Case Numbers: 3200247/2017 &
3200601/2017

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EMPLOYMENT TRIBUNALS

Claimant: **Ms A Kouchalieva**

Respondent: **London Borough of Tower Hamlets**

Heard at: **East London Hearing Centre** **On: 26-29 September 2017 (Friday 29 September Tribunal only)**

Before: **Employment Judge Prichard**

Members: **Mrs G A Everett**
Ms M Long

Representation

Claimant: In person (and Miss D Peponi, claimant's daughter)

Respondent: Ms I Omambala (counsel, instructed by Ms C Bowes solicitor, Tower Hamlets Legal Services)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The claimant was fairly dismissed and her complaint of unfair dismissal fails and is dismissed.

(2) The claimant's claims of disability discrimination all fail and are dismissed.

REASONS

1 The claimant, Ms Antoaneta Kouchalieva, is now aged 55. She is Bulgarian by birth. She came to the UK in 2000 and initially worked tutoring autistic children for an organisation set up by her sister who lives here, in South London,. She then found the

job which she currently holds as a passenger assistant on Tower Hamlets Transport Services. The runs in question were taking local children to their schools. All the pupils who use this service have been statemented as having special educational needs.

2 The claimant then worked as an agency worker with Tower Hamlets sometimes transporting disabled and vulnerable individuals to the day centres around the Borough.

3 These buses are kept busy for most of the day. They start with the school runs and when they are done the buses then go back to the depot and change to different crews who transport disabled and other vulnerable individuals to day centres. The passenger assistants always work in pairs on the school runs. Some of the buses are quite lightly loaded, with as few as 5 or 6 children. We heard about other buses that take 15 or more. It can vary from day to day.

4 The respondent is well known. It is a large local council employing 9,000 individuals including teachers.

5 The claimant worked for the respondent as an employee from 28 August 2007 until she was dismissed with effect from 21 April 2017, by reason of capability, specifically her poor attendance. At the time she was dismissed she had been on certified sick leave for nearly 8 months from the beginning of the school year in autumn 2016. She was dismissed under the council's sickness absence management procedure. Many workplaces, private and public, have very similar policies and processes. Absence review meetings are triggered by certain levels of absence; there are numerical triggers, it can depend on whether absences are short and intermittent or long-term.

6 The claimant had had a total of 270 days off sick from June 2014 to February 2017 according to the report prepared for the final "consideration for dismissal" meeting / hearing. That hearing followed at the conclusion of a series of absence review meetings under the policy.

7 Unsurprisingly the work of a passenger attendant on these school runs is quite physically demanding.

8 We heard of various schools that the children are taken to. The Phoenix School is an extremely large school incorporating a 6th form, It takes children from 4 to 19. They are pricipally focused on children with autistic spectrum disorders. Cherry Trees School specialises in children with the most challenging behaviours many of whom have ADHD. Stephen Hawking and Beatrice Tate Schools respectively primary and secondary schools specialising in children with physical disabilities the majority of who are wheelchair users. Culloden School, which the claimant was finally assigned to, specialises in children with auditory disabilities under a separate SEN sub-department.

9 We saw the breakdown of the runs. Most of the runs serve the Phoenix School. That is where the claimant had spent most of her time. Earlier she had spent 2 years in Cherry Trees School specialising in children with challenging behaviour, many of whom have ADHD. In those 2 years she was happy in her work and there were no

problems in carrying out her role but at that time she had not received any of the diagnoses which later led to the severe disabilities she now has, which form the basis of her disability discrimination complaint. After Cherry Trees run, the claimant worked for a spell on the Stephen Hawking run.

10 For the purpose of these proceedings the respondent has agreed with the claimant that the ADHD children who go to Cherry Trees School may, as the claimant maintained, often do their own seat belts up. However, that is no guarantee that they will not later undo them and wander around the bus. The claimant clearly had a good way with this group of children and enjoyed this work when she started.

11 The claimant lives in Soho. Her tube station is Tottenham Court Road she would take the Central Line to Mile End and then 1 stop on the District Line to Bow Road to join the bus in the morning. The problem with this work is that it is split into 2 separate shifts. There is the 8.30 start in the morning and then the 3pm start for taking the children home. Each run lasts 1½ - 2 hrs. In between time she would often go back home on the tube. She had a monthly travel card to make this at all economic. At the time she left her salary was based on an hourly rate of pay of £9.80. (The claimant was also in the local government pension scheme). Her gross pay equated to roughly £18,000 per annum FTE. But these passenger assistants only worked 15 hours a week i.e less than 50%. That was 3 hours per day split into 2 1½ hour sessions. If, for any reason, the round finished a lot later then the claimant would claim the extra time.

12 Later, as we heard, the claimant moved to one of the routes which service the Phoenix School. PHO1 is the Cherry Trees bus, TH35, 33 and 36 were all Phoenix School runs. Latterly, as we will describe, the claimant was moved in September 2016 to work on Culloden School, as the respondent tried to make reasonable adjustments. For the Culloden run she had to report to the Blackwall depot which is adjacent to this tribunal building and Tower Hamlets Town Hall at the Blackwall Transport Complex. She stated that in order to come here her tube journey would be 45 minutes long instead of the 20 minutes when she went to Toby Lane depot in Bow Road. She would have to make this tube journey 4 times per day. She complained about it.

13 It is not clear, as a matter of cause and effect, why it was that, having reported for work once on the first day of autumn term 2016, she never returned to work again and was dismissed over 6 months later. We have seen a sick certificate dated 12 September 2016 certifying her as conditionally fit for work but "to avoid repetitive manual handling".

14 Manual handling is very much part of this job. We were referred several times to the job description. Excerpts are:

> "2.5 To assist passengers to and from their homes and to the vehicle and from the vehicle to their destination as required.
>
> …
>
> 2.9 To ensure that customers in wheelchairs and special seats are adequately secured within the vehicle.
>
> 2.10 To ensure all the safety belts are worn and properly adjusted and fitted.

…

2.13 To assist passengers if necessary to board and disembark the vehicle safely and assist with any light luggage or possessions."

15 For recruitment purposes the person specification for this job states:

"Circumstances particular to the job
To be physically fit and able to bend, push and pull"

And, incidentally,

"Personal qualities

Satisfactory attendance (normally less than 5 days absence in a year) but taking into account individual circumstances"

16 The management structure for a passenger assistant is the immediate line manager is called the Route Manager or supervisor. The claimant had a succession of these. The route manager then reports to the Passenger Operations Manager and/or the Transport Operations Manager who are at the same level.

17 The reason for the claimant leaving the Cherry Trees School run is a matter of dispute between the parties. The claimant's clear recollection is that she was paired with another passenger assistant called Wendy and they did not get on. Wendy was an older woman nearer to retirement. The claimant simply said that Wendy really wanted to work the run with somebody else her own age and that the respondent unfairly chose to remove her, rather than Wendy.

18 This followed a period of sickness absence in 2008 after the claimant had broken her foot following an incident, unrelated to work, (or disability), where she had been pushed over in Liverpool Station by a crowd of men, according to the claimant's medical records (not 2009 as she told the tribunal).

19 She commenced a period of sickness absence on 13 November 2008 and only returned to work on 23 February 2009. She had a fracture of the fifth metatarsal on the right foot.

20 The first sign of the problems the claimant now complains of, one can see from the claimant's medical records, was on a GP's reference presumably intended to give to her employer dated 30 September 2009. It states:

"This patient of ours who came to see me in the surgery this morning has been having some pain and swelling in the digits of both hands for the last 3 months. She works as a passenger assistance for Tower Hamlets Childrens Services and the task requires her to manipulate wheelchairs and clamp them into place which exacerbates the pain and swelling in the fingers. Would it be possible to move her to a role within the service that reduces the need to do those actions, under the circumstances?"

Looking back, that must have referred to a time when the claimant was working on the run for Stephen Hawking School the primary school for physically disabled children.

21 By December 2009, the claimant had been referred to a rheumatology specialist at UCLH where the specialist reported that she experience pain in both hands right and then left and more recently complained of painful feet, particularly in the morning. The specialist's conclusion is:

> "I suspect this lady may have sciatic arthropathy or perhaps arthralgia secondary to her hypermobility and exacerbated by the recent change in her working pattern. It is important to exclude osteoporosis given her fracture history and even at that stage there was concern over her vitamin D levels which remain a concern throughout the records."

22 In these proceedings the respondent agrees that the claimant has a relevant disability. The disabilities that they agree did amount to disabilities, and the ones which had most impact on her ability to carry out day-to-day activities and her job, (particularly repetitive belting up of children), are the claimant's hyper mobility and osteophytes in her hand joints. It is these which affect the manual handling.

23 The claimant has osteoarthritis in both knees, but this has not been a relevant or agreed disability in this tribunal hearing.

24 The claimant also developed spondylosis i.e. a neck condition. While that became relevant to one particular issue around stooping near the back of the bus it was by no means a central issue. It was the manual handling which proved to be the insurmountable problem in the end.

25 A list of issues was drawn up between the parties, as often. However, the way this hearing has played out, and in the written witness statements, some of those issues have not been touched upon. We have to assume those issues have not been pursued, and therefore have disappeared.

26 Overall the picture we have from the claimant's testimony is that she had an extremely bad relationship with her Route Manager / supervisor Madge Martin. She states that Ms Martin knew that she was disabled and deliberately assigned her to the most onerous duties in order to exacerbate her pain. She maintains that Ms Martin was responsible for making her as disabled as she now is.

27 Since leaving work the claimant has not worked. She receives Employment and Support Allowance (ESA) meaning that, for DWP purposes, she is not fully fit for work and is not an active job seeker at present.

28 As well as Madge Martin, the claimant maintains that several other passenger assistants were actively hostile to her. She implies they were doing this at the bidding of Madge Martin. They were: Joyce Barnett, Zac, Pamela Benham, Amina Noor and Wendy (whom we previously mentioned on Cherry Trees run).

29 It appears that, following the GP's recommendation that the claimant should not have to clamp and manipulate wheelchairs, the claimant was moved from Stephen Hawking to one of the Phoenix runs. The respondent therefore appears to have made, or attempted to make, a reasonable adjustment. We were shown an occupational health report from that period, 9 November 2009, which stated:

> "Ms Kouchalieva presented with swelling and deformity to some of the fingers in both hands. She stated she is finding it difficult to clamp and release the wheelchairs at present. She is experiencing pain and restricted movement in her fingers. The only short term adjustments I would recommend is she should refrain from having to secure and release wheelchairs until she has been seen by the consultant."

30 The problem with the Phoenix runs was there were more children in the bus, and most of those children needed their seat belts fastened and/or adjusted. That is very much a manual handling task, even though it was less heavy than fastening wheelchairs.

31 A subsequent occupational health report in January 2010 from Dr Sperber, (who has been the OH consultant throughout the period of the claimant's employment), stated it was good that the clamping of wheelchairs had now ceased and that the claimant's symptoms had improved. On 25 January 2010:

> "It would be therefore sensible for her to continue to avoid this type of work [clamping] at least for the time being."

But by March 2010 Dr Sperber was stating:

> "I understand that her current role does not involve such strain on her hand joint as no wheelchair clamping is needed… No further workplace adjustments are currently required but clearly should her role change or should it require regular wheelchair clamping or other activities which could potentially strain her hand joints her fitness for the role would need to be reconsidered."

32 There was then apparently no further contact with occupational health and no further problems until 2012. There was a pair of medical reports persistently referred to by the claimant throughout this hearing the first was on 20 April 2012 stating:

> "In terms of the way forward whatever the underlying medical cause of her symptoms I feel she should avoid work which inherently involves repetitive forceful manipulation of objects with her hands. I would therefore recommend for her to be redeployed on medical grounds to a more suitable role."

At this stage the report was referring to the belting up of children on the Phoenix run. A subsequent report on 5 November 2012, 7 months later, from an OH advisor stated:

> "I understand from this lady that none of the recommendations made in the occupational health report 20 April 2012 were implemented. The recommendations in that report remain valid: I therefore refer you to that report."

33 The claimant relies upon this pair of reports to demonstrate that over a long period the respondent did not implement recommended reasonable adjustments. However, the problem with this argument is that the OH advisor is qualifying that information with: "I understand from this lady". It is hearsay, and self-serving. It may or may not be true. Further, such things as reasonable adjustments are not simply true or false. It is a matter of degree. Reasonable adjustments are always a matter of degree. The similarities between the routes are greater than the differences. The children vary individually. You cannot categorise them neatly. There are behavioural problems with

the physically disabled children, and there can be physical disabilities with the children with challenging behaviour.

34 It appears in May 2012 that the claimant's routes were changed from TH36 to TH35, both Phoenix routes but the buses may have differed in size. The number of children will obviously make a difference to the number of seat belts to be fastened.

35 The claimant's discrimination complaints are brought under 4 headings of the Equality Act 2010:-

1 section 13 direct disability discrimination;
2 harassment by reason of disability, section 26;
3 section 15 disability discrimination;
4 failure to make reasonable adjustments section 20.

36 The claimant's dismissal took effect on 20 April 2017. Relative to this the ACAS early conciliation referral and the ETI claim form are in time. The first ETI claim form was presented before the dismissal on 8 March 2017, as a claim for disability discrimination. It was coded as such by the tribunal (3200247/2017). The second ETI claim form (3200601/2017) was presented on 25 June 2017 having been referred to ACAS on 22 May 2017. That was coded as unfair dismissal (and discrimination again).

37 There are 10 alleged acts of disability discrimination dating from 2010 to approximately 2015 as far as we understand the evidence. It is remarkable at this hearing, and in preparation of the witness statements compiled for the hearing, the claimant has devoted almost no time at all to those earlier issues which are anyway a long way outside the jurisdictional time limit. She did not even raise a grievance until 20 April 2016, a year before her dismissal. She maintains it was February 2016 by email, but because it was not headed "grievance", the respondent did not treat it as such.

38 In June 2016 Madge Martin in fact left the respondent's employment altogether. She had been the focus of the claimant's complaints.

39 I remarked during the hearing that the claimant is essentially bringing a personal injuries claim. She is saying that Madge Martin, not inadvertently, but deliberately, crippled her by deliberately allocating duties which were onerous and which caused a degenerative condition to become worse faster than it would otherwise have done. It has left claimant, at the age of 55, unable to work.

40 We established from her that, because of her hands, not only is manual handling an issue but the use of a computer keyboard is almost impossible. Any documents which needed composing in these proceedings have been done with the assistance of the claimant's daughter.

41 Ms Peponi has been extraordinarily supportive of her mother throughout these proceedings and most helpful in her role as a part-representative throughout this hearing.

42 It appears there were no more problems and the claimant carried on working

from 2012 until starting a run of absences in 2014, from June to October 2014 (which does not include school holidays). In 2014 she had 50 days off sick with a diagnosis of left ankle sprain. It seems that the respondent is not counting any periods of sickness which fall during school holidays or half terms.

43 The next occupational health report was in July 2015. This dealt with a specific problem about the ceiling height at the back of a bus on the Phoenix run. The claimant is quite tall, at 177cm. The occupational health reports that the height of the bus was in fact 188cm in the relevant place. Even given 4.5cm heels on the claimant's shoes. She should not have had to stoop. (At that stage she had been diagnosed with cervical spondylosis in 2011 which is curvature of the neck and spine in addition to her other problems).

44 The whole seating arrangement was a matter of bitter controversy between the claimant and Pamela Benham which the claimant repeated several times during the 3 days of the hearing. Ms Benham was apparently an obstructive colleague to have on a bus. Pamela refused to watch the children, as was the passenger assistant's duty. These buses on the Phoenix run seemed to have 1 seat at the front which faces backwards and a seat at the back which faces forwards enabling the PA's to keep an eye on the children.

45 Apparently the claimant said she was the only one to keep her eye on the children because Ms Benham sat at the front looking in the direction of the driver, doing all the greeting of parents, leaving the claimant to do all the hard work of belting up the children. This is the sort of controversy that really is not relevant to an issue with which we have to deal in these proceedings. It was however identified as an issue in the final list of issues (1) forcing her to work on the bus at the back where she had to stoop; (2) requiring her to work on a longer route, increasing numbers of children therefore more manual handling and (3) requiring her to sit at the front turn around to face the children. The claimant stated (and this is unrelated to any of her stated disabilities) that sitting at the front facing backwards in a moving vehicle made her giddy.

46 These incidents coincided with a period when the claimant was having a lot of sickness absence. According to the final record in 2015 the claimant had 101 days of sickness with varying diagnoses – stress, neck ache, pain in hand, neck and left ankle, pain in base of thumb, and cervical spondylosis. These periods were from a period in July through December 2015.

47 By December 2015, Dr Sperber reported on the claimant's condition during this period of absence from work:

> "Due to her functional status she is currently unfit for the passenger assistant role when taking into account its inherent physical demands. She indicated that she has been offered a steroid injection to her thumb in order to relief her symptoms. However she declined this due to concerns regarding possible associated skin discolouration around the injection site."

48 By March 2016, there was another occupational health report from the OH adviser stating:

> "It is unlikely that her symptoms would improve to allow her to carry out her full duties. She is likely to require permanent workplace adjustments. Further advice regarding adjustments will be provided at the OHP assessment."

49 And then importantly:

> "Ms Kouchalieva has indicated that a move to working with Cherry Trees children [challenging behaviour school] which involves minimal manual handling duties will help her. I have referred her for further occupational health physician assessment and further OH advice will be provided following the appointment."

50 The situation had improved by April 2016. At this time the claimant had a good arrangement with the crew she worked with. On 19 April 2016, Dr Sperber was able to report:

> "She is currently coping with work which does not involve gripping and she says she has come to an informal arrangement with a member of staff in the vehicle in which she works in which duties she struggles with can be covered and the work is split between them accordingly."

51 This was a benign arrangement. She was paired with a passenger assistant with whom she had a good and cooperative relationship, called Lillian. In addition to that a helpful bus driver called Ram helped her. This was on TH 33 route. Ram was able to help with fitting the seat belts of the children going to Phoenix. This is a 16 seater bus and therefore smaller (some of them are 31-seaters). These children were less likely than the Cherry Trees pupils to undo their seat belts, but that possibility could never be ruled out, and it did happen. On the 16-seater bus there were usually 11 children.

52 However, despite the fact it was going quite well in April, in September, at the beginning of the next school year, Emma Parker, Passenger Operations Manager within the respondent's Place Directorate, decided that she would move the claimant to the Culloden School, working out of Blackwall Transport Hub. Her reasons for moving the claimant were to avoid the headroom issues at the back of the bus, and also there would be fewer children. Lillian, the PA with whom the claimant got on well, would be able to transfer to that round as well so they keep this good pairing of PAs. It was a good idea and showed sensitivity to the problems the claimant had had.

53 The children at Culloden School, as previously mentioned, all had auditory disabilities (for which there is a specialist SEN service). The problems presented by this group of children seemed less likely to present difficulty for the claimant (and her colleagues), given the nature of her disability. So far as working arrangements were concerned, this move had a lot to commend it.

54 The claimant, however, wished to resume working on the Cherry Trees route. This was her repeated request, to the exclusion of virtually all other issues at this hearing. It was an intransigent problem. The respondent was, and is, adamant (in our view, for good reasons) that such a placement was out of the question. The health and safety risks for the claimant, for her colleagues, for the driver and for the children themselves were far too great.

55 The boys at Cherry Trees (they are all boys at this school), all had challenging behaviour and were typically diagnosed with ADHD. They could be, and were, violent - violent to each other, and violent to staff. Ms Parker described how a member of staff had been punched in the face by a boy this year.

56 The claimant's evidence is not clear and nor is the medical evidence clear why she attended once on the first day of term and never again. She remained off work sick from September 2016 to the time of her dismissal in April 2017. The diagnosis on the certificates at the time did not mention anything about the travel time involved.

57 The claimant complained that there was more walking involved and that the journey time was too long for her. But that was not apparently why she was off sick for 7 months. She was off sick because of what were by then well known complaints about finding the work difficult, given her hands, with hypermobility and osteophytes.

58 The initial sick certificate had said conditionally fit for work "to avoid repetitive manual handling". Thereafter they all stated other diagnoses. On 26 September 2016, the sick certificate, instead of saying she was conditionally fit for work, stated she was not fit for work. The diagnosis given was "bilateral hand pain and arthralgia". On 3 October 2016 it was "bilateral OA knees arranged hyaluronic acid injections to treat pain".

59 Hyaluronic acid is a treatment which is not available on the NHS which was administered in Bulgaria when the claimant went back there.

60 Osteoarthritis of hands remained the lead diagnosis thereafter. The respondent was right, in our view, to say that the knee and ankle issues were not such as to prevent her from working or from getting to and from work.

61 The claimant had raised a grievance, dated 20 April 2016. It may be that, due to communication difficulties, the respondent did not properly receive it until 9 May. Nothing hangs on that and we need make no findings on it. The claimant is bitterly critical of the administrative handling of her grievance and the errors and poor communication of HR. This was true. We have seen some emails that would definitely require some response or acknowledgement, which received no response from HR.

62 This 2016 written grievance went back to events in 2009 and the claimant's duties on the Stephen Hawking school route, and all the wheelchairs. Then it went to February 2010 when the claimant was moved to Phoenix bus route 36 with 11 children who needed seat belt help. This was the period when the claimant was paired with Pamela Benham. The claimant complained that she did 80% of the manual handling rather than half of it. The claimant remained paired with Pamela Benham for 2 years. The claimant also complained about the head height at the back of the bus and how it impacted on her spondylosis. She was moved in February 2012, but there were still 13 children who needed seat belt assistance. The claimant then referred to that pair of occupational health reports in 2012 where, according to her, reasonable adjustments recommended in the first report were not put into place all the following year.

63 The claimant then complained about Madge Martin's inequitable treatment of her, and her favourable treatment of Pamela Benham, and how she had begged Madge Martin to be transferred to Cherry Trees. Apparently Madge Martin, rather than

refusing, told the claimant that she would do it sometime, but never did. That is why the claimant tells us she did not complain earlier. If Madge Martin had refused she would have complained earlier. We are not convinced that that is so. A typical passage in the grievance is this:

> "In October 2014 the spondylosis exacerbated but regardless of my plea I was still forced to work in this hell until 10 October helping 17 children with their seat belts, few of whom with a harness which meant even more manual handling."

(A harness is a special strap arrangement that is put on a child with the fastenings behind so they are unable to release it themselves).

The conclusion of the grievance was:

> "Over the course of the last 5 years Madge Martin ruined my health and self esteem. Her actions had a profound effect on me and include verbal abuse appointing 3 PAs to work with me who were abusive in any possible way, inadequate ability to deal with a problem… I would describe Madge Martin's behaviour as deliberate gross negligence."

The 3 PA's she was referring to there were Amina, Zac and Joyce (although we also know that Pamela Benham whom she complained about earlier was also a major problem to the claimant.

64 We have seen an email trail of 9 May which started the ball rolling on this grievance. The progress, as everyone agreed, was painfully slow. The claimant complains about that. The tribunal's problem with the whole issue of this grievance is that it is not relevant, procedurally or substantively, to anything we have to consider in these unfair dismissal and disability discrimination tribunal proceedings. And yet the claimant has spent much time and energy at this tribunal hearing describing the process.

65 At the time of the grievance Madge Martin was on long-term sick leave. She ultimately left in June 2016 but that was after months of absence so it was already a historic complaint at the time it was submitted.

66 The claimant's grievance was investigated by Mr Abdul Qaium. The claimant complained that Mr Qaium did not interview other people who might have given a more favourable and supportive account for her. It appears, however, from the notes of the interview with him that she did not suggest any potential witness names at that stage. It was only at the grievance appeal stage that she suggested new names that she wished to have interviewed, most of whom had left by that time, with the exception of Pamela Benham.

67 Pamela Benham is still employed as a passenger assistant by the respondent, she also has a job with the Phoenix School (which makes proper sense of her travelling to and from work and not having the 5½ hours to kill in the middle of the day). She was not likely to have given a statement supportive of the claimant.

68 Witnesses the claimant then named after the appeal interview were: Emma Parker, Mandy Osborne, Robert Reading (driver), Barrington Sanjo (driver), Norul Islam, and other PA's and drivers on Phoenix runs. She also named Dr Sperber the

occupational health physician.

69 One of the reasons that the grievance was slow starting was that the claimant did not understand that she needed to spell out what her preferred resolution was. Ultimately she stated she wanted an admission from the respondent that everything in her grievance complaint was true and that she should be paid compensation, (which the respondent council was unable to do). There is no power under the procedure to award financial compensation for a grievance. Her preferred resolution was of course that she should be transferred to work on the Cherry Trees route. That was out of the question for the respondent, and there was unanimity about this from all the respondent's managers, and HR.

70 Ultimately the claimant's grievance was not upheld. It was heard by Ms Bola Akinfolarin, the Interim Head of Development Compliance and Commissioning, also within the Place directorate. The grievance outcome letter was dated 10 March. The claimant appealed against that outcome as she was invited to, but at this stage on 22 March 2017, she was already on notice of dismissal during a medical redeployment period of 12 weeks.

71 In a most unimpressive piece of process handling, following the grievance appeal meeting on 24 April 2017, with Mr Roy Ormsby, Divisional Director Public Realm, the respondent omitted to send the claimant a grievance appeal outcome letter. It is not known if one was even drafted but it is doubtful because no-one can find even a draft on the system. Whether this was because the claimant was now formally dismissed and her notice had expired has not been explained. The respondent was unable to give the tribunal any suggestions at all as to how this had occurred.

72 It looks most likely to be a complete omission by Mr Ormsby and Yvonne Osedumme the HR business partner. (She reports to Johura Begum who was a witness before the tribunal). Ms Begum was unable to provide any detail as to what happened here because she was not directly involved. However, from his evidence to this tribunal it is clear that Mr Ormsby would not have upheld the claimant's grievance appeal to any extent, even if he left so many other matters unclear.

73 One of the major controversies we have had to deal with in this case was, while the claimant was still at work and still in the redeployment period, whether she stated that she would be prepared to watch the Cherry Trees run as an unpaid supernumerary visitor, so she could see for herself whether it was as suitable a role as she had constantly insisted. None of the respondent's witnesses remember her making any such offer. In our view it is likely that one or all of them would have remembered if such an offer had been made. It is not the sort of thing that it would have occurred to the respondent to suggest.

74 In our view there would have been considerable risks having her present in the bus even as a spectator. The fact that she was not on paid duties might not deter one of the children from punching her in the face.

75 Ms Peponi made an understandable submission that this could happen to anyone, disabled or otherwise, but the real point is how you deal with a situation like that. The only answer is physical restraint. That is where the claimant would have

been at a major disadvantage because of her hand problems. You need a good grip to restrain one of these children. All the restraint techniques need arm and hand strength.

76 Because of her long-term absence the claimant was moved through a succession of absence review meetings. After 50 days of sickness absence a formal sickness absence review was carried out by the claimant's Passenger Operations Manager, Lee Perry. The claimant was unaccompanied. She is not a member of a union. We take no particular point on this the fact, although the claimant maintains strongly that she was discriminated against because she was not a union member. It is not an issue which we need to decide. It was never one of the claimant's claims

77 Subsequently we saw a final absence review. A meeting took place on 24 November 2016. The final absence review meeting outcome, signed by Emma Parker, was on 4 January 2017, the bottom line there was:

> "I advise you that your sickness will continue to be monitored for a period of 18 months with effect from 24 November 2016 the date of this meeting. If your sickness level does not improve to an acceptable level your sickness absence will be further addressed in accordance with the Council's Sickness Management Procedure. Accordingly you may, at any point during the 18 month monitoring period, be referred to the next stage in the procedure, which is the consideration for dismissal stage at which point your dismissal from the Council's employment will be considered."

78 The next meeting was on 26 January and was conducted this time by Roy Ormsby Service Head - Public Realm. The most helpful document here was Ms Parker's report for that final meeting which gives a comprehensive overview of the history and attached the OH referral and minutes of the succession of meetings. The consideration of dismissal meeting took place on 26 January 2017 where Mr Ormsby decided that the claimant should be put on 12 weeks' notice. The bottom line was:

> "I have decided to issue you with a 12-week medical redeployment period and notice of dismissal in accordance with the recommendation of medical redeployment from your most recent occupational health report dated 21 September 2016. This will take effect from Monday 30 January 2017 until Friday 21 April 2017."

79 This meant that the consideration of dismissal meeting needed to be later reconvened at the end of the notice period on 27 April after the notice had expired. The summary of the reason to put the claimant on notice was:

> "From the information presented at this meeting and by acknowledging the recent medical advice available it is evident that you are unable to complete the duties of a passenger assistant in accordance with your job description. Unfortunately it is not feasible that you do not complete any manual handling duties on a long term basis as this is a primary requirement for a passenger assistant role."

Mr Ormsby quoted the 5 November 2012 occupational health report, much quoted by the claimant, which stated:

> "This lady believes that her joint symptoms are exacerbated by work related activities."

Mr Ormsby commented:

> "I clarify that this is your perception. Both Yvonne Osedumme and Emma Parker explained that the previous Passenger Operations Manager accommodated the request for reasonable adjustments by excusing you from fastening seat belts but this arrangement is no longer sustainable within the service as this approach has put additional pressure on other passenger assistants who you work with."

80 The claimant has contended it was wrong for the same manager, Mr Ormsby, who conducted the grievance appeal where the outcome letter was omitted. Curiously Mr Ormsby said that all these outcome letters are drafted by HR who will do the first draft and he checks it. Johura Begum who gave evidence to the tribunal stated categorically that Mr Ormsby was wrong about this and that managers do the first draft. Mr Ormsby's evidence to the tribunal was chaotic and unreliable. Nonetheless we do not find this a structurally flawed process.

81 Following the claimant's period of redeployment no vacancy was found for the claimant. The respondent has a standard redeployment process which was overseen by another specialist manager Denise Sage. The process is that the claimant had to submit a skills profile. She did not put a great deal of work into it it. She submitted it twice having been told the first time that the first version was not informative enough. There was almost less information in the second version. However, we accept that things like tutoring of autistic pupils would not be carried out in the council's employment with a person without a relevant professional qualification. The claimant had no such qualification. She left them with few options because of her hand disabilities in manual handling, and for operating keyboards with joint hyper mobility / swan neck index finger on her right hand. Ultimately she asked for voluntary redundancy.

82 The redeployment system appears to be the same for redundancy cases as it is for medical cases, except that slightly more complex situations surround someone who had been medically redeployed because of the various medical reasons which make their substantive role unsuitable.

83 As a tribunal using the best of our imagination we cannot easily think of any role she could carry out currently, even a call centre might be problematic as most involve some degree of keyboard use and clear English. It was not easy to understand the claimant at this hearing.

84 The claimant in fact has a Degree from Bulgaria in engineering. She worked after graduation in a factory for 4 years producing IT related products. Other than that she has not used this vocational degree at all. If the claimant wanted that to be taken into consideration she certainly did not put it in the skills questionnaire. We only know it because we asked her.

85 The claimant then worked as an insurance officer and then later returned to Sofia where she worked as a PA to the Academy for Science. It involved keyboard work but at that stage the claimant had no symptoms.

86 The other factor as the final letter confirms was:

> "Yvonne Osedumme (HRBP) explained that there is a lack of scale 3 vacancies within the council and according to the redeployment criteria a redeployee can only be redeployed in to a position two grades below or above their substantive post."

87 The claimant's salary and position is at scale 3 – a relatively unskilled scale. The Cherry Trees round remained at the forefront of the claimant's submission at the final meeting before Mr Ormsby of which he states the following:

> "You raised the possibility of being allocated to work on the Cherry Trees route. It was reiterated that the Cherry Trees route would not be a suitable option for you as this route still requires manual handling duties. Emma Parker explained during your previous consideration for dismissal sickness review meeting that the children on the Cherry Trees route are highly volatile more so than the children on your current route, as they have ADHD. They can often undo their seat belts and do occasionally attack members of staff and staff have been injured whilst restraining a child."

Mr Ormsby restricted his reasoning to the potential safety of the claimant but, as stated, this is an incomplete picture because there are risks to the children themselves because children attack children, and there was a risk to other passenger assistants and to the driver in a confined area like this in a moving vehicle.

88 The claimant never appealed this final outcome. She told us that she considered it would be futile because they had already made their minds up about it.

89 The tribunal considered the possible roles the claimant might have had within this large organisation with so many roles at so many skill levels. Ultimately, and taking full consideration of *Archibald v Fife Council* [2004] IRLR, 651, HL, we cannot imagine a good outcome here. The DWP has subsequently had no more luck.

Unfair Dismissal s 98(4) Employment Rights Act 1996

90 On that evidence the tribunal has to say whether the claimant was unfairly or fairly dismissed. The reason for dismissal which was eminently clear was the claimant's long-term absence on sick leave and the fact that her absence was in breach of triggers and targets set under the sickness absence management procedure. It could be categorised as a dismissal for capability or equally for "some other substantial reason". Either way, it was clearly a dismissible reason. This had gone on for years, rather than months. There were long-term problems interspersed with periods of return to work.

91 There was some satisfactory working until September 2016 when the longest 7-month absence started and persisted until the claimant's dismissal. The respondent was reasonable in treating that as a reason for dismissal. No specific critique is made of the procedure. In our view the procedure was structurally faultless. It followed the respondent's written procedure whereby the absence review meetings (ARM's) were held. There was a final ARM and then it moved to the consideration of dismissal ARM and then the redeployment process for a period that was slightly longer than the claimant's statutory entitlement to notice. Despite the fact that she would have exhausted sick pay she was paid full pay for a notice period of 12 weeks.

92 The process was standard and in our view beyond criticism. There could have been better outcome letters, particular Mr Ormsby's, could have been plainer and more forceful, and could have actually explained how this was really not a marginal decision in any way – a decision that, in our view, was overdue. It was obvious for many months if not years that the respondent really had no options with the claimant.

93 As stated above, the fact that the claimant is now receiving ESA suggests that the DWP is taking the same view, otherwise she would be receiving Job Seekers' Allowance (JSA), and be required to look for work.

94 The claimant called 2 witnesses, one of them was Maria Sivrieva. She is a Bulgarian a friend of the claimant's sister who also lives in Putney. She worked for an IT company and is also a volunteer for the Metropolitan Police but she simply gave evidence to the tribunal that was self-serving stating that the claimant had complained about her lot at work, and Madge Martin in particular, although the witness did not remember any of the names. She had also witnessed the claimant's physical deterioration.

95 That was even more closely witnessed by the claimant's daughter Dorothea Peponi who was an impressive young woman. She graduated in London in animation. She obviously devotes a large amount of time to caring for her mother and doing secretarial duties for her. At times she has had to help her mother to get dressed, to pull her trousers up, and to button her clothes when her hands were particularly bad. She does all the domestic cleaning and all the cooking in the Soho flat.

Disability Discrimination Equality Act 2010

96 Turning to the disability discrimination complaints. As earlier stated all the pre-dismissal are out of time, and some substantially out of time as far back as 2010. In the tribunal's view this is a paradigm case where it is not just and equitable to extend time.

97 The claimant did not present a grievance until April 2016 at which time Madge Martin was no longer her route manager/line manager and Madge Martin was at the centre of the complaint earlier quoted. This is not even a case to which the principles distilled in *Apelogun-Gabriels v London Borough of Lambeth* [2002] IRLR, 116, CA, apply. At the time of the grievance the matters complained of were far from fresh.

98 The fact that Ms Martin had ceased to the claimant's line manager also strongly suggests that there was no continuing act. The analysis simply does not hold. We do not need to refer to case authority for this it is a very obvious case in which continuing act could not reasonably be found by any tribunal.

99 One of the principles behind the short jurisdictional tribunal time limits is that the workplace is an evolving scene. Witnesses come and witnesses go, witnesses move on. The time limits exist. Why? (See *Robertson v Bexley Community Centre* [2003] IRLR, 434, CA). Managers leave. If the matter is not brought up at the time, memories of forgettable incidents that may only have appeared significant to the claimant at the time, will have disappeared for everyone else.

100 As stated there were several incidents that simply were not touched on during evidence or in the witness statements e.g. failing to investigate a complaint made by the claimant about being referred to as "an animal because she did not believe in God". This happens to have been a complaint against Amina Noor. We did not hear about it. It seems that the process of "agreeing" a list of issues was a waste of time. This, and other detriment complaints, has not been pursued.

The 4 types of disability discrimination

101 Finally, the dismissal itself do we find it is an act of direct discrimination by Mr Ormsby and other managers who made decisions which led up to the final "consideration of dismissal meeting" under the respondent's absence management procedure? It is quite impossible to find that this might have been done on the grounds that the claimant had a disability or that if she had not been disabled but otherwise unable to complete manual handling tasks, in the long term, she would not have been dismissed in those circumstances. How anybody ever thought that this could be established is beyond us. There is no *prima facie* case for direct disability discrimination here.

102 Second, was this an act of harassment? Again in the tribunal's view this is a category error. It is not creating an atmosphere for the purposes of 26 of the Equality Act 2010. Did the respondent engage in unwanted conduct related to [the claimant's disability] and did that conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? As stated above this is a category error. Thinking about this logically, if the respondent had allowed the claimant back as a passenger assistant, and she had had to beg all her colleagues to do 100% of her manual handling duties that might have been humiliating and degrading.

103 Third, was this a dismissal under section 15 of the Equality Act 2010: "because of omething arising in consequence of the claimant's disability?" Wel, it was a dismissal arising from the claimant's absence in circumstances where she had continuous sick certificates relating primarily to her ability to manual handle and the disabilities in both hands. So, yes, it was because of something arising in consequence of the claimant's disability. The claimant and the respondent did know that the claimant had the disability. How could they not know for the purpose of section 15(2)? However, under sub-section 15(1)(b), the respondent has amply demonstrated that this was a proportionate means of achieving a legitimate aim, namely the safety of the claimant, her colleagues, the children, and the bus driver, on these runs to school. It was no longer sustainable, if it ever had been. The respondent could have justifiably made this decision a long time earlier. With every month and year that succeeded it became more and more justified.

104 Finally, does this demonstrate that the respondent failed to make a reasonable adjustment for the purpose of section 20 of the Equality Act 2010? The adjustment that the claimant was asking that she be allocated to the Cherry Trees run. In our view such an adjustment was absolutely not reasonable. Even the claimant's suggestion that she at least trial it on an unpaid basis as a supernumerary visitor was not a reasonable request despite indecisive evidence to the contrary given by Mr Ormsby, and contrary to the claimant's reliance on 5 November 2012 occupational health report

the evidence shows that the respondent made several adjustments, attempting to do exactly what the claimant accused them of not doing. The respondent did not ignore HR advice, and did attempt to achieve reasonable adjustments.

105 The OH reports demonstrate that even Dr Sperber realised towards the end, when he understood more about the role, and the claimant's condition, that the respondent had run out of reasonable adjustments to this particular role. All the evidence was one way.

106 For these reasons all the claimant's claims fail and are dismissed.

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Employment Judge Prichard

31 October 2017