EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Okon**

Respondent: **Home Office**

Heard at: London South On: 23, 24, 25 & 26 October 2017

Before: Employment Judge Freer
Members: Ms Y Walsh
Mr M Walton

Representation
Claimant: Ms A Palmer, Counsel
Respondent: Mr A Paulin, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant's claims of a failure to make a reasonable adjustment and discrimination arising from disability are partly successful.

This matter will be listed for a remedy hearing.

REASONS

1. By a claim presented to the Tribunal on 1 April 2016 the Claimant claims a failure to make a reasonable adjustment and discrimination arising from disability.

2. The Respondent resists the claims.

3. The Claimant gave evidence on her own behalf together with Mr James McCabe, Assistant Branch Secretary for the Croydon branch of the Public and Commercial Services Home Office Group.

4. The Respondent gave evidence through Mr George Lewsey, a HEO Team Leader; Ms Katie Walton, Chief Caseworker in the Criminal Casework Directorate; and Ms Steph Hutchison-Hudson, Grade 6 in Criminal Casework.

5. The Tribunal also received a witness statement from Mr Andrew Jackson, Director of Criminal Casework who did not attend to give evidence and the Tribunal placed weight on that statement as appropriate.

6. The Tribunal was presented with two lever-arch files of documents comprising 867 pages and further documents during the hearing as agreed.

7. The issues for determination were confirmed at a preliminary hearing on 13 June 2016, although no final written list of issues was produced. Counsel for the parties produced an agreed written list of issues for determination at the outset of the hearing.

8. It was accepted by the Respondent that the Claimant was a disabled person at the material time as set out in her particulars of claim. The Claimant has multiple musculoskeletal problems including Osteoarthritis in both knees; plus Carpal Tunnel Syndrome; and Hypertension.

9. The Respondent also accepted that the PCPs relied upon by the Claimant in her reasonable adjustments claim were PCPs applied to her at the material times by the Respondent.

The law

The duty to make reasonable adjustments

10. Sections 20 to 21 of the Equality Act 2010 set out provisions relating to the duty to make reasonable adjustments:

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

. . . (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

11.	*Part of this Act*	12.	*Applicable Schedule*
13.	Part 5 (work)	14.	Schedule 8

21 **Failure to comply with duty**

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

15. Schedule 8 provides:

SCHEDULE 8
Work: reasonable adjustments
Part 1
Introductory
Preliminary

This Schedule applies where a duty to make reasonable adjustments is imposed on A by this Part of this Act.

2 The duty

(1) A must comply with the first, second and third requirements.

(2) For the purposes of this paragraph—

(a) the reference in section 20(3) to a provision, criterion or practice is a reference to a provision, criterion or practice applied by or on behalf of A;

(b) the reference in section 20(4) to a physical feature is a reference to a physical feature of premises occupied by A;

(c) the reference in section 20(3), (4) or (5) to a disabled person is to an interested disabled person.

(3) In relation to the first and third requirements, a relevant matter is any matter specified in the first column of the applicable table in Part 2 of this Schedule.

Part 2
Interested disabled person

4 Preliminary

An interested disabled person is a disabled person who, in relation to a relevant matter, is of a description specified in the second column of the applicable table in this Part of this Schedule.

5 Employers (see section 39)

(4) This paragraph applies where A is an employer.

16.	*Relevant matter*	17.	*Description of disabled person*
18.	Deciding to whom to offer employment.	19. 20.	A person who is, or has notified A that the person may be, an applicant for the employment.
21.	Employment by A.	22. 23.	An applicant for employment by A. An employee of A's.

24. The Equality and Human Rights Commission has produced a Code of Practice on Employment (2011) ("the Equality Code"). The Code of Practice does not impose legal obligations, but provides instructive guidance. The Tribunal has referred itself to the Code as appropriate. This has been taken into account by the Tribunal. For example, the Equality Act 2010 no longer lists factors to be considered when determining reasonableness, but these factors appear in the Code of Practice (paragraph 6.28). However, it will not be an error of law to fail to consider any of those factors. All the relevant circumstances should be considered.

25. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the

disability. This necessarily entails a measure of positive discrimination (**Archibald v Fife Council** [2004] IRLR 651, HL).

26. The test of reasonableness is an objective one.

27. A failure to consult is not of itself a failure to make a reasonable adjustment (see **H M Prison Service & Johnson** [2007] IRLR 951, EAT).

28. It is not a reasonable adjustment to discount *entirely* disability-related absences when considering levels of absence. Otherwise an employee could be absent for a wholly disproportionate and unmanageable length of time with an employer being in no position to take any management action in relation to that absence. An employer would have no control over its own standards with regard to any disabled individual (see for example **Bray –v- Camden London Borough** EAT 1162/01 and **Robertson –v- Quarriers** EAT 104674/10).

29. The correct approach to assessing reasonable adjustments is addressed in **Smith –v- Churchills Stairlifts plc** [2006] IRLR 41; **Environment Agency –v- Rowan** [2008] IRLR 20; and **Project Management Institute –v- Latif** [2007] IRLR 579.

30. In **Smith**, the comparative exercise required by s.6(1) of the DDA was considered by the Court of Appeal having regard to the speeches contained in the judgment of the House of Lords in **Archibald**. Maurice Kay LJ stated:

> ". . . Notwithstanding the differences of language, it would be inappropriate to discern a significant difference of approach in these speeches. . . it is apparent from each of the speeches in **Archibald** that the proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements".

31. The EAT in **Leeds Teaching Hospital NHS Trust –v- Foster** [2011] EqLR 1075 emphasised that when considering whether an adjustment is 'reasonable', it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage and that there does not have to be a 'good' or 'real' prospect of that occurring.

32. With regard to knowledge the EAT in **Secretary of State for the Department of Work and Pensions v Alam** [2009] UKEAT 0242/09 held that the correct statutory construction of s 4A(3)(b) involved asking two questions: (1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then (2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is also 'no', there is no duty to make reasonable adjustments.

33. The Court of Appeal in **Matuszowicz –V- Kingston Upon Hull City Council** [2009] IRLR 288 held that there may breaches of the duty to make reasonable

adjustments "due to lack of diligence, or competence, or any reason other than conscious refusal".

Discrimination arising from disability

34. Section 15 of the Equality Act 2010 provides:

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

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

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

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

35. In **Williams –v- Trustees of Swansea University Pension & Assurance Scheme** [2017] EWCA 1008 (Civ) the Court of Appeal endorsed the decision of the EAT, which confirmed that 'unfavourable treatment' was different from 'less favourable treatment' and is to be measured in an objective sense:

" "Less" invites evidence to be provided in proof of "less than whom?"; "un.." is by contrast to be measured against an objective sense of that which is adverse as compared with that which is beneficial. . . .

I accept Mr O'Dair's submission that it is for a Tribunal to recognise when an individual has been treated unfavourably. It is impossible to be prescriptive of every circumstance in which that might occur. But it is, I think, not only possible but necessary to identify sufficiently those features which will be relevant in the assessment which this recognition necessarily involves. In my judgment, treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be. Sometimes this may be obvious: as for example, where a person may suffer a life event which would generally be regarded as adverse – taking the *Malcolm* case as an example, eviction; or being surcharged; being required to work harder, longer, or for less. A person who is asked, on pain of discipline, to perform at a rate which he cannot achieve because of his disability would be treated unfavourably if he were then to be subjected to that discipline, or threatened with it: this would not be directly because of his disability, but because of that which arose from it – his inability to perform work at the same speed or with the same efficiency".

36. When considering a proportionate means of achieving a legitimate aim, the Tribunal will assess whether the aim of the provision, criterion or practice is legal and non-discriminatory, and one that represents a real, objective consideration and if the aim is legitimate, whether the means of achieving it is proportionate including whether it is appropriate and necessary in all the circumstances.

37. As confirmed in the Supreme Court in **Homer –v- Chief Constable of West Yorkshire Police** [2012] UKSC 15:

"As Mummery LJ explained in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. . . . First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

As the Court of Appeal held in *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

. . . To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so".

Burden of Proof

38. The burden of proof reversal provisions in the Equality Act 2010 are contained in section 136:

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

39. Guidance is provided in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, on a balance of probabilities there must be facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v-**

Manchester City Council [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If there is a *prima facie* case, then the burden of proof falls upon the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

40. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' (see **Nagarajan –v- London Regional Transport** [1999] IRLR 573, HL; and **Igen Ltd –v- Wong**, as above).

41. The Court of Appeal in **Madarassy** above, held that the burden of proof does not fall upon the employer simply on there being established a difference in status (e.g. sex or race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

42. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were, and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (*per* Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL).

43. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC confirmed:

> "The points made by the Court of Appeal about the effect of the statute in these two cases [*Igen* and *Madarassy*] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

44. The approached set out in **Hewage** was endorsed and applied to the Equality Act 2010 burden of proof reversal provisions by the Court of Appeal in **Ayodele –v- Citylink** [2017] EWCA (Civ) 1913.

Findings of fact and associated conclusions

45. The Claimant is pursuing two types of claim, a failure to make a reasonable adjustment and discrimination arising from disability.

46. The Claimant began her employment with the Respondent on 20 January 2003 and was promoted to her current grade of Executive Officer on 23 April 2007. The Claimant's current role involves asylum deportation decisions in the

Criminal Casework Team working at Apollo House in Croydon. She lives in the Deptford area South London.

47. The Claimant has hypertension and suffered a minor stroke in 2009. As stated above it is accepted by the Respondent that the Claimant had the disabilities of multiple musculoskeletal problems; Carpal Tunnel Syndrome; and Hypertension at the material times.

The duty to make reasonable adjustments

48. With regard to the reasonable adjustment claim, as stated above, the Respondent accepts that it applied both the PCPs relied upon by the Claimant being: (1) working Croydon; and (2) that when an employee has exhausted six months of full pay in any four-year period, that pay is reduced to half pay.

49. The substantial disadvantages argued by the Claimant are set out at pages 14 and 18 of the bundle, being specific references to the Claimant's particulars of claim.

50. In the Particulars of Claim the Claimant states: "Requiring Ms Okon to work in Croydon puts her at a disadvantage as she has not had the use of a car since 2014 and has had to use public transport in order to get to work. The walk to her nearest bus stop or train station, the journey itself where she might find herself unable to rise from a seat or have difficulty in getting a seat, the change from one vehicle to another vehicle\platform, standing to wait for the next bus or train and further walk at the end of the journey will have an impact on Ms Okon's long-term conditions and render her unfit to carry out her duties. She has been absent at times in 2014 and 2015 through sickness that arose from her exasperated condition. Train journeys are not suitable as they involve longer walking distances to and from stations and platforms. The journey from the Croydon work location with the least amount of walking involved is a 1 and a half hour journey by two buses".

51. With regard to the issue of disability-leave, the particulars of claim state: "The disadvantage Mrs Okon and others like her suffer from due to disability is they are not able to perform their duties when reasonable adjustments are not in place and suffer reductions in pay under the circumstances".

52. The substantial disadvantage relating to the Claimant working in Croydon was argued in evidence and submissions on the basis of mobility and cost. The principal disadvantage relied upon by the Claimant is in relation to mobility issues. The substantial disadvantage of financial difficulties only materially arises upon consideration of the Claimant's journey to her workplace in Croydon.

53. Any comparator, if one is specifically needed in the circumstances, is a non-disabled person who is able to manage a similar commute into work (i.e. by reference to the alleged disadvantage caused to the Claimant by the relevant arrangements).

54. The Claimant has suggested in the list of issues seven potential reasonable adjustments relied upon. The evidence, cross-examination and submissions of the Claimant did not rely upon any suggested reasonable adjustment outside those set out in the list of issues. The main thrust of all the Claimant's suggested reasonable adjustments was to secure work at a different location, specifically Becket House, near London Bridge, which was closer to her home.

55. The Tribunal accepts that the Claimant's mobility difficulties caused her pain and discomfort and those mobility issues became more pronounced over the material times under review.

56. The Tribunal understands that the Claimant now has a paid taxi journey to and from work provided to her by the Respondent and it was accepted by the Claimant that so far as work in Croydon is concerned, this amounts to a reasonable adjustment. Therefore, the reasonable adjustment claim relating to travel into Croydon is time limited. The date of that adjustment being made was not precisely identified in evidence, but on the evidence received it must have been sometime in or after April 2016 at which time the Claimant returned to work at Croydon.

57. When considering the adjustments raised, the Tribunal finds as follows:

(1): "To allow C to move to Becket House in November 2014".

58. On 08 November 2011 the Claimant attended at Occupational Health with regard to a number of medical conditions. The Claimant was declared as being "fit for work with advice for adjustments", which with regard to her commute was "to consider allocating a car parking space and if that was not operationally practical, then she is enabled to travel to work outside of normal rush-hour to ensure a seat on public transport". The Claimant was not provided with a car parking space but was given flexibility of work hours.

59. Although the Respondent ultimately arranged and offered a car parking space, the Claimant had by then sold her car but had not informed the Respondent.

60. In or around late October 2015 the Claimant applied for a temporary post as a Reporting Centre Counter Manager at Becket House.

61. The Claimant was successful in her application. This was communicated to the Claimant in an email dated 31 October 2014 (see page 118B of the bundle).

62. Ms Hayley French, from the Reporting Centre Team sent an email dated 04 November 2014 to Mr Lewsey, the Claimant's line manager, asking him to confirm when the Claimant would be able to be released to join her Team following the Claimant's successful expression of interest. Mr Lewsey forwarded that communication to his line manager Ms Makeishia Afflick.

63. On the same date the Claimant sent an email to Mr Lewsey stating: "I applied for the expression of interest as the post would be nearer to where I live. Not only would I prefer to shorten my commute to work but I need to shorten my

route because of my disability and request that I am allowed to take up the post, that I have successfully applied for, as a reasonable adjustment". That email was also copied to Ms Afflick.

64. Ms Afflick communicated to Mr Lewsey who replied: "I have never actually seen the advert and will try to find out. Also, the issue of disability has never been raised with me in connection with this move at any stage and there is no OHS recommending a move or reasonable adjustment at present. Was Matt aware of this aspect when he made his decision and is the decision still not to release? If the decision is still not to release I need to inform Hayley French of our decision".

65. There had been an e-mail sent to all staff on 31 October 2014 from Mr Kevin White, HR Director General, which states: "Given current and anticipated financial pressures, EMB have agreed to put in place a series of measures around existing and planned recruitment, as part of a broader programme of cost conscious resource management. We are not introducing a recruitment freeze but we are making sure that existing and planned recruitment is necessary and prudent in the light of future resource pressures. From now, the filling of new vacancies will need to be authorised by senior line managers. All existing campaigns will also be reviewed with the same intent".

66. It appears from the documentation that the Claimant had two discussions on 04 November 2014, one with Mr Andrew Jackson and a second with Mr Lewsey.

67. In an email to Mr Jackson on 05 November 2014 the Claimant records that in the meeting with him the previous day: "You indicated to me that you would not sanction that move because there was a recruitment freeze".

68. Prior to that discussion Claimant had spoken to Mr Lewsey as confirmed in an email to the Claimant: "As explained yesterday and at your midyear review it is not considered that you are performing to the required standard with regard to the quality of your case work. I am about to invite you to a formal meeting where we will discuss this further. Given these circumstances it would not be appropriate to release you. You have explained that this will be a shorter commute for you and mentioned a reasonable adjustment. At present I do not have a current OHS report or a recommendation you be allowed to move to different work location as a reasonable adjustment".

69. Mr Lewsey's oral evidence was that he was informed that the Claimant could not take up the expression of interest post because of performance issues and was not provided with any further information. That direction was given to him from a Grade 6 colleague because of the absence of the Grade 7 colleague who typically would have made that decision.

70. Meanwhile Mr Jackson was making enquiries about why Reporting Centres were still offering posts under expressions of interest “despite the recruitment freeze". Mr Jackson then sent an email to Ms Angela Perfect, Director of Central Operations, stating: "Can you ensure this is stopped". Mr Jackson stated that the Claimant was "about to go on performance measures but I've

said she can't go and shouldn't have been offered the post" and he was ultimately given the advice that "they should not be recruiting there".

71. There seems to be some confusion between managers at the time over the reason for declining the Claimant's move under the expressions of interest process, but it was not argued by the Claimant that the decisions made were a sham or not made in good faith.

72. It appears to the Tribunal that Mr Lewsey genuinely turned down the move on advice from his Grade 6 colleague, while at the same time Mr Jackson had made a decision the position.

73. Mr Jackson sent an e-mail to Mr Paul Wylie (Immigration Enforcement) and Ms Perfect later on 05 November 2014 stating: "The offer I mentioned to Angela earlier today. I've told my staff member this simply isn't happening".

74. The Tribunal concludes on balance having considered all the contemporaneous communications that Mr Jackson was the decision maker regarding the Claimant's prospective move and the reason for declining the Claimant's move was because Mr Jackson's considered that there was a recruitment freeze.

75. However, the email from Mr White stated that it is a "cost conscious resource management" programme where existing campaigns would need to be reviewed and authorised by senior managers. He expressly states: "We are not introducing a recruitment freeze".

76. There has been no evidence before the Tribunal to suggest that the post had in fact existed beyond that time and had been, for example, filled by some other person. The Tribunal reaches a conclusion on balance that the expressions of interest post was ultimately withdrawn as part of the cost-conscious resource management under which the Respondent was operating.

77. An Occupational Health report arising from an assessment on 12 November 2014 (see pages 134 to 135) addresses mobility issues and states: "At consultation she presented with swellings in her fingers and she has a limp. She bought to her appointment, medical evidence which confirms her medical diagnosis and the medical investigations undertaken. Her medical report shows that her condition is slowly getting worse and she cannot walk a mile which is required to take pain relieving medication to ease symptoms. . . She also finds her journey to work stressful and tiring: she takes two buses and her entire journey takes approximately 2 hours. Her sleep pattern remains very distracted by constant pain despite her prescribed medication and as a result she struggles with getting organised in the mornings . . . She believes it will be beneficial for her to be moved to a different location closer to home in order to reduce the pressure with long distance travel . . . As advised in the report, she does suffer with arthritis in her joints and her fingers. Her previous report shows that she suffers with carpel tunnel syndrome in her right dominant hand. Her condition does have an effect on her ability to manage her full duties and to regulate her attendance. She is unlikely to be functionally fit for her full roll"

78. With regard to advised adjustments the report states: "A move to a nearer location should be considered to reduce the stress and the pressure with her travelling".

79. Accordingly, although that Occupational Health Report does have a focus on the Claimant's stress condition, particularly in light of her stroke and hypertension condition, the Report does demonstrate that the Claimant's Arthritis condition places her at a substantial disadvantage compared to non-disabled persons with regard to her travel into work and a recommendation in the medical advice is that a move to a nearer location should be considered.

80. What is clear from the expressions of interest post is that there was work available to be done by the Respondent in that particular position, otherwise the post would not have been advertised. What is also clear is that the Claimant was considered suitable to undertake that work because she was recommended for it.

81. The Claimant was not placed in that role because of an erroneous view that there was a pay freeze. That was a general decision by the Respondent and was not considered with regard to the Claimant's own particular circumstances.

82. The Tribunal has not heard evidence from Mr Jackson about why it would have been prohibitive for the Claimant to undertake the expression of interest role despite the resource pressures and cost conscious resource management.

83. There was not a general recruitment freeze and it was expressly stated by Mr White that it was a matter for all existing campaigns to be reviewed by senior line managers as to whether it was necessary and prudent in the light of future resource pressures.

84. The fact that Mr Jackson considered that there was a recruitment freezes is irrelevant. The Tribunal is not concerned about process, but rather whether an adjustment was in fact possible. The Tribunal has received no evidence from Mr Jackson, particularly regarding the circumstances surrounding resource management and the Reporting Centre Counter Manager post.

85. For example, Mr Jackson has not attended at the Tribunal to provide evidence on the Respondent's position of why it was cost prohibitive for the Claimant to be placed in that position despite the "cost conscious resource management". Such as the cost of placing the Claimant in the position and having to backfill her other post at Croydon, or why the Reporting Centre Counter Manager job might have been considered to be less important in relation to function and cost. However, the Tribunal has received no evidence in that respect and it considers that the burden is on the Respondent to provide that evidence as to why once identified (together with the pcp and substantial disadvantage), the adjustment of moving the Claimant to that position would not be reasonable resource management in the circumstances.

86. The position itself was for a period of six months. It took around eight days for the Respondent to receive a response to a request for an OHS report after the decision to turn down the Claimant's application was made.

87. It may well be, as Mr Lewsey suggested, that the request for this Report was made prior to the expressions of interest process, but in any event the second Occupational Health report arising directly from the Claimant's request for a reasonable adjustment, also pursued by Mr McCabe on behalf of her trade union, was produced on 10 December 2014, only a month after the application was declined.

88. So, even if for some reason a further Occupational Health report was required before the Claimant could take up the Reporting Centre Counter Manager position, there was no evidence to suggest that this time period would have caused difficulties. The post was never filled and the Claimant had requested Mr Jackson to review his decision relating to the resource matters, but it appears from the evidence that he never did so. Mr Lewsey was not of a Grade to have undertaken that review.

89. Further, even if the reason for not placing the Claimant in the Reporting Centre Counter Manager post was because of performance management reasons (which the Tribunal has found above that it was not), the Tribunal has received no persuasive evidence to demonstrate why that would be a bar to the Claimant moving to the new position and, for example, any performance issues being monitored after the move, particularly as forming part of the reasonable adjustment.

90. As established by the EAT in a number of authorities, particularly **Foster**, the adjustment does not need to be a complete solution to the substantial disadvantage. There has to be 'a prospect' of the adjustment avoiding the disadvantage, but that does not have to be a 'good' or 'real' prospect.

91. The Tribunal concludes that placing the Claimant in the Reporting Centre Counter Manager position for a temporary period of six months with future options to be considered, would have avoided the disadvantage for that temporary period of time and provided a prospect of the disadvantage being permanently avoided.

92. Accordingly, Tribunal concludes that there is no evidence on why on this occasion, in relation to this Claimant, her particular disability and associated difficulties, it would have been a problem to place the Claimant in the temporary Reporting Centre Counter Manager role despite the resourcing difficulties that prevailed at the time.

93. Given the fact that the post was originally identified as vacant, there was work to be done, the Claimant was qualified and experienced enough to undertake the work, and the absence of evidence on cost-conscious resource management relating specifically to the position, the Tribunal concludes that it would have been a reasonable adjustment to place the Claimant into that post, even for the temporary period. Any set of circumstances may have arisen by

the end of that temporary period, such as the post becoming available for a further, or permanent, period, other work becoming available, or other adjustments becoming available. It is reasonable to consider on balance that there was at least a prospect of the Claimant's substantial disadvantage being avoided.

(2): "To give the post of Field Support Officer (EO) in Becket House to the Claimant in April 2015, a post for which she was qualified, without requiring her to apply in open competition".

94. The Claimant was not shortlisted for this role under the Respondent's Guaranteed Interview Scheme. The Claimant accepted in evidence that, contrary to the phrasing of the issue, she was not qualified to undertake the post. The Claimant accepted that there were reasonable minimum requirements that a person would need to have in order to undertake the Field Support Officer role and that she did not meet these minimum requirements. Therefore the Claimant did not meet the standard required for a guaranteed interview. There was no evidence, or argument made, of available training that may have been afforded to the Claimant to assist her meeting the minimum requirements. The Tribunal concludes that in those circumstances it would not have been a reasonable adjustment for the Claimant to have been given this post.

(3): "To move the Claimant to one of the asylum/case-working vacancies that arose in Becket House in Summer/Autumn 2015".

95. The Tribunal finds that, in fact, there were no case-working/asylum vacancies or posts that arose in Becket House in Summer/Autumn 2015.

96. Some employees had been transferred for operational reasons from Marsham Street to undertake their specific work at Becket House. It appears that not all Asylum workers had moved out of Becket House, but there was no evidence, or suggestion, that any of those positions had become vacant or had created surplus work. Moreover, the majority of the Asylum Team was being moved, and did eventually move, away from Becket House. The Tribunal accepts the Respondent's evidence that it made repeated enquiries into the availability of any vacancies and the only vacancy that arose was for arrest trained Immigration Officers, which would have been unsuitable for the Claimant given the physical nature of the work.

(4): "To find meaningful work for the Claimant to do at Becket House just as meaningful work was recently found for 8 employees already based at Becket House who would have been moved to Croydon with others but would have had difficulty travelling to Croydon".

97. The Tribunal received no evidence to suggest that, as a matter of fact, there was any available meaningful work available as suggested.

98. As stated above, there were a few employees who were moved into Becket House, but this did not create any vacancies or available work. The majority of

Asylum based staff, and the work being done by them, was being moved out of Becket House. There was no reliable evidence that there was any spare capacity for any meaningful work to be done at Becket House; what any such work might have comprised; or that the Claimant was qualified to undertake it with or without adjustments. The evidence of Mr McCabe on the potential availability of work at Becket House was purely hearsay and unpersuasive on this issue.

(5) "To allow the Claimant to work remotely from home as recommended by Nicola Byrne".

99. The Tribunal accepts the Respondent's evidence that at the time it was not possible for the Claimant's work to be done remotely at home. The Claimant worked on highly confidential files. To work at home would require access to the physical files in respect of which the Claimant would require a good deal of support and guidance which would not have been available to her. Also, at the material times there were insufficient IT facilities to support homeworking by the Claimant. Therefore the Tribunal concludes that there was no prospect of this suggested adjustment avoiding the substantial disadvantage and does not amount to a reasonable adjustment.

(6) "To pay for a taxi from the Claimant's house to New Cross gate station and back again in the evening, allowing her to get a direct train to and from East Croydon with a much shorter journey time than travelling by bus and a shorter/less stressful/less expensive journey than travelling by train via London Bridge".

100. The Claimant initially travelled to and from work by bus which, door to door, took around an hour and twenty minutes.

101. The other public transport routes available were by train from New Cross Gate Station direct to Croydon with walks at either end, or a train from Deptford Station to East Croydon Station with a change of platform at London Bridge and walks at both ends of the journey.

102. The Tribunal accepts the Claimant's evidence on the respective walking distances involved in the alternative routes, but the Tribunal notes that these are not significantly different from those applied by Ms Walton at the February 2016 Grievance Hearing.

103. The Claimant sought to present evidence of train times, but these were recent times and did not relate to the material times under review. For example, from around early 2015 there were works being undertaken at London Bridge Station, which affected train times and routes.

104. Ms Walton at the grievance stage calculated the train time from New Cross Gate Station to West Croydon Station as being an hour and two minutes, which the Tribunal with its general knowledge of London transport considers to be of significant length. The Claimant's evidence was that there is a fast train from New Cross Gate to East Croydon of around 15 minutes, although the evidence

suggested on balance that this route was not available at the material times, which is why Ms Walton does not appear to have made any calculation of the train time from New Cross Gate to East Croydon Station at the grievance stage. There is also no suggestion in the Claimant's grievance appeal, or the hearing itself by either the Claimant or her Trade Union Representative that Ms Walton should have calculated the time from New Cross Gate Station to East Croydon Station, but they did raise queries in detail relating to other journey calculations Ms Walton had made.

105. The Tribunal has not received any other figures on train times relevant to the material times (during which there may have been operational or other delays for any reason) and therefore is driven to accept the research done by Ms Walton at the time. That is the best evidence, indeed the only evidence, relating to the periods under review.

106. The train route from New Cross Gate to West Croydon involved a walk from the Claimant's house to New Cross Gate station of around 22 minutes for a non-disabled person. The Claimant has not provided evidence on the estimated walk from West Croydon Station to her workplace at Apollo House, Croydon. Ms Walton at the grievance hearing calculated the distance on Google Maps as being 0.6 miles. The journey from East Croydon Station to Apollo House was calculated by Ms Walton as being 0.3 miles, which the Claimant estimated at the time would have taken her around an 11 minutes to walk (see page 615). Therefore extending that estimate to the journey from West Corydon station, in the absence of any other evidence to the contrary, it would amount to a walk for the Claimant of around 20 minutes.

107. The evidence was that a taxi fare for a single journey to or from the Claimant's home to New Cross Gate Station was £6, giving a cost of £12 per day (the evidence produced relates to 2017 and required a minimum monthly spend of £200 plus an additional 10% service charge – see page 866).

108. The PCP is the requirement to work in Croydon, the substantial disadvantage to the Claimant compared to non-disabled persons is she can only undertake the journey to Croydon with difficulty due to the pain caused by her disability.

109. The Respondent was therefore under a duty to make a reasonable adjustment to avoid that substantial disadvantage.

110. The alternative journey suggested by the Claimant is one including an adjustment of a taxi journey to New Cross Gate Station paid for by the Respondent with a direct train and a walk from the station to Apollo House.

111. This adjustment was suggested to Ms Hudson by Mr McCabe, as confirmed in her witness statement at paragraph 12 and page 647G. The reason for rejection was clearly wrong in law, but that is irrelevant to the Tribunal's determination. The question for the Tribunal is whether or not it was reasonable for the adjustment to have been made to avoid the disadvantage.

112. The evidence of Ms Hudson was that she had referred the matter of the Claimant's travel to work to Access to Work and if they had said that it was a cost that should have been made, Ms Hudson would have authorised it.

113. Accordingly, the Tribunal has received no evidence from the Respondent setting out any reasons why this suggested adjustment would be unreasonable on the ground of cost.

114. However, there did appear to be a degree of irony that Mr McCabe described the payment of £700 towards the Claimant's additional travel expense from Deptford as being a "waste of public funds", whereas the cost of a £12 return taxi journey to New Cross Gate Station once a day, even making allowance for annual leave, would amount to an expense of at least £2,500 per annum (the minimum terms of the taxi fare evidence produced would require an annual payment of £2,640). The Claimant now has a full taxi journey to and from her home to work provided by the Respondent. The Claimant placed the amount of that expense being £46 per day.

115. The Claimant confirmed in evidence that she could not physically undertake a bus journey of around an hour and twenty minutes, which was a door-to-door trip with minimal walking involved. The best evidence of the journey from New Cross Gate Station to Croydon provided at the hearing was a train journey of around an hour and two minutes with a walk of around twenty minutes. It is walking and sitting that the Claimant found particularly difficult.

116. The Claimant confirmed in her witness statement that at a Formal Attendance Review Meeting with Mr Lewsey on 04 February 2016: "I repeated the effects of my disabilities and how they affected my mobility and ability to sit for no more than 10 minutes. We then discussed how I travelled to work and alternative routes. James stated that travel to Croydon via London Bridge by train would be too expensive and I explained that travelling by train was too uncomfortable due to the risk that there would be no seats and the changes of platform". In evidence under cross-examination the Claimant confirmed that she found it "very difficult to stand on public transport".

117. In the meeting the Claimant stated: "I have tried the trains; they are too difficult with all the changes; I just can't travel this way anymore; it may be easy for you but not for me. I can't even bend down or pick anything up". Also "When you live in pain its hard waiting for a train; sometimes there are no seats; I'm living in pain".

118. In the Claimant's grievance under the heading 'failure to make a reasonable adjustment', she stated: "I am disadvantaged by the requirement placed on me of having to work in Croydon. I am fit to work but not to travel to Croydon daily from my home. I am fit to travel nearer to my home such as Becket House". In the grievance hearing it was suggested to the Claimant that she may wish to work at Marsham Street and the Claimant stated: "it's sitting down, can't sit for too long, my knees lock. I am in pain, for me to come here yesterday *[Croydon]*. My Nephew helped me, I couldn't get in the car". The Claimant estimated that

a reasonable travel time to work was around 40 minutes and could not sit for long periods as her knee hurt.

119. Indeed, that is how the pcp is argued in the Particulars of Claim drafted by the Claimant's trade union representative (as set out in full above), where the disadvantages are expressed as including "the journey itself where she might find herself unable to rise from a seat or have difficulty in getting a seat . . . and further walk at the end of the journey will have an impact on Ms Okon's long-term conditions and render her unfit to carry out her duties. She has been absent at times in 2014 and 2015 through sickness that arose from her exasperated condition. *Train journeys are not suitable as they involve longer walking distances to and from stations and platforms*". [The Tribunal's emphasis].

120. The Claimant's evidence to the Tribunal was inconsistent on this point. In cross-examination the Claimant stated that she would have undertaken the journey from Deptford Station if the differential in travel costs had been met by the Respondent. That position is in complete contrast to the Claimant's position during the internal process during which she ruled out that journey on the basis that she could no longer travel that way anymore.

121. The Tribunal has referred itself to the relevant established authorities together with those specifically referred to by the parties. In considering whether or not an employer has complied with the duty to make a reasonable adjustment regard should be had, amongst other things, to whether taking any particular step would provide a prospect of avoiding the substantial disadvantage.

122. On the evidence produced to it (with the Tribunal's general observation in that respect that there was too much focus on process rather than the substantial facts of the potential adjustment) the Tribunal concludes the suggested adjustment of a taxi journey from the Claimant's home to New Cross Gate, followed by a journey by train to work, did not amount to a reasonable adjustment.

123. Given the journey time and the Claimant's stated extreme difficulty in undertaking the journey due to the inherent risks (such as potential standing and waiting) and the adverse effects of her disability, such as standing on public transport; sitting for long periods; standing generally; and walking any moderate distance, the Tribunal concludes that the suggested adjustment had no prospect of avoiding the substantial disadvantage. On the evidence, the Claimant was just as unlikely to maintain the adjusted taxi and train journey as she was the bus journey, which she stated she could no longer undertake. It would be inevitable that the substantial disadvantage would not be avoided.

(7) "To put the Claimant on disability leave until reasonable adjustments were made"

124. The Respondent's Disability Leave provisions are contained in the its Workplace (Reasonable) Adjustments Policy and Guidance at paragraphs 21 to 24. It explains that Disability Leave is a form of special paid leave for disabled

employees. The provision cross-refers to Annex B of the Guidance for types of circumstances when providing Disability Leave would be appropriate. Annex B states under "Rehabilitation": "A disabled person requires additional equipment as a reasonable adjustment. The period of time the employee is off sick and unable to work should be recorded as sickness absence. However, disability leave may be considered if the employee is fit to work but still requires time to adjust to a change in circumstances; *or is fit to work but cannot until specific reasonable adjustments are made*" *[the Tribunal's emphasis].*

125. The Tribunal has found above that the single reasonable adjustment failure by the Respondent was in respect of the Reporting Centre Counter Manager position at Becket House. Although there was no specific start date, the appointment was confirmed on 31 October 2014 and Ms Hayley French of the Reporting Centre Team made an enquiry to Mr Lewsey on 04 November 2014 to confirm when the Claimant could be released to join her team following his successful expression of interest.

126. Clearly that release did not happen for the reasons set out above, but the Tribunal concludes on a balance of probability that if the reasonable adjustment had been made, the Claimant would have been placed in post very soon after Ms French made her enquiry. The initial position was for a six-month period, which would have resulted in the Claimant being in employment and not being off work through sickness up to early/mid May 2015. There is no evidence before the Tribunal to determine whether or not that adjustment would have continued in place after the expiry of the original temporary six-month period envisaged by the Respondent. The Tribunal received no evidence on why the position was temporary in nature. There was no suggestion that had the Claimant been placed in that temporary position her salary would have been adjusted in any way.

127. The Claimant received full pay up to and including the period over which the temporary post would have occurred and was not placed on half-pay until November 2015.

128. Accordingly, the issue of placing the Claimant on Disability Leave until an adjustment had been made did not occur until November 2015. At that time there were no reasonable adjustments to be made by the Respondent with regard to the adjustments considered as part of these Tribunal proceedings.

129. What would have happened had the Respondent made the reasonable adjustment found by the Tribunal is that the Claimant's period of half-pay would have taken place at a later date relative to the period in which the Claimant worked in the temporary position. That is not a matter to be determined under this reasonable adjustment issue as expressed, but is a matter of remedy in relation to the failure to make a reasonable adjustment determined by the Tribunal above.

The discrimination arising from disability claim

130. The Claimant argues that the unfavourable treatment was "the exhaustion of her right to full sick pay from 02 November 2015 and refusal of disability leave, and the consequent reduction in her pay from then until 26 April 2016" because of absences arising in consequence of her disability.

131. This argument is made under two alleged acts of unfavourable treatment, as accepted by the Respondent in its submissions. One the Respondent placing the Claimant on reduced pay under its sick pay policy and two, the Respondent's refusal to place the Claimant on Disability Leave.

132. The Tribunal concludes that the Claimant was unfavourably treated by the Respondent by placing her on half pay from November 2015.

133. At that time, as found by the Tribunal, the Respondent should have made a reasonable adjustment of placing the Claimant into the Reporting Centre Counter Manager position, which means at that as at November 2015 the Claimant would not have been off work on sickness absence for a period sufficient to be placed on half pay.

134. That unfavourable treatment was because of the Claimant's absence from work, which arose because of her disability.

135. The Tribunal concludes that the Respondent's objective of implementing a sick pay policy is sufficiently important to limit a fundamental rights (as set out in **O'Hanlon** below), the measure of reducing the Claimant's pay is clearly rationally connected to that objective, but the means adopted by the Respondent in the Claimant's circumstances were more than necessary to accomplish the objective on the basis that the means have been directly influenced by an unlawful breach of the provisions of the Equality Act 2010 and a failure to make the reasonable adjustment identified above.

136. However, the Tribunal finds that placing the Claimant on half-pay would have been a proportionate means of achieving a legitimate aim once the requisite period to implement half-pay had been reached in the event the Respondent had complied with its reasonable adjustment duty reasonable adjustment of placing the Claimant into the Reporting Centre Counter Manager position and that employment came to an end.

137. In that respect the Tribunal refers to the case of **O'Hanlon -v- Commissioners for Her Majesty's Revenue and Customs** [2007] EWCA Civ 283, CA, per Sedley LJ:

> "99. For the present, it seems to me that justification has been established by the respondent in Mrs O'Hanlon's case on an objective as well as a subjective basis. While collectively agreed pay structures for a very large establishment are not in principle beyond the reach of the 1995 Act, they are not ready candidates for individual variation. The whole point of a comprehensive pay scale and scheme is that it applies to everyone, so that individual departures are likely to create justified

> resentment and require the exercise of discretion in both the legal and non-legal sense of the word.
>
> 100. It is relevant that the aspect of the scheme with which we are concerned is not a term of a kind which every contract of employment has to contain. An employee who is absent for 6 months or more because of chronic illness, whether or not it amounts in law to a disability, might well find that at common law the contract has been frustrated by illness and that a consequent dismissal is held to be fair. A scheme which preserves the contractual relationship in such circumstances and assures first full pay and then half pay for extended periods of time therefore goes well beyond anything required by law. This is not of course to say that it is permissible, much less justified, to construct or administer such a scheme so that it operates arbitrarily to the disadvantage of the disabled. But any unplanned discriminatory impact may well be justified on the ground that such exceptions as can fairly be made in favour of disabled employees are already programmed into the scheme".

138. The Tribunal concludes that this principle applies in the Claimant's case in that any unplanned discriminatory impact is already programmed into the full-pay/half-pay sick pay scheme, particularly when considered in tandem with the Respondent's Disability Leave provisions. The Sick Pay Scheme is not arbitrarily drafted, nor arbitrarily applied. It is a proportionate means of achieving the legitimate aim of providing both a degree of wage protection for sick and disabled employees whilst ultimately encouraging a return to work.

139. When the requisite period to implement half-pay was reached had the Claimant's employment in the Reporting Centre Counter Manager position occurred and come to an end, placing the Claimant on half pay would have been a proportionate means of achieving a legitimate aim. The application of the policy to the Claimant in those circumstances would have been no more than would have been necessary to accomplish the objective.

140. Therefore, the Claimant's allegation of discrimination arising from disability is successful with regard to the act of unfavourable treatment of placing the Claimant on reduced pay under its Sick Pay Policy to the extent of the period the Claimant would have been employed in the Reporting Centre Counter Manager position.

141. The Tribunal concludes, with regard to the second alleged act of unfavourable treatment of not placing her on Disability Leave from November 2015, that this event does not amount to unfavourable treatment.

142. At that time, as the Tribunal has found above, there was no reasonable adjustment to be made, as under review in these Tribunal proceedings. As a consequence, the Claimant could not be placed on Disability Leave pending the making of specific reasonable adjustments.

143. The Tribunal concludes that, on a normal reading, the wording in the Guidance anticipates identified reasonable adjustments. It is to cover the period during which reasonable adjustments have been identified but not yet made.

144. In the circumstances, therefore, on an objective measure, the Tribunal concludes that it is not unfavourable treatment to apply correctly the agreed Disability Leave provisions, which in the circumstances did not entitle the Claimant to Disability Leave.

145. Even if the circumstances of the Claimant not being placed on Disability Leave during the period when she was on half-pay does amount to unfavourable treatment - and in that case the unfavourable treatment was because of the Claimant's work absences that arose as a consequence of her disability - the Tribunal concludes that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

146. The Respondent had in place an adopted policy on Disability Leave. Disability Leave is applied, in circumstances relating to this case, in respect of any period where the Claimant is fit for work but cannot return to work until specific reasonable adjustments are in place. If a reasonable adjustment cannot be made and the employee is unfit to return to work, then the absence is recorded as sickness leave.

147. The Tribunal refers to **O'Hanlon** and its conclusion above with regard to the proportionate means of achieving a legitimate aim through the ultimate implementation of the Sick Pay Scheme.

148. The Tribunal further concludes that the Disability Leave provisions are also a proportionate means of achieving a legitimate aim for similar reasons. The Disability Leave provisions are agreed, apply to everyone and are not arbitrarily drafted or applied. It is a proportionate means of achieving the legitimate aim of allowing those disabled employees who are fit to work but unable to return due to a delay in the employer complying with its duty to make a reasonable adjustment, not to lose pay during that arrangement period. Application of the policy in the Claimant's circumstances was no more than was necessary to accomplish the objective.

149. The Tribunal therefore concludes that the Claimant discrimination arising from disability claim relating to the alleged unfavourable treatment of application of disability leave is unsuccessful.

150. The successful reasonable adjustment claim may, on the face of it, be out of time. The parties had a full opportunity to make submissions on the matter. The Tribunal concludes that the successful reasonable adjustment claim and the successful discrimination arising from disability claim are clearly inter-linked and amount to a continuing discriminatory state of affairs (see the established case of **Hendricks –v- Metropolitan Police Commissioner** [2003] IRLR 96, CA). The Respondent was responsible for an ongoing situation or continuing state of affairs where it failed to make a reasonable adjustment and whereby the Claimant had her pay adversely affected, as distinct from a succession of

unconnected isolated specific acts. The discrimination arising from disability claim is in time (it also being a continuing discriminatory state of affairs that arises from the implementation of a policy and continues into the time limit period) and therefore the successful reasonable adjustments claim also falls in time.

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Employment Judge Freer
Date: 27 February 2018