Code of Practice on Employment 2011 (chapter 6) gives guidance in determining whether it is reasonable for employers to have to take a particular step to comply with a duty to make adjustments. What is a reasonable step for an employer to take will depend on the circumstances of the particular case.

72. The tribunal must identify:

    a. the PCP applied by or on behalf of the employer, or the physical feature of premises occupied by the employer.

    b. the identity of non-disabled comparators (where appropriate), and

    c. the nature and extent of the substantial disadvantage suffered by the claimant.

73. The test of reasonableness imports an objective standard. The Tribunal must examine the issue not just from the perspective of the Claimant but also take into account wider implications including the operational objectives of the employer.

Indirect discrimination

74. Section 19 of the Equality Act 2010, provides that:

    (1) A person (A) discriminates against another person (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B's

    (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a protected characteristic of B's if:

        (a) A applies, or would apply, it to persons with whom B does not hare the characteristic,

        (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage, when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

All four conditions in s.19(2) must be met before a successful claim for indirect discrimination can be established. That is, there must be a PCP which the employer applies or would apply to employees who do not share the protected characteristic of the claimant; that PCP must put people who share the claimant's protected characteristic at a particular disadvantage when compared with those who do not share that characteristic; the claimant must experience that particular disadvantage; and the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

75. The burden of proof is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. A mere feeling that there has been unlawful discrimination is not enough. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial. Direct evidence of discrimination is rare, and tribunals may have to infer discrimination from all the material facts.

Conclusions
Discrimination arising from disability

76. As we have said, we do not accept that the Claimant was not performing in her role. The Claimant suggests that a number of matters set out in the list of issues amounted to unfavourable treatment because she had taken or would take time off again in the future for cancer treatment. It is not disputed that the fact that the Claimant had taken time off and would need to take time off again in the future were matters that arose from the Claimant's disability.

77. Key to our findings in this case is the transcript of the telephone call between Ms Pragnell, Ms Williams and Ms McCallum of HR (SB 56) which took place on 10th September, the week after the Claimant had notified the Respondent of her treatment plan. Ms Pragnell and Ms Williams are taking advice about terminating the Claimant's secondment early. There is direct evidence that Ms Pragnell and Ms Williams sought to take action against the Claimant because she was due to take time off for cancer treatment.

78. Our task was to decide whether or not the Respondent treated the Claimant unfavourably as alleged. If it did was that because the Claimant had taken or was going to take time off for cancer treatment? As is well

known, this calls for consideration of the mental processes (conscious or subconscious) of the alleged discriminator, and that employers will very rarely admit to discriminatory reasons. Motives, per se, are irrelevant. The tribunal has to decide whether the Claimant's past or future absences were the cause of her treatment.

79. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he or she has acted in a certain way towards another, whether consciously or subconsciously and will in any event be determined to explain their reasons for what they have done in a way which does not involve discrimination. Discrimination may be inferred from all the material facts.

Changing the Claimant reporting line

80. We are satisfied that the Respondent treated the Claimant unfavourably when Mary Pragnell changed the Claimant's reporting line to Ms Lambourne. Mr Crowe submits that this was not unfavourable treatment because it was intended to be supportive and simply brought forward a change that was in the pipeline in any event. Nonetheless, as Mr Gilroy submits, it is clear that her absence past or future was a substantial reason for the change in line manager at that time and that the Claimant could reasonably regard this as a detrimental change.

Asking the Claimant to leave the Monday morning meeting

81. We are also satisfied that this was unfavourable treatment. As we have said, if Ms Pragnell had genuinely intended to support the Claimant, she should have discussed with her in advance how to do so. Ms Pragnell said that she wanted to give the Claimant an hour back, to that extent, even if it was true the reason for the treatment related to the Claimant's time off for cancer treatment.

Failure to complete the year end performance review

82. Mr Crow submits that this was not unfavourable treatment and that the reason why she was not given a year end review was because she would have to be given some challenging messages and because the Claimant had "more important things to think about". Ms Pragnell accepted in cross examination that the fact that the Claimant had cancer was a part of her thinking. In this case the motive may have been benign, but the consequence was unfavourable treatment because the Claimant had been or would be absent with cancer.

Failing to complete the PDP

83. As set out above we do not consider that the Respondent treated the Claimant unfavourably in this respect. It was the Claimant's responsibility to draft the PDP and if she had wanted Ms Pragnell to assist with that it was for her to take the initiative. Ms Pragnell had raised the issue at the mid-year review, but thereafter the Claimant had to take responsibility.

Telling the Claimant she would get a bad number.

84. Ms Lambourne says that the reason she told the Claimant that she would get a bad number was in response to the Claimant's suggestion that she would get a 4, and that she meant a 3. As a 3 is not a bad number, we conclude that she must have meant a 2 as the Claimant understood. While this was an unhelpful and unnecessary comment, we conclude that it was made because Ms Lambourne was irritated by the Claimant's remark that she would get a 4 rather than because the Claimant had been off or was likely to be off work for cancer treatment.

Comment by Ms Baliga

85. As set out in the facts above we have not accepted that this comment was made.

Dissuading the Claimant from applying for other roles

86. We accept that in February Ms Pragnell did tell the Claimant it would be ridiculous to apply for other roles and expressed reasonable confidence that her secondment would be extended. We find that this was unfavorable treatment likely to dissuade the Claimant from applying for other roles. Ms Pragnell said this because (i) she thought that the Claimant would get an extension on compassionate grounds and would have more time to look and (ii) because she felt sorry for the Claimant. Even if her motives were benign this was nonetheless treatment influenced by that fact that the Claimant would be having cancer treatment**.**

Salary bonus and performance rating

87. We are satisfied that the reason that the Claimant did not get a salary increase is that she was already paid significantly more than the market value for the job. Ms Pragnell had told her that the reason why she had not got a salary increase was because her salary was already very high for the role and for Treasury. (571) She accepted in evidence that she had not had a salary increase since 2015 (although she denied that this was because she had been at the top of the salary scale for her various previous jobs). We also find that the reason that her bonus was low was in part the Claimant's high salary and in part the fact that she was under notice. Ms Pragnell says that she had to fight for the Claimant's bonus because it is the bank's policy not to award bonuses to those who are under notice, and we accept that. On balance we conclude that the reason for the low bonus and the failure to increase the Claimant salary related to the fact that the Claimant was under notice and in the light of her overall pay. (The question of whether the Claimant would have got a higher bonus were it not for the discriminatory treatment referred to below may be an issue at the remedy stage.**)**

88. As for the performance rating the Claimant got a 3. We had no evidence to suggest that the Claimant would have got a 4 if she had not been out of the office for sickness purposes, given she had obtained a 3 at the midyear review.

Not inviting the Claimant for interviews for other roles when she was recovering from surgery in March 2020

89. The Claimant applied for a significant number of jobs during March 2020 as set out in her witness statement. She complains that she was not invited to a single interview but has not explained why she was suited for any of those jobs. We were taken through each of these roles during the Claimant's cross examination. We are satisfied that none of these jobs were suitable for the Claimant for the reasons set out by Mr Crow in paragraph 34 of his closing submissions.

90. Equally, we accept Ms Lambourne's evidence that she told the Claimant that she didn't have the necessary skills to apply for the vacant role of Business Lead for Continuity of Financial Contracts in Resolution, because that was her genuine view and not because of the Claimant's absences. Although the Claimant had not seen the formal job profile (846) at the time that they had the discussion, she now says that, having done so, she has the skills for the job. We have had very little evidence as to how the Claimant says that she meets the skills for the job, and we prefer the evidence of Ms Lambourne that this job required very specific skills.

Appointing a new member of staff to the Claimant's team without her prior knowledge or involvement

91. As we set out in findings of fact above, the Claimant was aware of the recruitment to the role of OCiR Analyst. Ms Lambourne took this on as a supportive measure to make things easier for her. She was told about his secondment to the team on 11 February 2020, and the Claimant accepts that she expressed no particular concerns. We conclude that the Claimant was in agreement with Ms Lambourne taking over the recruitment process and thus it was not unfavourable treatment.

Ignoring the Claimant's request to Alison Rose

92. In his submissions Mr Gilroy makes much of the fact that the briefing note provided to Ms Rose was only sent some 14 minutes before her response to her team that they should "stick to advice by HR". The Tribunal cannot infer any discriminatory reason from this. Chief Executives have many decisions to make all the time and frequently make them extremely fast. The Claimant had no right to a personal intervention by Ms Rose in HR. Decisions made in relation to her case were for others in the Bank.

By failing to provide proactive help or support with redeployment

93. The Claimant says that no one from the bank provided her with a list of vacancies that were available within the bank at the relevant time or supported her to find an alternative role. However, as the Claimant knew, the Bank had a portal containing all advertised vacancies, and she used this to apply for a significant number of jobs as set out in her witness statement. She had been through this process before and has not explained what additional support should have been provided. We do not consider that she was subjected to unfavourable treatment in this regard.

Dismissing her

94. As Mr Crow submits the Claimant was under notice of termination at the material time. However, the cause of the Claimant's dismissal was a

decision made by the business that they would not seek or make a business case for the Claimant to continue in her role. To that extent much of the email trail in which there is a discussion of extensions on compassionate grounds is not relevant. If the operative cause of the Claimant's dismissal had been a genuine redundancy, then any extension, whether for one or for 6 months, could only have been more favourable rather than less favourable treatment.

95. What is an issue here is not the decision of anyone in HR to only extend for one month, but the decision of the business that the Claimant would not be retained once she was ready to return to work, (so that an extension could only be sought on compassionate grounds).

96. However, the work which the Claimant was doing continued to exist. We are satisfied that the Business would have been able to make a case for the Claimant to be made permanent or for a continuation of her secondment while matters were negotiated. It was this omission which was the operative cause of the termination of the Claimant's employment.

97. The issue then is whether the omission (plainly unfavourable treatment) was because of the Claimant's past or future absences from work for cancer treatment.

98. The Respondent has not satisfactorily explained why it never made clear to the Claimant what its intentions were for her after her 12-month secondment. The Respondent says that there was no commercial reason to make the role permanent in London and it would be impossible to continue the secondment after 12 months. However, we do not accept that. The evidence suggests that where a business need arises the Respondent is prepared to spend money to achieve its business objectives, as it did when it appointed Deloitte's. As we have said it could have made a case for the continuation of that secondment, or for the Claimant to be confirmed in post on a permanent basis, and we conclude that they would have done so had the Claimant not been ill. On balance we think that they would have obtained it -- although we do accept that they were unlikely to get approval for the role to continue both in London and at the Claimant's existing rate of remuneration indefinitely.

99. We are satisfied that the omission was because of something (absences) arising from the Claimant's disability. Unusually in this case we have clear evidence of discriminatory intent in the transcript of the 10th September telephone call. The Respondent suggests that the decision was not in the hands of the business but was in the hands of HR only. We accept that the decision as to whether an extension on compassionate grounds could be agreed was in the hands of HR. However, the earlier decision (or omission) was in the hands of the business. Ms Pragnell says that she was too expensive and was not performing. As to the expense - that was something which could and should have been negotiated if there had been a will to do so. We do not accept that she was performing badly, noting

that as late as 10th September Ms Pragnell said that the Claimant was very valuable.

Justification

100. The Tribunal has found that the Claimant was treated unfavourably because of something arising from disability in the following ways:
    a. changing her reporting line to Ms Lambourne
    b. asking the Claimant to leave the routine Monday morning meeting
    c. failing to complete the Claimant's year end review
    d. by dissuading the Claimant from applying for other jobs.
    e. By dismissing her.

101. The Respondent has a defence to a section 15 claim if it can show that the unfavourable treatment amounted to a proportionate means of achieving a legitimate aim – the burden at this stage being firmly on the Respondent. The pleaded legitimate aim was "efficient management of the Respondents human resources having regard to the Claimant's particular circumstances." While efficient management might be a legitimate aim, none of the above could be said to be a proportionate means of achieving that aim.

Time limits

102. Mr Crow submits that save for the dismissal the potential acts of discrimination relied upon by the Claimant are out of time. In fact, it is also the case, on our analysis that the operative cause of the Claimant's dismissal occurred outside the primary time-limit in that the business had made a decision not to seek to extend the Claimant secondment other than for compassionate purposes, although the Claimant was unaware.

103. It is the Claimant's case that all the Claimant claims are in time as the Respondent's conduct amounted to conduct extending over a period within the terms of section 123 (3). An act extending over a period is treated as done at the end of that period although this should be distinguished from a single act with continuing consequences. A failure to act is treated as done when the person decided on it.

104. The concept of an act extending over a period was considered in Commissioner of Police of the Metropolis v Hendricks 2003 IRLR 96 and given a wide interpretation. ... The question is whether there is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed". An act extending over a period is a wider concept than the application of a policy. The issue is whether the acts constitute a continuing state of affairs in which discrimination occurs- or put another way whether the various complaints are so linked as to be continuing acts or an ongoing state of affairs.

105. We are satisfied that the various acts of discrimination identified are part of a continuing act. If any point is taken the operative decision, (not to seek to

extend the Claimant's secondment beyond her absence) we are satisfied that it will be just and equitable for time to be extended, given that the Claimant was kept wholly in the dark as to what the business was considering or deciding.

Unfair dismissal

106. We considered first what was the reason for dismissal. This was not wholly straightforward. The Claimant was under notice that her employment would come to an end on 4 March 2020.

107. The Respondent's case is that the Claimant was redundant. Her contractual job was her ICB role which had ceased to exist and that she was on notice of dismissal throughout her secondment. Her employment came to an end at the expiry of that notice. In the alternative they also argue that the Claimant was redundant from her Head of OCiR role because the requirement for that role to be performed in London had ceased or diminished. It was moving from project to business as usual. In the further alternative the Respondent argues that the reason for dismissal was "some other substantial reason" in that the Claimant's permanent job no longer existed and there was no business/commercial justification to continue to offer the alternative secondment work because the business could not justify paying the Claimant's much higher salary for a job that commanded a lower remuneration.

108. The Claimant says on the other hand that the requirements of the Respondent for employees to carry out the role in which she was employed at the time of the termination of her employment had not ceased or diminished and it was immaterial that the Respondent had classified this as a secondment.

109. A reason for dismissal is generally said to be the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss. In this case the Claimant was already under notice, but there was a very real possibility that this could be rescinded and that she could continue in her role. We considered that the principal reason for her dismissal was the decision by Ms Pragnell and Ms Williams that she would not return to the OCiR role after her treatment/ or put another way that it would not seek to regularise the Claimant's position by negotiating a permanent role for her or extending her secondment for business reasons.

110. We do not accept that the Claimant was dismissed for redundancy. At the time that she left the bank she was employed to do work relating to Operational Continuity in Resolution. That work had not ceased or diminished. Ms Lambourne was clear that they still had a requirement for someone in that role at the Claimant's level. She had already set the Claimant's goals for 2020 (537). Although the Respondent says that the requirement was for a role in Edinburgh it was plain from the evidence which we have heard that the requirement for the role to be in Edinburgh was mutable, and that the work could be done from either location.

111. The Tribunal concludes that the reason for the Claimant's dismissal was that the Respondent had taken a decision not to seek an extension to her secondment or to negotiate for the Claimant to take the job on a permanent basis. Although the Respondent had a policy that secondments would not be extended beyond 12 months save in exceptional circumstances, we are satisfied that exceptions could made when it suited the bank. We conclude that the Respondent has not shown a potentially fair reason for dismissal.

112. However, if we are wrong in this conclusion and the Claimant was dismissed for redundancy then we find that decision to dismiss was unreasonable in the terms of section 98(4). First it was a decision which was tainted with discrimination. Secondly the Respondent failed to discuss with the Claimant various possibilities for regularising her role or extending her secondment and instead led her to believe that there would be an extension and that therefore there was no need for her to look for alternative roles.

Indirect discrimination

113. Both this claim and the failure to make reasonable adjustments claim have been oddly pleaded. The pleaded PCP is "a policy to end a secondment if there was no valid reason to extend it". As formulated, it suggests that in the Claimant's case there was no valid reason to extend her secondment – which is wholly contrary to the section 15 case.

114. Further, it is not clear how that policy, if there was one, put disabled persons at a particular disadvantage in comparison to those that were not disabled. The group disadvantage relied on in the list of issues is identified as follows "did the PCP put disabled persons at one or more particular disadvantages when compared with persons with whom the Claimant does not share the characteristic, in that the Claimant was unwell and unable to consult over the valid reason so as to show that she had one? This conflates group and individual disadvantage.

115. The issue as formulated is hard to understand and, in any event, we are satisfied that the Claimant has failed to show why such a policy causes group disadvantage or individual disadvantage.

Failure to make reasonable adjustments

116. The same PCP is relied on in relation to the failure to make reasonable adjustments. The PCP is predicated, as we have said, on the basis that there was no valid reason to extend secondment, which is contrary to the Claimant's case.

117. What we understand the Claimnt to be saying is that the Respondent had a policy not to extend secondments on purely compassionate grounds-

that this out her at a disadvantage because she could not be consulted and so and it would have been a reasonable adjustment to extend the secondment. However, she was able to be consulted, so the pleaded disadvantage is not shown.

118. The case might have been put on the basis that the policy put her at a disadvantage because the Claimant was absent and unable to seek alternative employment, but it was not put in that way. In any event there had been an extension of one month and we do not consider that an employer, even a highly profitable on, is required to continue a secondment for an indefinite period where there was no business reason to do so, even where the individual is disabled.

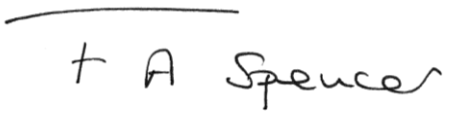
Remedy

119. As to remedy, the Tribunal will need to consider at the remedy hearing what loss flows from the successful parts of the Claimant's claim. In particular, absent the discrimination and the dismissal how long would the Claimant have remained in post at that salary? We are satisfied that there would have been, at least, an extension to her secondment, but we are unable to make a finding at this stage and without further evidence as to how long that extension would have been, or whether the permanent role could have been renegotiated on terms that the Claimant would have accepted, or whether the Claimant would have found another position. Would any extension have meant that the Claimant was no longer redundant in accordance with the Respondent's policy? Those matters will be the subject of further evidence at the remedy hearing.

120. The parties are encouraged to seek to settle appropriate compensation for the successful parts of the claim. However if they are unable to do so, the following directions are made to assist the parties in preparing for the remedy hearing

    a. If the dates are inconvenient to the parties the Tribunal should be notified within 7 days of receiving this Judgment copied to the other side and enclosing dates to avoid from May – July 2022.
    b. The parties shall cooperate to agree a list of issues relevant to remedy the primary responsibility for this document being with the Respondent. The Claimant shall also prepare an updated Schedule of loss. The list of issues, agreed if possible, and an updated schedule of loss shall be sent to the tribunal no later than 18th March 2022.
    c. If either party seeks to adduce additional documents, beyond those already in the documents before the tribunal, they shall provide a list and copies by way of mutual exchange to the other on or before 25th March 2022.
    d. The Respondent will prepare a short supplementary bundle and send it to the Claimant on or before 1st April 2022.

e. Witness statements relevant to the issues at the remedy hearing shall be exchanged no later than 11th April 2022.



Employment Judge Spencer
11th February 2022

JUDGMENT SENT TO THE PARTIES ON

14 February 2022

.....
FOR THE TRIBUNAL OFFICE

AGREED LIST OF ISSUES

Unfair dismissal

(i) Has the Respondent shown the principal reason for dismissal and that it was a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

(ii) The Respondent asserts that the reason was redundancy, or alternatively some other substantial reason due to the Respondent carrying out re-organisation.

Redundancy

(iii) Had the requirements of the Respondent's business for employees to carryout work of a particular kind or for employees to carry out work of a particular kind in the place where the employee was so employed by the Respondent ceased or diminished or were they expected to cease or diminish and if so, was the Claimant's dismissal wholly or mainly attributable to that state of affairs?

(iv) NOTE: The Claimant says that while the role that she had been working in previously being Head of Operational Readiness and Business Certification
had ceased to exist, she had been seconded to a different role from March 2019 to April 2020 which had not ceased to exist and there was a continuing need for someone to perform that role and it was immaterial that the Respondent classified the role as a secondment.

(v) Did the Respondent consult with the Claimant about the reasons for Redundancy? The Claimant says the Respondent did not consult properly with her.

(vi) Was a fair selection process applied?

(vii) Did the Respondent seek alternative work for the Claimant? The Claimant says the Respondent failed in its duty to assist her in her search for alternative employment and to offer her suitable alternative employment.

Some other Substantial Reason - Re-organisation

(viii) Was there a sound business reason for the re-organisation?

(ix) Was the procedure fair?

(x) Did something else occur which rendered the dismissal unfair? In particular

the Claimant says the Respondent had pledged its support for all employees because of the national Covid19 lockdown and stated its aim to protect people's positions and not to make redundancies but she was dismissed in April 2020 and not given the benefit of that protection.

(xi) Was the dismissal fair or unfair in accordance with ERA section 98(4), and,
in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

Jurisdiction

(xii) There is a jurisdictional point relating to the discrimination claims.

The Respondent submits that events occurring prior to 4 April 2020
are out of time.

The Claimant will argue that there was a continuing act.

EQA, section 15: discrimination arising from disability

(xiii) Did the following thing(s) arise in consequence of the Claimant's disability?

a. The Claimant took time off work for cancer treatment and then surgery;

b. The Claimant would need to take time off again in the future in the light of her diagnosis.

(xiv) Did the Respondent treat the Claimant unfavourably as follows?

a. It changed her reporting line from Mary Pragnell to Lucinda Lambourne on about 18 September 2019 which was a de facto demotion.

b. On 28 October 2019 which was the Claimant's first day back in the office after chemotherapy, the Claimant was humiliated in a meeting in front of colleagues when she was asked to leave a routine Monday morning meeting and told by Ms Pragnell that she wasn't needed.

c. In December 2019, when the Respondent failed to complete the Claimant's end of year performance review and told her that she had better things to concentrate on, which included her cancer, treatment and recovery.

d. When the Respondent did not complete the detailed personal

development plan which Ms Pragnell had intended to complete with the Claimant as referred to in the half-year performance review.

e. When the Respondent determined without prior consultation with the Claimant that the Claimant would have been given a bad number had she gone through a performance review with Ms Pragnell.

f. In early 2020 when the Claimant was advised by Anitha Baliga, not to apply for other roles within the business and to concentrate on getting better.

g. In February 2020, when Ms Pragnell dissuaded the Claimant from applying for other roles and described such steps as ridiculous, so creating an impression in the Claimant's mind that her continued employment weas not in jeopardy at the end of her technical secondment.

h. In February 2020, by wrongly grading the Claimant's performance as a "3" without a formal review and by electing not to increase the Claimant's salary, and by awarding a disproportionately low bonus in comparison to the Claimant's performance and prior year bonus payments.

i. by not inviting the Claimant for interviews for other roles when she was absent from work recovering from surgery in March 2020.

j. when Lucinda Lambourne informed the Claimant that she could not apply for the vacant role of Business Lead for Continuity of Financial Contracts in Resolution.

k. when the Respondent appointed a new member of staff to the Claimant's team in March 2020 without her prior knowledge or involvement.

l. by ignoring or refusing and/or not acting on the Claimant's requests to Alison Rose and others for specific intervention and help for adjustments to be made to the Respondent's practices to allow the Claimant to remain in employment beyond the Termination Date.

m. by failing to provide the Claimant with any proactive help or support with redeployment or to otherwise help ensure that the Claimant continued in her employment with the Respondent.

n. by dismissing her.

(xv) Did the Respondent treat the Claimant unfavourably in any of those ways?

(xvi) Was the treatment in each of the matters listed above done because the Claimant took time off work for cancer treatment and then surgery?

(xvii) If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

(xviii) The Respondent relies on the following as its legitimate aim(s):

a. efficient management of the Respondent's human resources having regard to the Claimant's particular circumstances

EQA, section 19: indirect disability discrimination

(xix) A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP(s):

(a) a policy to end a secondment if there was no valid reason to extend it.

(xx) Did the Respondent apply the PCP(s) to the Claimant at any relevant time?

(xxi) Did the Respondent apply (or would the Respondent have applied) the PCP(s) to non-disabled persons?

(xxii) Did the PCP put disabled persons, at one or more particular disadvantages when compared with persons with whom the Claimant does not share the characteristic, in that the Claimant was unwell and unable to consult over the valid reason so as to show that she had one?

(xxiii) Did the PCP put the Claimant at that/those disadvantage(s) at any relevant time?

(xxiv) If so, has the Respondent shown the PCP to be a proportionate means of achieving a legitimate aim? The Respondent relies on the following as its legitimate aim(s):

a. efficient management of the Respondent's human resources.

Reasonable adjustments: EQA, sections 20 & 21

(xxv) A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP(s):

a. a policy to end a secondment if there was no valid reason to extend it?

(xxvi) Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that: the Claimant was unwell and unable to consult over the valid reason for the extension?

(xxvii) If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

(xxviii) If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant; however, it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:

a. the Respondent could have relaxed its policies which prevented the extension of the Claimant's second secondment and allowed the Claimant to return to work and be confirmed in the role.

(xxix) If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?