



EMPLOYMENT TRIBUNALS

Claimant

Respondent

J Allard

v

**Central & NW London NHS
Foundation Trust**

Heard at: Cambridge

On: 24, 25 and 27 July 2017

Before: Employment Judge Brown, Ms A Carvell and Mrs L Gaywood

Appearances

For the Claimant: In person

For the Respondent: Mr Andrew Midgley, counsel

JUDGMENT

1. The respondent unlawfully discriminated against the claimant, contrary to ss.15 and 39(2)(c), Equality Act 2010, by dismissing her because of something arising in consequence of her disability in circumstances where dismissal was not a proportionate means of achieving a legitimate aim.

REASONS

Introduction

1. Miss Allard, the claimant, was employed by the respondent Trust from 18 October 2004 to 12 December 2014 as a non-emergency ambulance person. On 12 December 2014 she was dismissed, with pay in lieu of notice. Her only complaint before the Employment Tribunals, following a preliminary hearing on 5 July 2016, is that she was dismissed because of her reduced capacity for work and periods of absence, which arose in consequences of her disability, and that her dismissal was not justified because alternative employment was available at the time of her dismissal.
2. That is a complaint by reference to s.15 and s.39(2)(c), Equality Act 2010.
3. There was no dispute that the claimant was, in law, a disabled person at the time of her dismissal.

4. At the start of the hearing before us, Mr Midgley confirmed that the respondent accepted that the claimant had, by being dismissed, been treated unfavourably, and that her dismissal arose in consequence of her disability, because it was on the grounds of her capability.
5. The issue for our determination therefore, was the question of alternative employment at the time of the claimant's dismissal and whether, in light of the circumstances, the claimant's dismissal was a proportionate means of achieving a legitimate aim, or not. In these reasons, we will sometimes adopt, as shorthand for the question of proportionality the term 'justification.'
6. In deciding the claim, we had a single agreed bundle of documents.
7. We had witness statements for:
 - 7.1 Miss Allard;
 - 7.2 Mr Vincent Almond, Miss Allard's line manager during the latter part of her employment by the respondent;
 - 7.3 Dr Sheila Begley, formerly Joint Intermediate Care Services Manager, who had decided to dismiss Miss Allard;
 - 7.4 Mr Richard White, Strategic Human Resources Business Partner, who had advised Dr Begley; and
 - 7.5 Ms Lorna Payne, Divisional Director for Diggory Division, who dismissed the claimant's appeal against her dismissal.
8. We heard evidence from each of these witnesses; each was cross-examined.
9. Regrettably, Ms Payne was not available to give evidence until the morning of the last day of what was to be a four day hearing, and we concluded at the start of the hearing that it would not be fair to exclude her evidence because of her unavailability, which, we were told, was because of circumstances outside of her, or the Trust's control.

The evidence of the other witnesses had been completed by the afternoon of Tuesday 25 July 2017, and so we did not sit on Wednesday 26 July 2017. After hearing the evidence of Ms Payne, on the morning of Thursday 27 July 2017, we then heard closing submissions, which lasted until 2.18pm that day, with a shortened midday adjournment. We had hoped to be able to give the parties a decision on that day, and had sought to case manage the hearing to that end, but the loss of five hours sitting time on Wednesday, and the consequent use of most of Thursday to complete evidence and submissions, meant that this was not possible. We concluded that we could not deliberate, formulate our reasons and deliver them by a reasonable time

on Thursday afternoon. Therefore, at 3.30pm we reserved our decision, and adjourned the hearing.

Findings of fact

10. We reached the following findings of fact:
11. Miss Allard had begun her employment, in 2004, with the Milton Keynes Community Health Services division of Milton Keynes Primary Care Trust. Milton Keynes Community Health Services had been integrated into the respondent Trust in about April 2013. As a result, the Trust operated services in London and in Milton Keynes. We did not have any evidence about the number of people employed by the Trust, but it was not a small organisation and it had a dedicated human resources function with several HR staff.
12. Milton Keynes policies had continued to be applied to employees (including Miss Allard) who transferred to the employment of the respondent Trust as a result of that integration.
13. One such was a *Policy and Procedure on Sickness Absence Management* ('the Policy'), the application of which was extended until at least March 2015, after the integration of Milton Keynes Community Health Services and The Trust. Mr White was identified as the Policy's author and as the document owner. We find that he was aware of the Policy, and its terms. The Policy is extensive, it runs to 55 pages and its syntax is not always elegant.
14. The Policy said at section 5.8 that 'case conference meetings' could be arranged.
15. Section 5.11 made provision for alternative employment in cases of incapacity. It said:
 - 5.11.2 If alternative employment is recommended, this is stating the employee is no longer capable to remain in their contracted post and without such alternative employment, the employee may be dismissed. Such a recommendation to find alternative employment would be shown in a report from Occupational Health, where guidance as to the characteristics and capability requirements of alternative types of work is often explained. The employee in such a situation will required to be met with and this situation explained. A case conference is recommended to ensure complete understanding of details in a report.
 - 5.11.4 If alternative employment is being sought, a period of no less than 8 weeks is provided, which commences from when the employee was informed that alternative employment is recommended. During the 8 week period vacancy bulletins will be provided to the employee,

and support on completion of application forms and interview technique offered. The employee will be required to complete a current CV or generic application form to enable a full appreciation of the skills, knowledge and qualifications they hold. If the employee wishes this process to be waived, this requires the express written confirmation from the employee. At the end of the 8 week period the matter will be reviewed through a formal meeting. If it is considered no suitable alternative has become available, a decision as to the continued employment of the employee has to be stated.

- 5.11.5 Means to appoint to alternative employment through this process. If a post of the same band/grade of the employee looking for alternative work becomes available within the same directorate of the employee, the employee will be offered the post to be “slotted in.” Appointment will be without interview or advertisement provided all essential criteria in the person specification are met. A meeting may be arranged to fully explain the role and ensure skills are able to be transferred, and the employee is comfortable and in agreement with such a move.
- 5.11.6 If the alternative post is of the same grade, and the employee meets all essential criteria on a person specification for the post can be identified from the application form or CV [sic], yet outside of the employee’s Directorate an application form will need to be submitted, and a “ring fenced” interview process takes place, whereby the only applicant in the first instance is the employee(s) meeting essential recruitment criteria looking to be redeployed.
16. Section 8 of the Policy made provision for dismissal from employment for absence. It required, at section 8.1.3, five working days’ notice of a meeting where dismissal was contemplated.
17. Section 8.1.6 said that at such a meeting, an employee would be invited to present her understanding of the Trust’s attempts at absence management, the facts as the employee saw them, and addressed any areas of concern or comment about how and why things might have been done differently.
18. By section 8.1.8, the director chairing such a hearing would then be required to assess the facts presented and decide on an ‘appropriate outcome,’ which could be dismissal. In reaching this conclusion, the director must be satisfied that the responsibilities of the Trust had been discharged appropriately and in accordance with good practice, and having regard to section 5.5. of the policy.
19. The duties of an appeal panel, the constitution of which was set down at section 9.1.7, were essentially the same as those of a dismissing director: see section 9.1.11.
20. Miss Allard was employed as a non-emergency ambulance person at band 2. The main purpose of her job, as set out in a job description dated

February 2011, was to transport patients from their homes or other approved locations to NHS premises, clinics or nursing homes and vice versa, or as directed, using an allocated ambulance. The essential requirements for the post, as set out in the person specification, were a good general education, a clean driving licence, knowledge of Milton Keynes and the surrounding area, understanding of confidentiality in the workplace, the ability to show a high standard of driving, an ability for the post holder to work on her own initiative, an ability to manage time and priorities to enable the post holder and others to achieve plans in a timely and organised manner, an ability to communicate effectively with a wide range of people, clean smart appearance, and an ability to maintain quality in the post holder's own work and encourage others to do so.

21. Miss Allard had taken GCSEs in the summer of 1988. In the autumn of the same year, she had done three weeks work experience at a residential home for older people in Bletchley. The report on her work experience said that she was excellent in terms of timekeeping, learning ability, productivity, accuracy, relationships with other employees and with her supervisor. In 1987/1988, she undertook an RSA level 2 certificate in typing. She undertook a Youth Training Scheme placement with British Rail in 1989. Miss Allard also obtained qualifications in first aid and food hygiene, among others. Miss Allard took eight years away from paid work to raise a daughter. Between February 2000 and March 2004, Miss Allard had worked part-time, for 20 hours per week, as a general assistant at the League of Friends shop at Milton Keynes General Hospital.
22. Miss Allard's 2011 appraisal, the only one in evidence before us was positive. It said that she had a good attitude and understanding of patients' needs. Her paperwork was always up-to-date and neat.
23. Mr Almond assumed line management responsibility for Miss Allard from April 2014.
24. On 1 April 2014, Miss Allard began a period of absence from work because of sickness. She was initially certified by her doctor as unfit for work on 8 April 2014, because of a flare-up of lower back pain. This period of absence ended on 11 April 2014. At a return to work meeting on 14 April 2014, with Mr Almond, Miss Allard said that her back pain had started about five years before, following a car accident.
25. Miss Allard began a further period of absence on 19 May 2014, and was certified unfit for work again on 28 May 2014, and again on 6 June 2014. She was seen by a senior occupational health nurse adviser on 24 June 2014, who said that her lower back was vulnerable and that she was not fit to return to work, and was unlikely to be for a further three weeks. On review on 28 July 2014 the occupational health advice was that Miss Allard was not fit to work in any capacity.
26. A formal meeting took place on 12 August 2014 between Miss Allard and Mr Almond to discuss Miss Allard's sickness absence. A note taker attended

and made a note. Miss Allard explained her circumstances. Mr Almond said that he would arrange a case conference and see how Miss Allard could come back to work. Mr Almond followed up the meeting with a letter to Miss Allard dated 14 August 2014.

27. Dr Bashi produced a Statement of Fitness for Work for Miss Allard dated 22 August 2014. The doctor included in the statement the time period of four weeks from 11 August 2014, but did not indicate, by ticking the boxes on the form, if Miss Allard was not fit for work, or would be fit for work with adjustments. The relevant boxes were left blank.
28. A senior occupational health nurse wrote to Mr Almond on 11 September 2014, saying that a scan showed a problem in Miss Allard's lumbar spine; she had been referred for an injection. Hopefully the injection would work, but it was not guaranteed. If it did not, then there was the option of surgery. For the time being, Miss Allard was in pain and on painkillers. Her mobility was limited. She was not fit for her role at that stage and it was not possible to predict when she might be. It was possible that Miss Allard could undertake 'lighter' duties if they were available. They would need to be reasonably sedentary, with the opportunity to move around regularly.
29. On 17 September 2014, Mr Almond invited Miss Allard to a sickness management meeting on 30 September 2014.
30. On 18 September 2014, a further sick note was prepared by Miss Allard's doctor. Again, this sick note did not indicate if the doctor thought that Miss Allard was not fit for any work or that she would be fit for work with adjustments, because none of the relevant boxes are ticked on the Statement of Fitness for Work.
31. On 30 September 2014, Ms Moira Mathers, HR Manager, attended the meeting. Miss Allard attended, accompanied by a friend. It does not appear that any note was made of this meeting, as had been made on 12 August 2014. Mr Almond wrote to Miss Allard on 1 October 2014. That letter is in similar form to the letter he wrote on 14 August 2014, following the 12 August 2014 meeting.
32. In his letter, Mr Almond referred to the occupational health advice of 11 September 2014. He recorded that Miss Allard had said that she wanted to return to work, but did not feel that it was possible in her current post due to the physical demands of the role. Mr Almond said that he had asked Miss Allard if she had any transferrable skills, for example if she could type. Mr Almond said that Miss Allard had said that she could not type and was not at all computer literate.
33. We are not satisfied that the account set out here by Mr Almond accurately reflects what Miss Allard told him at the meeting. There is no note of the meeting. That is surprising, since this was an important, formal meeting, at which Miss Allard was encouraged by Mr Almond to be accompanied by a friend, colleague or trade union representative. A note had been taken at the

previous meeting of the same sort. In evidence before us, and in asking questions of Mr Almond, Miss Allard's account was that she had explained to Mr Almond about her past work experience, including time spent doing administrative work at the League of Friends shop, using a computer and typing. Her account, which we accept as more likely than not, was that she acknowledged to Mr Almond the benefit she would attain from training, and indicated her desire to be given training, but we cannot accept that it is likely that Miss Allard said that she could not type, that was not in fact the case, and there is no good reason for Miss Allard to have said it, where she had an RSA II qualification or that she was not at all computer literate. We find that it is probable that Miss Allard gave a fuller account of her abilities, rather than her lack of abilities to Mr Almond, although she was tentative about the extent of her abilities, which was a reasonable and modest approach, and she certainly did not seek to play them up. Miss Allard expressed a desire for training. We are also satisfied that, at the meeting on 30 September 2014, Miss Allard was representing to Mr Almond that she wished to do some work, and could do so if the right work could be found for her.

34. Mr Almond decided to re-refer Miss Allard to occupational health. In his letter of 1 October 2014, he set out what he described as 'the following stages,' the first of which was referral to occupational health and the second:

- 34.1 Referral to a Long Term Sickness management panel to be convened to consider the full circumstances of your sickness absence and whether we are able to support your return to work via a gradual return; adjustments to your role, redeployment. I also made you aware that dismissal could be a potential outcome if no other options are suitable.

35. On 14 October 2014, Dr A Edet reported to Mr Almond pursuant to his referral and an appointment with Miss Allard on 13 October 2014. Mr Almond had asked a series of questions, in response to which Dr Edet expressed the view that Miss Allard was not currently fit to return to work. It is unclear whether Dr Edet's opinion was that Miss Allard was unfit to return to work in her current role, or unfit to do any work, having regard to the earlier occupational health advice that Miss Allard might be fit for lighter duties and Miss Allard's own position that she would like to do something. We are not satisfied that Dr Edet was saying that Miss Allard was not fit to do any work at all, only that she was not fit to do her own job. We say this in particular having regard to how Dr Edet addressed the question of other work, which we consider below.
36. Mr Almond had asked if there was an expectation that Miss Allard's health would improve sufficiently to enable her to return to work in the foreseeable future. Dr Edet's opinion was that the expectation was that Miss Allard's health would improve sufficiently for her to return in the foreseeable future. It is unclear what either Mr Almond or the doctor meant by 'foreseeable future,' since this could mean different things to different people, and it would have been more helpful if concrete time periods had been requested and provided, which reflected the timescales that mattered to the Trust.

37. Mr Almond asked Dr Edet, if Miss Allard was unfit to continue in her present job, what other duties or alternative roles she would be fit to undertake so that suitable alternative employment could be looked at. Dr Edet responded: "I feel that there is good prospect of improvement in this case therefore; I do not feel that seeking an alternative role is required at present." We note that Dr Edet did not say here that Miss Allard would not be fit for other work. It would perhaps have been better for Mr Almond to ask Dr Edet about what work Miss Allard was then currently capable of doing, irrespective of her ability to return to her original role, since Dr Edet took up the invitation not to answer this question by relying on an opinion that Miss Allard would be fit to resume her original job.
38. A further Statement of Fitness for Work, dated 17 October 2014, like the two previous statements, did not indicate if Miss Allard was fit for no work, or only for work with adjustments for the four week period from 8 October 2014.
39. Miss Allard started to receive lists of internal vacancies by email. The first email which Miss Allard received with details of vacancies was on 30 October 2014. Mr Almond was unable to say how Miss Allard came to receive these emails, because he had not arranged for Miss Allard to receive them. It is not clear what had prompted Miss Allard to be sent them. As at 30 October 2014, Dr Edet's report was optimistic about a return to work for Miss Allard in the foreseeable future, and that was a positive answer to the question which Mr Almond had asked. There was no evidence that alternative employment was recommended, for the purposes of section 5.11.4 of the Policy and Procedure on Sickness Absence Management; to the contrary, no one had yet recommended alternative employment and Dr Edet had not even addressed it. There had been no case conference.
40. Miss Allard enquired by email about two of the roles which were advertised to her on 30 October 2014. We are satisfied that she did not hear back in response to her enquiries. No explanation for the failure to respond to her was offered to us. We are satisfied from Miss Allard's enquiries that she was looking for alternative work.
41. It took a considerable time for Miss Allard to be given the spinal injection that had been prescribed for her; Miss Allard was given an injection on 11 November 2014.
42. Miss Allard received a further email on 13 November 2014 with other job vacancies. Again she emailed requesting more information. Again, she received no response. She left a voicemail on the phone number provided, but received no response. No explanation was offered to us for these failures to respond to Miss Allard's enquiries.
43. On 1 December 2014, Miss Allard, on her own initiative, went into work to see Mr Almond, and to tell him about her concerns that she was not receiving responses to her enquiries. We accept Miss Allard's account that Mr Almond told her not to worry about it. We reject Mr Almond's evidence

that Miss Allard said that none of the vacant roles she had been sent were suitable. We consider it unlikely that Miss Allard said this to him when she had identified, and responded to, particular jobs which she considered were suitable, when she maintained before us that those jobs were suitable and explained how they were suitable. However, Miss Allard was raising with Mr Almond her concerns that no one was engaging with her enquiries.

44. Mr Almond took no steps, we are satisfied, to discuss with Miss Allard the jobs she had expressed an interest in, or to require Miss Allard to complete a current CV or generic application form, or to obtain express written confirmation from Miss Allard that she wished to waive this process, as section 5.11.4 of the Policy and Procedure on Sickness Absence Management required. Mr Almond was doing nothing at all proactive to help Miss Allard to obtain alternative employment. Since Mr Almond did not consider that Miss Allard had anything to worry about, and had occupational health advice that she would be able to return to her role in the rather vague time period he had identified, it may have been that he did not consider that more needed to be done to support Miss Allard at this time because he believed that she would be able to return to her job 'in the foreseeable future.'
45. However, also on 1 December 2014, Miss Allard told Mr Almond that the first injection which she had received had not resolved her back pain. In his witness statement, Mr Almond said that Miss Allard had had two injections, but he accepted in cross-examination that this was not correct, and Miss Allard had only had one injection. This had been relatively recently, and we are satisfied that Miss Allard did not suggest that there was anything surprising that the injection had not yet shown lasting benefit. Mr Almond did not have the medical ability to draw any inferences from Miss Allard's current state of health less than a month after the first injection.
46. After meeting Miss Allard on 1 December 2014, Mr Almond discussed Miss Allard's ongoing absence with his line manager, Mr Steve Caffrey. In evidence, Mr Almond said that he did not think that he had discussed Miss Allard's case at this time with human resources. He assumed that Mr Caffrey would take advice from human resources if appropriate, but Mr Almond did not know if Mr Caffrey had taken such advice. Since Mr Almond had been given responsibility for the management of Miss Allard's absence, it would be surprising for Mr Caffrey to have responsibility for taking HR advice, and it is noteworthy that Mr Almond neither checked that someone else had taken HR advice, nor took HR advice himself. Had he done so, he may have appreciated a number of significant matters although, equally, given later failings which we will address, these might not have been brought to his attention:
 - 46.1 Miss Allard had not yet received support in identifying her skills by way of producing a CV or generic application;
 - 46.2 Miss Allard had not yet been given at least 8 weeks to find alternative employment;

- 46.3 no recommendation to find alternative employment had been shown in a report from occupational health as section 5.11.2 of the Policy envisaged;
- 46.4 there was no referral to occupational health to seek an answer to the question which Dr Edet had not answered, namely what duties Miss Allard was now capable of doing;
- 46.5 a case conference, recommended by section 5.11.2 of the policy, had not taken place, despite the undertaking by Mr Almond on 12 August 2014 to arrange one.
47. On 4 December 2014, three days after Miss Allard had attended work to speak to Mr Almond about her concerns, Dr Begley wrote to Miss Allard, inviting her to a meeting on 11 December 2014. Dr Begley warned Miss Allard that the outcome of the meeting could be Miss Allard's dismissal.
48. The speed with which this meeting was arranged after 1 December 2014 is notable.
49. Miss Allard raised with the respondent's witnesses in cross-examination the fact that Mr Almond was due to leave the Trust's employment on 12 December 2014. Miss Allard raised too the fact that Ms Mathers was due to leave the Trust's employment at around the same time. Miss Allard suggested to Mr Almond in cross-examination that the speed with which the hearing had been arranged in December 2014 suggested a desire to achieve a resolution before the departure of Mr Almond and Miss Mathers. We do not consider that we need to resolve this question of fact in order to determine the issues in this claim, but, in light of Mr Almond's failure to act in accordance with basic and clear provisions of the Policy and Procedure on Sickness Absence Management, and the failure to refer back to occupational health, where there had been no occupational health advice about alternative roles for Miss Allard, and the failure to allow at least 8 weeks to find alternative employment, we consider that an inference might reasonably be drawn in the circumstances, and from the failure to provide an explanation for the haste to arrange a capability meeting, that the Trust was acting with undue haste to resolve the question of Miss Allard's absence before the imminent departure of Mr Almond and Miss Mathers. Mr Almond was not able to offer an alternative explanation for the sudden rush to action between 1 and 4 December 2014, where he himself had told Miss Allard not to worry on 1 December 2014.
50. A seven page Management Report was produced for the hearing before Dr Begley. It is unclear how much of its contents were authored by Mr Almond and how much by Ms Mathers. This report was materially inaccurate in several respects:
- 50.1 It asserted, at paragraph 1.6, that management had been looking for alternative roles that might be suitable redeployment since 30

September 2014. That was wrong: Miss Allard had been sent bulletins since 30 October 2014, and there was no evidence at all of any other steps being taken by managers or HR to help Miss Allard; Miss Allard's enquiries had been left unanswered, even after Miss Allard raised her concerns to Mr Almond.

- 50.2 There had been the material non-observance of the Policy and Procedure on Sickness Absence Management referred to above.
 - 50.3 There had been no recommendation by occupational health to seek alternative employment.
 - 50.4 The report asserted that Miss Allard had confirmed that she had 'limited transferrable skills' and was 'not particularly computer literate.' This was different to what Mr Almond had said in his 1 October 2014 letter, and it was a vague description of what Miss Allard could not do, with no explanation of what Miss Allard could do, a reason for this lack of information about what Miss Allard could do was because there had been no proper exploration of Miss Allard's skills and abilities as the Policy required.
 - 50.5 It represented, at paragraph 4.2, at the 1 December 2014 meeting as an informal meeting, when it had in fact been a conversation instigated by Miss Allard to raise her concerns about the lack of any response to the enquiries she had made about alternative employment. The report made no reference to the fact that Miss Allard had raised these concerns, and did not explain what, if anything had been done in response. That was probably because nothing had been done.
 - 50.6 On page 6, it misrepresented what Miss Allard had told Mr Almond on 1 December 2014 about suitable alternative employment.
51. At section 8, the report said that alternative work was 'being considered.' Mr Almond to us in evidence had no personal knowledge of what had been done. And in fact, the Trust had done no more than to send bulletins to Miss Allard for a shorter period of time than the 8 weeks referred to in their Policy, and had failed to respond to Miss Allard's enquiries about job vacancies. At section 8, the report referred to what it described as Miss Allard's 'limited IT skills and transferrable skills.'
 52. No note was kept of the formal meeting which took place on 11 December 2014. There were two HR people present, Ms Mathers and Mr White, and two managers, Mr Almond and Dr Begley. Dr Begley's evidence was that Mr White had made notes at the meeting, although Mr White said in evidence that he had not. We were surprised by this failure to make, and keep, a note: in the collective experience of this tribunal, especially that of the lay members, it is unusual not to keep a note of a formal meeting when an employee's job is on the line, especially where the employer is a reasonably large one, with a human resources function, and detailed policies and

procedures. Significantly, a note *had* been taken of the 12 August 2014 meeting, which was less important than the 11 December 2014 meeting. Such notes need not be a transcript. A note, made at the time, of the significant things that people have said—which therefore also shows what they have *not* said—is a helpful record, both to a person hearing an appeal against dismissal, and later to advisors, if there is a dispute about what has and has not been said, and, ultimately, for a tribunal where there are disputes of fact about what has happened at a meeting.

53. It is all the more regrettable that there is no note, since there is some dispute about what was said and not said at the meeting on 11 December 2014.
54. Mr White's evidence was that Miss Allard had said at the meeting on 11 December 2014 that she 'could not send emails.' We unhesitatingly reject that evidence. We do not think that Mr White could seriously have believed that this was true. Miss Allard had in fact sent emails, and we think that Mr White probably knew this. Mr White had no note of Miss Allard saying this when he signed his witness statement as truthful. He told us that it reflected the terms of the outcome letter, dated 17 December 2014, but the outcome letter refers to 'a lack of computer skills,' not an inability even to send emails. Mr White's evidence does not reflect what Mr Almond had recorded in his 1 October 2014 letter. Mr White's evidence in this respect, and in other respects which we consider below, damages his credibility. It is at best reckless and at worst actively misleading.
55. Dr Begley's evidence to the tribunal was that Miss Allard had told Dr Begley that she (Miss Allard) did not have any administration experience, or typing skills and that she was not computer literate. Again, no note from the time supported Dr Begley's evidence in this respect. When Dr Begley was asked about this in oral evidence, her account changed, and she said that Miss Allard had not disclosed at the meeting that she had any other skills. In other words, Dr Begley's evidence became that this was not something that Miss Allard had said, but it was something that she had not challenged. This change in Dr Begley's evidence was, in our view, significant and did not enhance the credibility of her evidence.
56. Mr White said that Miss Allard had admitted during the 11 December 2014 hearing that she would not have wanted to secure any of the available roles at Milton Keynes. We reject that evidence, because it is directly contrary to Miss Allard's, namely, that she wished to be enabled to work in an alternative role, and to the enquiries that she had made about alternative roles, and we prefer Miss Allard's evidence as the more credible.
57. We were unimpressed by the evidence of Mr White and Dr Begley in this regard: they had, in our judgment, not taken enough care in their evidence about a central issue of fact, which was unsupported by a contemporaneous note.

58. Miss Allard did not put to the Trust's witnesses that she had, at the meeting on 11 December 2014, challenged the previous descriptions of her skills, as set out in Mr Almond's 1 October 2014 letter and the management report. It follows that we conclude as a fact that Miss Allard did not challenge these representations. Therefore, we find that Dr Begley proceeded from the written representations before her that Miss Allard 'could not type,' and was 'not at all computer literate,' (1 October 2014) and that Miss Allard had 'limited transferrable skills' and was 'not particularly computer literate' (Management Report).
59. The first, obvious, point is that these two written descriptions of Miss Allard's degree of computer literacy are inconsistent ('not at all,' 'not particularly'). Dr Begley, we find, took no steps to enquire about this inconsistency between the two documents, both authored by Mr Almond. Secondly, the focus of these brief statements was entirely on what Miss Allard could *not* do, or her limitations, and not on what she could do. Dr Begley took no steps, we find, to enquire about this either.
60. We accept as probable Dr Begley's evidence that Miss Allard said at the meeting on 11 December 2014 that she would be happy to consider a clerical role. We accept Miss Allard's evidence that her position at the 11 December 2014 meeting was that she wished to remain in the Trust's employment, she wished to be redeployed, and she felt that she could be redeployed, although she considered that she would need some training. This reflected what Miss Allard told us, which we accept as credible, and what she put squarely to the Trust's witnesses, and it reflects the grounds of her appeal against her subsequent dismissal.
61. This is significant also because it shows, and we find as a fact, that Miss Allard was not, at this time, suggesting that she was not capable of any work at all. It is a nice question whether Miss Allard must prove that she was capable of work, or whether the Trust must prove that she was not, but, wherever the burden of proof lies, we have been satisfied that Miss Allard was not so disabled that she was capable of no work: she herself was saying that she could work; occupational health advice had suggested the possibility of lighter duties, and Miss Allard's GP had not represented that she was capable of no work whatsoever. We have taken into account Miss Allard's evidence about her disability, which suggests that she was substantially disabled, and certainly not able to fulfill her substantive role, with the manual handling which it involved, but we are satisfied that Miss Allard was capable of lighter work.
62. In fairness to Miss Allard, until a proper assessment of her skills had taken place, and she had a proper idea of what other jobs would involve, it was difficult for her to know what training she might require in an alternative role, and Miss Allard's attempts to engage with a process of redeployment by making enquiries and meeting with her manager had met with no action or real response.

63. Both Mr White and Dr Begley said in their witness statements that redeployment was a two-way process, the clear implication being that the Trust had done what it could, and Miss Allard had not, and Mr White's express contention, at paragraph 11 of his witness statement, being that Miss Allard had failed to apply for or make enquiries about suitable roles. That evidence is wrong and, again, we find it difficult to see how this was not apparent to Mr White when he wrote his statement: Miss Allard had made enquiries by email, and had gone into work to see Mr Almond, but he had not supported her, and her email enquiries had gone unanswered. It is bold of Dr Begley and Mr White, in those circumstances to blame Miss Allard when she had been proactive and the Trust had not. This misrepresentation also further damages Mr White's credibility.
64. Two vacancies have been identified which were available during the period, between 30 October 2014 and 11 December 2014, and which Miss Allard believes she could have done. The Trust accepts that these posts were vacant, but denies that Miss Allard could have done them.
65. We had copies of the job descriptions for these two roles, and evidence from Mr White. We felt unable to place any substantial weight on the evidence of Mr White about the roles for several reasons.
66. Firstly, we were concerned about the general credibility of Mr White's evidence, in light of its failings, as set out above. Mr White's evidence appeared in these respects to ignore the obvious truth in favour of an account which suited the Trust's case.
67. Secondly, Mr White's evidence about the two roles was itself undermined: Mr White's evidence was that he had spoken to the managers responsible for recruiting to the two vacancies, but he did not know whether this was before or after the capability hearing. If it was after the 11 December 2014 hearing, at which Miss Allard had been dismissed, there was at least a prospect of Mr White seeking to justify the decision that had already been taken, with his advice, rather than approaching the matter purely as a fact-finding exercise. If it had been done before Dr Begley's hearing, one could expect the results to have been shared with Miss Allard; they were not. Mr White's evidence was that the question that he had asked the recruiting managers was: 'Would you recruit someone with limited IT capability and office experience?' We hope that Mr White will reflect on the propriety and utility of putting a question in that way, whatever stage his enquiry (such as it was) took place. His approach is consistent with, and illustrative of, the deficient way in which the Trust approached the question of redeployment, and does him little credit.
68. Thirdly, Mr White had kept no note of what had been said in response by these managers, and so he was basing his evidence, at best, on his recollection of conversations well over two years before.
69. Fourthly, Mr White's understanding of the roles was superficial: he was not able to explain precisely what the post holders did.

70. Fifthly, Mr White's account was neither consistent with the terms of the job descriptions, nor was the apparent inconsistency between his evidence and the job descriptions produced by the Trust explained.
71. For example, in respect of the Administration Support for Safeguarding Children Team, Mr White's evidence was that a principal duty of the role was 'holding responsibility for vaccinations,' but he was unable to explain what this meant, in terms of the day-to-day functions of the role, nor is it identified as a principal duty in the job description (which is for a safeguarding role). Further, Mr White's evidence was that a very high level of IT skills was required, but the person specification said that experience of working with databases including Excel to input and present data and information was desirable, not essential. Use of the Trust's RiO IT system was also desirable, not essential.
72. In respect of the Administrative/Clerical Assistant to the District Nurses post, Mr White's evidence was that advanced IT skills were essential. The job description and person specification do not say that.
73. The cumulative damage to Mr White's general credibility was serious enough that we felt unable to disregard the Trust's own formal documents in favour of Mr White's say-so, unsupported by evidence from others, or even by a note from the time of what they had said in response to his loaded and imprecise question.
74. Miss Allard set out reasons for her belief that she would have been able to do these two jobs at pages 472—473 of the hearing bundle. We considered that Miss Allard's evidence was credible: it gave examples, and was not, in our judgment, an exaggeration of her abilities.
75. The first post was Administrative/Clerical Assistant to the District Nurses, at Band 2. It was 80% of a full-time post. This post was brought to Miss Allard's attention, and was a post that she enquired about, without receiving a reply.
76. The essential criteria in the person specification were a Royal Society of Arts Level III typing qualification, experience of office management and dealing with the public and knowledge of Microsoft office applications.
77. Miss Allard did not satisfy us that she met the essential requirements for this post. We were satisfied from our consideration of the job description and person specification that the need for advanced typing skills, beyond the old RSA II qualification which Miss Allard had, and office management put this job beyond Miss Allard's abilities, as they were proved before us. We were satisfied that Miss Allard had computer skills, and administration skills from her time working at the League of Friends shop, that she had dealt with members of the public effectively, that she had prioritised her own work effectively—there had been no concerns about her abilities in her substantive role—but we considered that she did not come close enough to demonstrating that she met the essential criteria for the Trust to have been

required to redeploy Miss Allard to work as Assistant to the District Nurses. We took into account that Miss Allard would have been expected to work independently and probably without much supervision.

78. We take a different view, however, in respect of the Administration Support role within the Safeguarding Children Team. This vacancy does not appear to have been brought to Miss Allard's attention at the time leading up to her dismissal. Several of the essential criteria were common to Miss Allard's ambulance person role and the administration support role. Miss Allard had previous experience working in an office, as part of her YTS training, and in a shop doing administrative work. She was, we find, capable of demonstrating proactivity in ensuring accuracy at speed when using a keyboard, she had an RSA II qualification, and no formal typing qualification was required of this post. She had previous NHS experience, and previous experience of the RiO system, both of which were desirable. Her ambulance role required her to priorities her work and there had been no concerns about her ability to do so. We are satisfied from the evidence before us that Miss Allard had sufficient manual and physical dexterity to meet the requirements of this part-time, office-based role, provided that she was able to work standing up from time-to-time (and we have not been satisfied that she could not have worked while standing up). We are satisfied that Miss Allard was enthusiastic, a team player, had good attention to detail, was an effective communicator with a flexible and patient approach, she had demonstrated these skills effectively in her work as an ambulance person and in her shop-based role. We are satisfied that Miss Allard was able to maintain quality in her work.

The Trust did not put in issue Miss Allard's academic qualifications; its witness evidence focused on Miss Allard's computer skills, and we have noted above that the administration support role did not require advanced computer skills. It may be the case on the evidence before us that Miss Allard did not have GCSE O-level standard in maths and English, although the decision makers did not make their decisions on this basis. If Miss Allard did not meet these qualification requirements—and we shall assume that the burden was on her to prove that she did, and that she failed to discharge that burden of proof, we consider that Mr White's lack of focus on the need for such qualifications is significant so far as justification is concerned.

79. Training was a significant issue between the parties: Miss Allard said that she would need training, and the Trust's position was that training in general computer skills was not available. Mr White's evidence was that several of the computer systems that the Trust used at the time were esoteric. We have noted that experience of the Trust's RiO system was desirable, not an essential requirement for the administration support post. This was a relatively junior administrative post; an idea of its position within the organisational structure can be seen from the fact that the post-holder reported into the PA to the Safeguarding Children Team and that one of eleven principal duties was to make 'the appropriate person' aware of low levels of office supplies in good time to allow for ordering. Other duties included distributing post, filing, covering reception and specific PA tasks

during annual leave and sickness, and processing information. This was not a senior role.

80. Anyone who lacked previous NHS and RiO experience would require some on-the-job training. We do not consider from the description of the principal duties for the administration support role that any specialist IT training was required. We reject Mr White's evidence that the tasks associated with the post 'required a very high level of IT skills.' Mr White said that the Trust's computer systems were not intuitive, but, if this was so, anyone unfamiliar with them would require exposure and some training on them in order to be able to use them. We are satisfied therefore that Miss Allard would have needed no more training than other candidates who met the essential criteria.
81. We accept that NHS trusts have seen significant budgetary pressures and reduction in staffing levels, so that a long period of on-the-job training during which the post holder would not be productive might be unsustainable, but we were satisfied that Miss Allard could carry out the functions of this junior administrative post without specialist, or external training, and without a long period of on-the-job training during which she would be unproductive. The role was 43% of a full-time role, so this would mean Miss Allard returning to a role with shorter working hours.
82. There was no detailed consideration of the suitability of either of these two roles for Miss Allard at the 11 December 2014 meeting or before the decision to dismiss Miss Allard; Miss Allard was not considered for them. There is no evidence that offers of employment had been made for either post by 11 December 2014. By the end of this meeting, Miss Allard's skills and abilities remained opaque to Dr Begley and Miss Allard had had a shorter period than the eight-week minimum period for redeployment. She was not referred to occupational health. Dr Begley decided that Miss Allard should be dismissed. Mr White drafted a letter to that effect. Dr Begley signed the final draft, dated 17 December 2014. We had no evidence of what, if any, changes Dr Begley made to the draft, and the copy we had was unsigned.
83. The second page of the letter confirming dismissal addressed alternative employment. It suggested, wrongly, that the process of seeking alternative work had begun on 17 October 2014; the identification of that date is inexplicable from the other evidence before us. The letter identified the barriers to redeployment as: posts being in management, Miss Allard's lack of computer skills, and the physical requirements of care roles. None of these were barriers to the Band 2 Administration Support role.
84. On the last page of the letter, Dr Begley said that she was satisfied that attempts to amend Miss Allard's role were sufficient and reasonable, 'and the matter of the time to seek alternative work was considered especially the element of time.' It was not clear to us what was meant by this. Dr Begley proceeded to address Miss Allard's limited transferrable skills, and said that given a requirement to undergo surgery, if Miss Allard had secured

alternative work, this would be significantly disrupted due to a further lengthy period of absence for surgery.

85. The basis for this assertion about the effects of possible future surgery is unclear: There was no occupational health or other medical advice before Dr Begley about the prospects of surgery, or the amount of time which Miss Allard would have needed away from work, if she was working in an administrative role. Nor was there any evidence about these matters before us. However, there was no dispute that Miss Allard had not had surgery on her back by the time of the hearing before us, well over two years after her dismissal.
86. Miss Allard was dismissed summarily, with pay in lieu of notice, and given a right to appeal. She indicated her intention to appeal on 29 December 2014 and her union representative submitted grounds of appeal on 12 January 2015. Those grounds of appeal took issue with the accuracy of the 17 December 2014 letter, contended that the Trust should have made reasonable adjustments and said that there were many tasks that Miss Allard could do, for example office-based administrative roles, that Miss Allard had first received a vacancy bulletin on 30 October 2014 and that alternative roles should have been considered earlier. The grounds of appeal asked: were there temporary vacancies in admin that Miss Allard could do that were being done by bank or agency staff?
87. Miss Allard received a reply to her appeal on 26 February 2015, some two months later, inviting her to an appeal hearing on 25 March 2015, a further month later. These were extraordinarily long time periods, and were not properly explained in evidence before us; Ms Payne's evidence was vague and did not explain the reason for such long timescales. Miss Allard sought a postponement of the hearing, and it was re-arranged. We had no evidence about precisely when the postponement was sought, but on 30 March 2015, the hearing was postponed to 5 May 2015. Given the very long time it had taken to acknowledge Miss Allard's appeal, the 30 March 2015 letter may also have been delayed, but Miss Allard's request for a postponement plainly means that some of the reason for the delay was because of her. Nonetheless, it was the Trust who postponed the hearing to 5 May 2015 and that was a long further postponement, on top of the long initial delay.
88. Dr Begley and Mr White produced a management case for the appeal hearing, dated March 2015. That report included express reference to the two roles considered earlier in these reasons.
89. No notes were made of the appeal hearing. Ms Payne, who heard the appeal, conducted a review of Dr Begley's original decision, asking whether the process had been fair and whether Dr Begley's decision had been reasonable and appropriate. Ms Payne concluded that the process had been fair, and the decision reasonable and appropriate. Ms Payne did not ask herself afresh what might be done to enable Miss Allard to remain in employment, did not investigate what vacancies there were in May 2015, or carry out any assessment of Miss Allard's skills, or have medical evidence of Miss Allard's condition and prognosis. Ms Payne failed to identify the failures

to comply with the Trust's policy which we have observed and set out earlier in these reasons. Ms Payne had no note of the 11 December 2014 hearing. This does not seem to have caused Ms Payne any concern.

Applicable law

90. The sole question for us under s. 15, Equality Act 2010 was whether Miss Allard's dismissal was a proportionate means of achieving a legitimate aim. Mr Midgley submitted that the test was an objective one. He expressly contended in his written submissions that we must make our own assessment on the basis of the evidence before us, and that both employer and employee might rely on arguments and evidence that were not considered at the time of the decisions.
91. However, Mr Midgley, relying on O'Brien v Bolton St Catherine's Academy [2017] ICR 737, submitted that, where decisions had been reached at a capability hearing and on appeal, it was first necessary to assess as a question of fact whether the justification advanced by the employer relied materially on matters raised in the appeal. If the appeal was a review, and the justification argument did not depend materially on evidence adduced on appeal, then the appropriate temporal reference point for the assessment of justification was the capability hearing.
92. We are not sure that Mr Midgley's suggested approach to the question of justification is correct, in light of O'Brien, but in light of our conclusions, below, we have decided that we do not need to resolve whether his suggested approach is correct or not.
93. We remind ourselves of the Equality and Human Rights Commission's Code of Practice on Employment, which we are bound to take into account, and which says at paragraph 5.21, that if an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for the employer to show that the treatment was objectively justified. We do not consider that this is the statement of a rule (and we do not treat it as such), but merely an observation as to a common consequence of a failure to comply with a duty to make reasonable adjustments, in contrast with the previous position under the Disability Discrimination Act 1995, by s. 5(5) of which, if an employer was under a duty to make reasonable adjustments in relation to a disabled person but failed without justification to comply with that duty, his treatment of that person could not be justified unless it would have been justified even if he had complied with the duty.

Conclusions

94. There is no dispute that Miss Allard's dismissal was unfavourable treatment arising in consequence of her disability.
95. The Trust did not suggest in its closing submissions that it could not reasonably have been expected to know that Miss Allard had the disability which it now accepts she has. In our judgment, the Trust was right not to

argue that it could not reasonably have been expected to know this: it knew that Miss Allard had a back injury which had already lasted for several months and which, Miss Allard had told them, was an underlying vulnerability several years old. The Trust was relying, in deciding to dismiss, on a pessimistic prognosis which suggested that Miss Allard would continue to be significantly disabled for a further long period of time. In those circumstances it could reasonably be expected to know that she was disabled.

96. At the time of her dismissal, and at the time when Miss Allard's appeal against dismissal was rejected, she was not capable of performing her role as an ambulance person. The Trust was justified in seeking to address that situation, and justified in seeking to arrange for Miss Allard's role to be vacated, so that they could engage someone who would be able to carry out the role.
97. There were no adjustments that could have been made to that role to enable Miss Allard to resume her duties. It would not have been reasonable to expect the Trust to continue to wait further before filling that Miss Allard's post, during what was an uncertain period.
98. In our judgment, the Trust should have obtained a further occupational health opinion or other medical opinion at this time, and the failure to do so undermined the robustness of the decision which the Trust took, but we do not consider that this failure to obtain such an opinion undermines the Trust's ability to justify the decision that Miss Allard could not remain in her post, because the evidence before us, considered objectively, supports the position that the Trust took at the time that Miss Allard could not return to that role within a satisfactory timescale.
99. The possible, realistic, options therefore were to redeploy Miss Allard or to dismiss her.
100. In our judgment, obtaining occupational health advice was also relevant to redeployment: under the Trust's Policy, a recommendation for redeployment was the trigger for redeployment, and it would enable decisions to be made about what work was within or outside Miss Allard's capabilities. The Trust's failure to obtain occupational health advice therefore affects this aspect of the case. If obtaining occupational health advice would have supported the position which the Trust now argues before us, its absence could not itself make the Trust's conduct unlawful, because we must consider the matter objectively and we are not concerned with procedural failings which would have made no difference to the substance of the matter. However, the Trust seeks to argue that Miss Allard was capable of no work at all in December 2014, and we have concluded on the evidence before us, including occupational health advice from earlier in the autumn of 2014, that Miss Allard was then capable of lighter office-based administrative work.
101. Redeployment and recruitment are not the same process. We acknowledge that employers who are seeking to redeploy may encounter resistance from recruiting managers who would prefer to have their own choice of the widest

pool of candidates, rather than feeling that a particular re-deployee is being imposed on them (although there was no evidence to that effect before us in this case). However, redeployment is an important way to mitigate the effects of changes which affect employees' jobs, including changes in employees' abilities. It involves compromise from employers in identifying someone who can do a vacant job.

102. Miss Allard may not have been the absolutely perfect candidate for the Band 2 Administration Support role in the Safeguarding Children Team, but we have been satisfied that she could have done this job effectively. The Trust has not satisfied us that it could insist on rejecting Miss Allard for it because she did not have GCSE O-level standard qualification in maths and English. We are satisfied that Miss Allard met each and every other one of the essential criteria, as well as having desirable previous NHS experience. She should have been offered that role. We are satisfied that, if she had been offered it, she would have accepted it instead of being dismissed. We are satisfied that Miss Allard would have been able to perform the role satisfactorily, and would have developed into it.
103. It follows that Dr Begley's decision to dismiss Miss Allard was not a proportionate means of achieving the legitimate aim of securing effective deployment of non-emergency ambulance staff, because Miss Allard could have been removed from her ambulance person role without being dismissed by the Trust, had Miss Allard been redeployed instead, as she could and should have been.
104. The Trust has not helped itself in the way that it managed Miss Allard's absence. This would not have affected the lawfulness of its decision under the Equality Act 2010 if it was otherwise objectively justified, and we do not find Miss Allard's dismissal unlawful because of these failures, but the failures by the Trust to follow its own Policy left the Trust ignorant at the time of matters which it could have found out about and it makes it difficult for the Trust to argue that it could not reasonably have done more than it did to secure Miss Allard's redeployment where it could have done what it had undertaken by its Policy to do. We need not repeat our earlier criticisms here and they are not criticisms on which we need to rely in reaching our conclusions, but, had the Trust followed its policy, it might have avoided acting unlawfully, as we have found it has.
105. There will, therefore, need to be a hearing to decide what remedy Miss Allard should be awarded, in light of our conclusion that her dismissal was unlawfully discriminatory, and that, had the Trust acted lawfully, it would have redeployed her to the Band 2 Administration Support role in the Safeguarding Children Team.
106. That hearing has been listed, with the agreement of the parties for 9 October 2017 in Cambridge.

Case management

107. Our conclusions address the situation until 11 December 2014, and the role which Miss Allard should have assumed from that date, but either party may seek to advance arguments, relevant to compensation, about what would have happened in the longer term thereafter. The parties should seek to agree whether any other documents need to be disclosed to one another and provided at the hearing, and whether any further witness evidence is required. Either party may apply to the Employment Tribunals for case management directions, and a telephone preliminary hearing may be arranged if that is necessary, in which case, the parties should identify what matters need to be addressed, and why those matters have not been agreed between the parties, with draft proposed directions from each party.
108. In preparing for the remedy hearing on 9 October 2017, Miss Allard should produce, and provide to the Trust and the Employment Tribunal, a revised Schedule of Loss which reflects our conclusions, no later than 4pm on 25 September 2017.
109. The Trust shall produce a counter-schedule of loss and provide it to Miss Allard and the Employment Tribunal by 4pm on 2 October 2017.

Employment Judge Brown

Date:22 September 2017.....

Sent to the parties on:

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For the Tribunal Office