EMPLOYMENT TRIBUNALS

Claimant:	**Mrs T Clifford**	
Respondent:	**Skills to Group Limited**	
Heard at:	**Exeter**	**On: 23-25 January 2023**
Before:	**Employment Judge A Matthews**	
Members:	**Mrs V Blake** **Ms R A Clarke**	
Representation:		
Claimant:	**Mrs A Tanisman (the Claimant's daughter)**	
Respondent:	**Mr N Smith of Counsel**	

RESERVED UNANIMOUS JUDGMENT

1. Mrs Clifford's claims that she was discriminated against because of the protected characteristic of disability by reference to sections 20 and 21 (duty to make adjustments and failure to comply with duty) and 39 of the Equality Act 2010 are dismissed.

2. Mrs Clifford's claims that she was subjected to discrimination arising from her disability by reference to sections 15 and 39 of the Equality Act 2010 are dismissed.

3. Mrs Clifford's claim that she was unfairly dismissed is dismissed.

4. Mrs Clifford's claim under regulation 30(1) of the Working Time Regulations 1998 that the Respondent has failed to pay Mrs Clifford an amount due under regulation 14(2) of those regulations is dismissed.

REASONS

INTRODUCTION

1. Mrs Tina Maria Clifford's claims and the issues involved were discussed at a preliminary hearing before Employment Judge Gray on 9 June 2022. We see those claims and issues in paragraph 53 of Employment Judge Gray's resultant Case Management Orders at pages 70-75 (the "List of Issues") of the bundle of documents produced for this hearing.

2. We will list the issues in a slightly different order to that of the List of Issues. This is the order in which we have addressed them in the Judgment above and our conclusions below, although there is some necessary cross referencing.

3. The Respondent Company accepted that Mrs Clifford had a physical impairment, being the post operative complications of a right knee replacement, at all material times. This had a substantial and long-term adverse effect on Mrs Clifford's ability to carry out normal day-to-day activities. Thus, this was a disability for the purposes of the EA. Further, the Company accepted that it knew that Mrs Clifford was a disabled person and of the effects of that disability on Mrs Clifford at all relevant times. The effects in question were, in broad terms (they were the subject of an occupational health report we will come to), impaired mobility and sickness absence.

4. Paragraph 53.1 of the List of Issues raises time limitation points in relation to the discrimination claims. At the start of the hearing, it was agreed that the time limitation points only apply to the claims made under sections 20, 21 and 39 of the Equality Act 2010 (the "EA"), being the duty to make adjustments. This is because the discrimination arising from disability, section 15 EA, claim relies only on the dismissal and is clearly in time. Mrs Clifford was invited to and made an application to extend time as necessary.

5. At paragraph 53.5 of the List of Issues we see Mrs Clifford's sections 20, 21 and 39 EA claims of a failure to make reasonable adjustments. By the end of the hearing the live issues were these. Did parking facilities and/or the lack of a lighter/aluminium chair put Mrs Clifford at a substantial disadvantage by reference to her impaired mobility and need to sit more and could the Company have made adjustments to avoid any such disadvantage?

6. It is not uncommon that cases concerning "reasonable adjustments" are, on a legal analysis, really about discrimination arising from disability. This is such a case. Although, in an evidential sense, this

case had a heavy focus on “reasonable adjustments”, that focus fed into the section 15 EA claim founded on Mrs Clifford’s dismissal. Paragraph 53.4 of the List of Issues records Mrs Clifford’s section 15 EA claim of discrimination arising from disability. Mrs Clifford relies on her dismissal as the unfavourable treatment. Mrs Clifford points to the effects of her disability (see paragraph 3 above) as the “something arising in consequence” of her disability. The Company accepted that the dismissal was unfavourable treatment and that it was because of Mrs Clifford’s impaired mobility and sickness. However, the Company did not accept that this amounted to discrimination because it says dismissal was a proportionate means of achieving various legitimate aims. The eight legitimate aims relied on are fully pleaded in paragraph 82 of the Amended Grounds of Resistance (see 95). Whilst an employer may rely on legitimate aims identified “after the event”, we only need to record those that were mentioned by the Company to Mrs Clifford during the dismissal process. They were the provision of a safe working environment, to ensure compliance with employer liability insurance and, in effect, cost.

7. Mrs Clifford conceded that the Company had a legitimate aim in wanting to provide a safe working environment. However, Mrs Clifford disputed that her dismissal was a proportionate means of achieving that legitimate aim. In essence, Mrs Clifford’s case was that the Company took an over rigorous approach to its aim of providing a safe working environment. At the core of this case is the issue of an employer ensuring a safe working environment whilst accommodating the protections afforded to disabled persons by the EA. In particular, the balancing exercise required when applying section 15 of the EA.

8. Paragraph 53.2 of the List of Issues sets out Mrs Clifford’s claim of unfair dismissal. The Company says that the dismissal was by reason of capability and was fair.

9. Finally, Paragraph 53.6 records a claim, in essence, for a payment equivalent to twelve days holiday pay.

10. The Company, to the extent that it does not concede the claims as recorded above, defends them.

11. On behalf of the Company, we heard from Ms Sharon Chaffe (the Company’s Managing Director and a Director of its holding company), Ms Helen Morrish (a Hairdressing Team Leader with the Company), Ms Tracey Wright (a Hairdressing Trainer and Assessor with the Company) Ms Julie Mclean (Further Education Consultant with the Company and also Chair of its Board of Directors - this evidence was taken using a videoconference facility) and Ms Sharon Mousley (a

Business Development Executive with the Company). Each produced a written statement.

12. Mrs Clifford gave evidence and produced a written statement.

13. There was a 394 page bundle of documentation. References in this Judgment to page numbers are to the pages in the bundle, unless otherwise specified.

14. There were also a Chronology and a Cast List, both of which were helpful. The Chronology was not agreed and we have not relied on it in our findings of fact. Mr Smith produced written argument.

15. The hearing was completed in three of the four days allocated to it. This was only achieved on the basis that the Tribunal was to reserve judgment. The time allowance of four days was realistic had it included judgment. In the event, the Tribunal took time to absorb the oral evidence and papers.

16. The material facts are mostly well documented and tolerably clear. The disputes are over the interpretation that should be put on them. It is understandable, but unfortunate, that some perspectives became personalised. The Tribunal's findings of fact are on the balance of probability taking account of the evidence as a whole. Where there are other applicable burden of proof rules, they are explained below.

17. A feature of this case is that Mrs Clifford's daughter, Mrs Amy Tanisman (formerly Ms Clifford – we will refer to "Mrs Tanisman" throughout), has been involved from the outset of Mrs Clifford's wanting to return to work. We understand that Mrs Tanisman has graduate and postgraduate legal training. There is, of course, no objection to a family member representing another in employment tribunal proceedings. It is a common occurrence. What it risks, however, is emotional involvement taking over from objectivity. This seems to have been a factor in the case. For example, on one occasion it is probable that Mrs Clifford, on re-examination about time points, gave evidence that had been coached. Unavoidably, that reflects on the credibility of Mrs Clifford's evidence.

FACTS

18. The Company describes itself as an independent training provider specialising in delivering apprenticeships, full time courses and bespoke career programmes across the Southwest of England. We understand the Company's base is on the Langage Industrial Estate in Plympton, near Plymouth, Devon.

19. Mrs Clifford joined the Company on 8 February 2016 and was dismissed on notice expiring on 24 December 2020. Mrs Clifford's job was that of a Hair Assessor, assessing hairdressing apprentices. As such, Mrs Clifford visited hairdressing salons in various locations not owned or operated by the Company. At all material times, Mrs Clifford lived in Brixham, on the South coast of Devon.

20. Mrs Clifford has extensive experience and considerable qualification in teaching hairdressing (see 117-119). As a reference provided by the Company after Mrs Clifford's dismissal and during this litigation reflects, the Company regarded Mrs Clifford as a good employee with a good attitude towards her work and good relationships with her customers and colleagues.

21. The terms and conditions applicable to Mrs Clifford's employment by the Company are at 122-130. Mrs Clifford worked 24 hours a week being 0830-1700 on Tuesdays, Wednesdays and Thursdays. Mrs Clifford's normal place of work was specified at an address in Exeter. In the event of sickness absence, Mrs Clifford was entitled to two weeks full pay and 2 weeks half pay in any twelve month period with statutory sick pay thereafter. The terms and conditions include (125):

> *"12.9 The Employer reserves the right to require you to take any unused holiday entitlement during your notice period, even if booked to be taken after the end of the notice period."*

22. There are two job descriptions for Mrs Clifford's post at 131-135.

23. Mrs Clifford had a successful left knee replacement operation some years ago. In February 2019 Mrs Clifford had a similar operation on her right knee. Unlike the earlier operation, the second was not successful and Mrs Clifford was left with pain and impaired mobility pending further surgical intervention. As a result, Mrs Clifford went on sick leave on 25 February 2019. Mrs Clifford did not return to work before her dismissal on 24 December 2020, some twenty-two months later.

24. On 28 October 2019, Ms Chaffe wrote to Mrs Clifford to confirm that, with effect from 14 October 2019, Mrs Clifford was no longer entitled to statutory sick pay (141).

25. During her sickness absence Mrs Clifford and her line manager, Ms Morrish, kept in touch (see 147-151). They obviously enjoyed good relations and Mrs Clifford often mentioned that she missed being at work. On 23 February 2020 the two met (see 150). It appears there is no note of their conversation (Morrish WS 7).

26. On 21 February 2020, Mrs Clifford sent a message to Ms Morrish (150). it included:

> *"As your aware"* [presumably from the meeting on 23 January 2020] *"my sick note ends on Monday 2nd March. I am hoping to return to work. However, as discussed there will need to be a phased return with reasonable adjustments. Please would it be possible to meet with you next week As I will be seeing my GP on Thursday and will need to discuss, and hopefully agree my return."*

Ms Morrish says that she was a bit surprised by this message as Mrs Clifford had not indicated to her that her condition was improving (WS 10).

27. Ms Morrish consulted Ms Chaffe (152). Ms Chaffe advised Ms Morrish to arrange a meeting with Mrs Clifford, as a return date could not be agreed until it was established if any adjustments could be met.

28. A meeting was arranged for 12 March 2020. However, on 9 March Mrs Clifford sent Ms Morrish a message which included (151):

> *"Please can we reschedule our meeting on Thursday? Having now had the SPECT scan I am awaiting the report to be sent to my Consultant whish I am told will be early this week. Following that I will go and see my Consultant for the results which I am hoping will be next week. I will let you know as soon as I now more, and can we then meet to discuss return to work. Sorry to cancel but as you said it's best to wait to meet until we have scan results."*

29. On 31 March 2020 Mrs Clifford sent Ms Morrish, a message, which included (151 and 155):

> *"Following on from our last conversation regarding my return to work, I can confirm that I have had the results of my latest scan which confirms that I will require further surgery. Unfortunately, given the current issues in the NHS, it is impossible to say when this will be but it is not in the immediate future.*
>
> *I appreciate that you requested that I did not return to work until I had received this outcome despite being willing to do so, however I am now writing to confirm that I intend to work when my current fit note ends on 2nd April 2020 – meaning my first day back would be Monday 6 April 2020. Pleas can you confirm when you are able to discuss my return with me and if not before 6th April 2020, please let me know what work you would like me to support with in the interim period?"*

30. Comparing the exchanges on 9 March and 31 March 2020 we see the first hints of the change in the relationship between Mrs Clifford and the Company, which became a destructive feature of subsequent events. On 9 March Mrs Clifford seemed to go along with the sense of waiting for the scan result. By 30 March the clear implication was that Mrs Clifford was willing to come back to work but the Company was placing obstacles in her way.

31. It is probable that there were two factors in this change. The first was Mrs Tanisman's involvement. The second was the Covid 19 pandemic, which was taking hold in the background. On 20 March 2020 the Chancellor of the Exchequer announced the furlough scheme. On 23 March the Prime Minister announced the stay-at-home rules. By this time, it would have been apparent to Mrs Clifford that any return to the workplace would be on a furlough basis. Mrs Clifford had expressed a wish to return to work before the onset of the Covid 19 pandemic. At that stage her motivation for wanting to return was clearly unrelated to Covid 19 and furlough. However, it is probable that, by the end of March 2020, Mrs Clifford's objective became to return to work on a furlough basis. We make no criticism of this. There was nothing intrinsically wrong with it.

32. At this point Ms Morrish was furloughed and Ms Chaffe stepped in to liaise with Mrs Clifford.

33. Thus, on 31 March 2020, Ms Chaffe was faced with an employee who intended to return to work on 6 April having been signed off as unfit for work for over a year with what appeared to be an unresolved medical condition requiring further surgery. Unsurprisingly, Ms Chaffe wanted some oversight on this. It seems that Mrs Clifford had recently seen both her GP and her Consultant but had not produced anything from either. In the circumstances, Ms Chaffe asked the Company's Health and Safety Consultant, Mr Bob Peters (a member of the Chartered Institute of Occupational Safety & Health – see 157), to speak to Mrs Clifford.

34. There are messages between Mrs Clifford and Ms Chaffe on 3 and 6 April at 156. It is plain from these that furlough had been discussed.

35. On Sunday 5 April 2020 Mr Peters telephoned Mrs Clifford. Mrs Clifford took exception to the call being on a Sunday, which is understandable.

36. On 6 April 2020 Mr Peters sent Ms Chaffe an e-mail (163). This can be referred to for its full content. It included:

> *"Tina-Maria informed me that her GP has said that she does not require further visits or treatment from the surgery at this*

> *time. Having not seen any documentation I understand that Tina-Maria has interpreted this as being "fit to return to work".*
>
> Mr Peters then records specific points about Mrs Clifford's impaired mobility and continues:
>
> *"Tina-Maria has indicated a wish to return for a full 3 days per week and not a staged return. She has also said that a different in-house job role would not be suitable for her.*
>
> *Tina-Maria understands that her job role is not possible anyway under Covid-19 regulations and expects to be furloughed before returning to work."*

37. On the same day, 6 April 2020, because of receiving the feedback from Mr Peters, Ms Chaffe sent Mrs Clifford an email (164). It included:

> *"I am concerned that in light of the adjustments required, that currently you are not able to carry out your role. We would not be able to furlough an employee in those circumstances as it appears that you remain unfit to work in the role you are employed.*
>
> *I note that you have said to Bob that you expect to be furloughed before returning to work, but in order to establish whether you are able to be furloughed or should remain off sick we need further medical advice and will need to make a referral to Occupational Health. You will remain on sick leave pending the outcome of the occupational health referral."*

38. Mrs Clifford, presumably reacting to the implication that she was trying to be furloughed when she was unfit for work, replied in a confrontational e-mail on 7 April 2020 (166-167). It can be referred to for its full content. Central to it were Mrs Clifford's assertions that she was fit to return to work and the Company had been preventing this since 28 February 2020. In the circumstances, Mrs Clifford expected full pay from 2 April 2020. Victimisation and discrimination were mentioned and Mrs Clifford wrote that she had sought advice with reference to her rights under the EA as a person with a disability. We have little doubt that, by now if not before, Ms Chaffe was, in effect, corresponding with Mrs Tanisman. We also know that, from quite early in the process, Ms Chaffe was using letters drafted for her by legal advisers (see 234-235). There is, of course, nothing wrong with this. However, a consequential side effect was that it impeded direct and straightforward contact between the principals to the relationship.

39. Mr Peters sent Ms Chaffe a copy of his full report on 9 April 2020 (168 and 157-160, the "Peters' Report"). It was to the same effect as Mr

Peters' email of 6 April. It also included a reminder of the Company's duty to make adjustments under equality legislation and added:

Commenting on the salons serviced by the Company:

> *"Skills Group have a duty to ensure employers workplaces are safe under the 1974 Health & Safety Act, however their only recourse if an employer fails to comply is simply to not work with them for training provision.*
>
> *As previously mentioned Skills Group does not own or operate these salons and have no way of, and should not, accept them as an employer, based solely on their location or accessibility.*
>
> *In conclusion Skills Group does not have any influence on the type or location of any given salon beyond compliance with the 1974 H & S Act. In my opinion it would be negligent to send an employee to an "ever changing" list of establishments given it has no way of assessing its suitability for an employee with the listed mobility limitations. I struggle to find a "Reasonably Practicable" adjustment in this role which wouldn't seriously affect the operations of the company."*

Regarding an alternative role:

> *"Although Tinamaria has stated that an alternative role would not be acceptable, in this situation I believe that a reasonable adjustment would be to offer an office/classroom based role within the sector should one be available. This can be reassessed at regular intervals as Tinamaria's mobility improves."*

40. The Peters' Report became a major issue for Mrs Clifford, who maintains that much of it was inaccurate. We doubt that. We cannot see a reason why Mr Peters would have falsified any aspect of his report. We suspect that what lies at the heart of Mrs Clifford's characterisation of the Peters' Report is the issue of furlough. Mr Peters obviously thought that is what Mrs Clifford expected. Mrs Clifford is sensitive on the issue because she does not want furlough to be seen as her objective in circumstances where there was a question about her fitness for work.

41. On 21 April 2020 Ms Chaffe replied to Mrs Clifford's email of 7 April (169-179). It seems a measured and conciliatory summary of the Company's position at that stage, enclosing occupational health referral paperwork and a copy of the Peters' Report. It should be referred to for its full content. It includes:

> *"As a company, we are duty bound to protect your health and safety and acquiescing to your wishes to return to work against medical advice would have been in breach of the duties we owe to you as an employee." ….*
>
> *"Due to the conflict of your statement with the independent H & S report I suggest we engage with Occupational Health as soon as possible to consider any reasonable adjustments which would facilitate your return to work. In the meantime it would be very helpful if you could return to your doctor and obtain verification in writing that you are indeed fit to return to work, and whether he/she recommends any adjustments." ….*
>
> *"Please be assured we are committed to returning you to work, considering and implementing reasonable adjustments and meeting all legal obligations. It is essential that you engage with us in this process."*

42. The letter of referral to occupational health and the referral form itself can be seen at 172-175. They can be referred to for their full content. The letter includes this:

> *"We require guidance on whether she is medically fit to return to her role in order for us to be in a position to consider furloughing her."*

It is clear from this that both parties would have anticipated that any return to work at this stage would have to be on a furlough basis.

43. On 23 April 2020 Ms Chaffe received an email from ACAS (180). Evidently the conciliator had had a prior conversation with Ms Chaffe. Conciliation was offered in respect of a potential claim for disability discrimination as Mrs Clifford felt she was *"ready to return to work with a minor adjustment but that the respondent, allegedly,"* was *"preventing her from returning".* That seems a perplexing allegation. Mrs Clifford had not yet suggested any adjustment.

44. On 29 April 2020 Mrs Clifford wrote to Ms Chaffe (181-185). The letter was a lengthy criticism of what had happened to date and took issue with parts of the Peters' Report. It confirmed that Mrs Clifford was not prepared to approach her GP about fitness for work or adjustments. Central to the letter was the assertion that, on Mrs Clifford approaching Ms Morrish about a return to work on 23 February 2023, the Company should have acted:

> *"As an employer, whilst you are duty bound to consider my health and safety, you are not bound by a fit note where an employee requests to return to work before the expiration of a*

> *fit note. At this juncture, it would have been appropriate to discuss a return to work with myself, complete a risk assessment, look at a phased return to work and consider reasonable adjustments to facilitate my return. None of this was done. Just a simple refusal. This was not appropriate action and I feel this is an example of the discrimination I have faced due to my disability."*

45. Ms Chaffe was *"a little taken aback"* by this letter which she found *"unnecessarily aggressive and confrontational"* (WS 25). Whilst the letter correctly identified that the way forward was a reference to occupational health, it is surprising that Mrs Clifford did not ask her GP to provide some information which Mrs Clifford could show to the Company. During the hearing Mrs Clifford's evidence was that her GP had said that she could approach her employer to go back to work if she felt able to do so. The letter of 29 April 2020 asserts *"As I have advised you above, GP's do not provide reports for the purpose of confirming a patient's fitness for work. This is the role of your Occupational Health provider."* Fit notes, of course, contain a section that reads *"you may be fit for work taking account of the following advice:"* If the position was as Mrs Clifford says it was, we do not understand why Mrs Clifford's GP was not asked to provide a suitable note. Nor did the Company.

46. On 1 May 2020 Ms Chaffe wrote a letter to Mrs Clifford (187-189). The letter crossed with the letter Mrs Clifford had written on 29 April 2020, referred to in the preceding two paragraphs. It was a review of the position but included putting Mrs Clifford back on full pay with effect from 2 April 2020, when Mrs Clifford had self-declared herself as fit for work. The parties seem to have proceeded on the basis that Mrs Clifford was suspended from work on full pay pending clarification of Mrs Clifford's fitness to return to her role. This remained the position until 24 December 2020. At the end of her letter Ms Chaffe revealed her true concerns about furlough in unequivocal terms:

> *"Finally, I feel it is important to draw your attention to my concern that the inconsistency between what you have told us and what Bob reports you told him could be viewed as an attempt to be furloughed rather than be off sick. I have highlighted above the potential for that to have put the company into difficulty with HMRC and invite you to reflect on both conversations as either way, providing misleading information to us about your health would be a matter of misconduct."*

47. Mrs Clifford responded on 5 May 2020 (190-193). Mrs Clifford found Ms Chaffe's concerns about furlough *"abhorrent and offensive".* Mrs Clifford's letter, reaching its conclusion, included:

> *"Finally, let me make it implicitly clear to you that I feel that your behaviour has been unprofessional, unwarranted and accusatory at every turn. You have consistently discriminated against me on the grounds of my disability, blocked my return to work and sent letters that serve only to consolidate this opinion and cause stress for me. The actions you have taken are tantamount to bullying and I feel that you are simply trying to force me from my employment. You have stated now on several occasions that you do not feel you can provide a safe working environment for me, but have done nothing to facilitate any return or provided any evidence to support your statement."*

48. There was further correspondence between Ms Chaffe and Mrs Clifford about access to the Company's GP (194-202). The upshot was that Mrs Clifford would not allow the Company access and, in any event, the occupational health adviser had indicated it would not need access either.

49. After this inauspicious start, we come to the occupational health report. In a sense, this reset the position. Notwithstanding, we have included the account of events leading up to the occupational health report because it affected what happened afterwards.

50. The occupational health referral took place by telephone on 26 May 2020. Occupational Health Nurse Advisor Samantha Morrison's report dated 28 May 2020 is at 203-207. It seems to us that this is a relatively straightforward report, although it became the subject of considerable dispute. It should be referred to for its full content. For our purposes we note the following:

    - *"With the information shared at assessment, I believe Tinamaria is unlikely to be medically fit for the full scope of the workplace role or have further improvement with her symptoms until she has received further assessment and treatment for her right knee. COVID 19 has disrupted the likely timescale for resolving the current knee symptoms. It is hoped, with private medical treatment, the current limitations on her activities involving her knee can be resolved as soon as medical availability increases. With a successful outcome of medical treatment and recovery, she is likely to be fit for the full role and scope of her tasks.*

Currently, I believe Tinamaria is likely to be fit to attempt a return to work if the business can consider temporary adjustments to the role tasks to support her current limitations until further medical intervention is available. Loosening of a knee replacement can be a cause of falls and bone fractures, in addition to the symptoms she is currently experiencing, so it is important she should be able to work within her current limitation levels."

- The report went on to address suggested adjustments. These can be referred to for their full content and context in the report. In summary they covered a phased return to work, avoidance of periods of standing/walking of over 20 minutes, driving for longer than 30 minutes, carrying heavier items, kneeling, pushing, pulling and use of stairs.

- The report continued with recommendations for risk assessment. They can be seen at 205. These became the subject of dispute between the parties. Mrs Clifford's case was that, because there was no formal risk assessment, they were irrelevant. In the Company's view, they were to be considered. It seems to us that the Company was right about that.

- *"Tinamaria has, since this time,"* [the last visit to her GP] *"been reviewed by an Orthopaedic Consultant. She has not indicated to have been advised to refrain from work or daily activities. Therefore, without returning to work, it remains unknown to all if she will be able to tolerate the levels of activity a return might bring."*

- *"It is for the business to determine, with advice, the business risk of returning an employee with medical symptoms, the potential impact on the business function and their employer responsibilities."*

51. Having received the occupational health report, Ms Chaffe decided to refer the issue of adjustments arising from it to three work colleagues. One of the reasons for doing so was to address Mrs Clifford's view that Ms Chaffe was acting unprofessionally and in a discriminatory way. The three were Ms Mclean, Ms Mousley and Ms Wright. We will refer to them as the "Assessment Group". It is clear from the evidence we heard that Ms Mclean's role was as "moderator" (our word) of the Assessment Group. Ms Mousley and Mrs Wright were brought in for

their hands on experience and knowledge of the salons the Company provided services to.

52. Mrs Clifford suggests that there were problems with all three in fulfilling this role. Ms Mclean had no hands-on experience and Ms Mousley and Ms Wright were conflicted because of the vulnerability of parts of their own job roles. We do not agree. Ms Maclean was an experienced further education consultant and manager well able to assimilate the background paperwork and the information provided by Ms Mousley and Ms Wright. The evidence is that she did so impartially. Ms Mousley and Ms Wright were open and honest in their testimony, if not leaning towards Mrs Clifford's views. There is no evidence of any dishonest input by either.

53. On 22 June 2020 Ms Chaffe sent an email to Mrs Clifford, copied to Ms Mclean (208). The purpose was to set up a videoconference between Mrs Clifford and Ms Mclean to discuss the recommendations in the occupational health report. Unfortunately, Ms Chaffe used an incorrect email address for Mrs Clifford and the email did not reach Mrs Clifford. Attempts by Ms Mclean to contact Mrs Clifford on 23 and 30 June failed for the same reason. Mrs Clifford has not suggested that this was deliberate on the Company's part and, looking at the evidence, we are satisfied it was not.

54. On 7 and 16 July 2020 the Assessment Group had videoconference meetings to discuss the position. The minutes are at 215-218 and 221-222. It had been the intention to invite Mrs Clifford to, at least, the second of these. However, the mix up over the email address meant that this did not happen.

55. The minutes can be referred to for their full content. Having noted the suggested adjustments in the occupational health report (phased return, standing/walking, driving and carrying etc), the Assessment Group went on to consider the recommendations. Some material on travel times was available to Ms Mclean, but it seems neither Ms Mousley nor Ms Wright saw this (217-218). In short, the conclusions were these:

    - Echoing the Peters' Report, the location of salons was ever changing and the Company had no control over the locations.

    - A phased return to work could be accommodated.

    - A lightweight tablet would help with the weight of the laptop bag.

- 8 salons met the 30 minute driving criteria, although this could not always be relied on.
- All had parking close by. However, none of the parking could be reserved.
- Of the 8, 4 had steps.
- Longer appointments might be possible.
- A chair could not be guaranteed for Mrs Clifford in any salon.
- *"In conclusion it was determined that changes to hours should be recommended, as should changing load carrying to tablet as well as longer appointments with customer agreement. However, given the tolerances/capabilities to avoid it has not been possible to find any workplace locations that meet all the criteria. While we agree that a risk assessment would be appropriate should any locations be identified as potentially appropriate, as none are we cannot recommend a risk assessment at this time.*

  We are able to recommend that the company consider redeployment to a training or administration role should TMC" [Mrs Clifford] *"agree."*

56. Thus, the stage was set for the dispute that followed. In essence, the Company's position was that it could not guarantee all the identified adjustments. This was because Mrs Clifford's job involved travel and access to premises and arrangements at those premises, none of which the Company had control over. At the time, Mrs Clifford's focus was on the detailed practicality of the required adjustments. The focus has now shifted somewhat. Mrs Clifford accepts that the Company did not have that control. However, Mrs Clifford argues that the Company should have accepted the lack of control as the risks involved were minimal.

57. Having resolved the email mix up, Ms Mclean did have a videoconference with Mrs Clifford and Mrs Tanisman on 22 July 2020 (see 226-227). The minutes (approved by Mrs Clifford) are at 232-233. The purpose was to go through the suggested adjustments and recommendations in the occupational health report. The meeting

seems to have done just that. Ms Mclean does not seem to have shared the conclusions the assessment Group had reached in their meetings on 7 and 16 July. To the contrary, Mrs Clifford's expectation of this meeting was that the Company would conclude the adjustments could be made once one of the salons Mrs Clifford usually visited was reallocated (WS 31).

58. In any event, Mrs Clifford later commented, in a videoconference with Ms Chaffe on 5 August (see below) (236):

> *"I am happy with the meeting with Jules"* [Ms Mclean] *"she asked many questions and it's a pity that Jules didn't carry out the risk assessment as I don't think we would be where we are today, Jules was really good, very helpful and I came out of the meeting feeling completely different to Bob's meeting."*

59. In the background, Ms Chaffe, picking up on comments about stress in the occupational health report, had arranged a videoconference with Mrs Clifford and Mrs Tanisman to address that subject (219-220, 223-225 - it was this process that uncovered the failure of the email communications).

60. The videoconference took place on 5 August 2020 and Ms Mandy Kerslake's minute is at 234-237, annotated by Mrs Clifford. There was a wide-ranging discussion. Mrs Clifford was critical of the Peters' Report but understood the need for the occupational health referral. In terms, Ms Chaffe apologised for any stress the process had caused; it had been unintended. Mrs Clifford commented:

> *"I am not disrespecting anything that has happened and know I just can't come back to work. I am happy with the Occupational Health report and will follow the recommendations that have been suggested. I feel that the meeting with Jules, and the previous meetings with yourself have been very honest and very transparent, I thought this is how I was with Bob but clearly not according to the report." ….*
>
> *"The adjustments written in the report from Occupational Health its up to Skills Group as to whether they can meet adjustments."*

Those comments were probably made on the basis that the upshot would be what Mrs Clifford wanted - clearance to return to work with adjustments to allow for furlough. This was not to be.

61. Unknown to the Company, Mrs Clifford had obtained a private referral to a Consultant Orthopaedic Surgeon, Mr Jonathan Phillips. This concerned her right knee and was arranged through her GP. Mrs

Clifford and her husband, saw Mr Phillips no later than 27 August 2020. Mr Phillips' letter of that date to Mrs Clifford's GP can be seen at 321-322. The letter included:

> *"She has had persistent high levels of pain not only at the front of her knee but also around the tibial region on both sides and femoral region laterally. It hurts to walk and also the rest of the time. She has tried a number of different painkillers none of which seem to have significantly improved her symptoms. She is unable to work. She feels as though the right knee replacement has significantly changed her life."*
>
> *"At her request, I have agreed to perform left"* [presumably, right] *"total knee replacement revision surgery. I will place her on my NHS waiting list and I would hope to be able to perform surgery by the end of the year. I will list the operation as urgent."*

62. We record four points arising from Mr Phillips' report. The first is that the Company did not see it until discovery was in progress as part of this litigation. This leads to the second point; Mrs Clifford's assertion that it is, therefore, irrelevant. We will deal with that in our conclusions. The third point is evidential and this is relevant in terms of credibility. It concerns Mr Phillips' comment *"She is unable to work."* Mrs Clifford's vehement evidence on this point was that Mr Phillips' comment was in the context that Mrs Clifford had explained to him that the Company was preventing her return to work. Therefore, what Mr Phillips meant was "She is unable to return to work because her employer is preventing a return." We allow that is a possibility. The probability looking at the context, however, is that Mr Phillips meant that Mrs Clifford was unable to work because of the impairment to her right knee. That leads to the fourth point. Why did Mrs Clifford not share this information with the Company? (We note that, at the capability meeting, which followed on 30 September 2020, Mrs Clifford did mention the fact that she had had a private medical appointment in the context of being on the 12 week emergency waiting list 253-254. No other information is recorded as having been provided.) The obvious conclusion is that Mrs Clifford knew it would probably be fatal to her case, that she was fit to return to work, if she shared Mr Phillips' view with the Company. So far as we can see, Mr Phillips was not asked about a return to work with adjustments. What his view might have been had he been asked is a speculation too far for these proceedings.

63. Returning to interactions between the Company and Mrs Clifford, Ms Mclean had confirmed the Assessment Group's conclusions to Ms Chaffe (Chaffe WS 49). Evidently, Ms Mclean's views had not changed

because of her videoconference with Mrs Clifford and Mrs Tanisman on 22 July 2020. As Ms Mclean comments (WS 20):

> *"It became apparent that a lot of the recommendations that were within the OH report were simply outside of our control and therefore could not be accommodated. We did not want to put the Claimant in a position where she was unsafe, or at risk of reinjuring or exacerbating her conditions." ….*
>
> *"The letter at page 238 of the Bundle from Sharon Chaffe to the Claimant summarises the Respondent's position in respect of the recommendations and advice contained within the OH report. These findings are concluded at page 240, setting out the Respondent's position in respect of the OH recommendations and advice. I agree with these conclusions."*

64. It fell to Ms Chaffe to set out and explain the Company's conclusions to Mrs Clifford. This Ms Chaffe did in a letter on 18 September 2020 (238-242). Ms Chaffe had reviewed the material to date and now summarised the train of events and the conclusions the Company had reached. The letter should be referred to for its full content. Salient points were:

    - A phased return could be accommodated and a tablet provided.
    - 9 salons (we do not know why this had changed from the 8 identified by Ms Mclean) with acceptable step access had public parking close by. Notwithstanding, there was a significant risk to Mrs Clifford if no parking was available.
    - A chair for Mrs Clifford to sit on could not be guaranteed.
    - Whilst 30 minute access was possible, it could not be guaranteed due to traffic conditions.
    - Of the 9 salons, only two had multiple learners, which would allow longer sessions in one place.
    - The upshot, looking across all the criteria, was *"This means that there are no sites where you would be able to undertake all of your duties."*

- *"The conclusion is that the adjustments we can make will only allow a return to work in a safe manner for a very limited number of customers while your knee condition remains the same. As there is no timescale for further medical intervention there is no reasonable expectation of you being able to return to work in your current role or any meaningful way, even with reasonable adjustments in the foreseeable future.*

  Further, although you did not indicate a desire to take another role I have concluded that only an administration or Newton Abbott based training role would be suitable, and we do not currently have any vacancies." ….

  "We therefore need to consider your capability for your role under our formal capability procedure." ….

- Mrs Clifford was invited to attend a capability hearing. Mrs Clifford was reminded of her right to be accompanied.

- *"At this time, the Company can offer you a modified role of 2 days per month, which takes into account the reasonable adjustments that we can accommodate above. If you would like to consider this please let me know and we can discuss this further at the meeting detailed above."*

65. On 27 September 2020 Mrs Clifford sent an email to Ms Chaffe. Among other things, Mrs Clifford asked for copies of the *"relevant investigatory documents that you have prepared or reviewed in order to convene this hearing."* Without those, amongst other documents, Mrs Clifford felt the meeting would be unfair. The minutes of the two videoconferences on 7 and 16 July between the members of the Assessment Group were not provided at the time. From an email to Mrs Clifford on 28 September 2020, it appears Ms Chaffe had not thought of them as relevant. Mrs Clifford already had the minutes of her own meeting with Ms Mclean.

66. The capability meeting took place by videoconference on 30 September 2020. Ms Kerslake's minute is at 252-255. The minute can be referred to for its full content. Mrs Tanisman challenged the recommendations in the occupational health report on the basis that they were only relevant if a risk assessment was carried out. We have mentioned this dispute in the third bullet in paragraph 50 above. In any event, during this videoconference, Ms Chaffe agreed with Ms Tanisman's view. The minute records that Ms Chaffe agreed that the

Company needed to review the whole of the letter of 18 September 2020 to Mrs Clifford (254). In essence, what followed was a discussion in which Mrs Clifford sought to minimise the risks involved in the adjustments. We will not record the details because it is not Mrs Clifford's case that there were no risks. Rather, the risks were so small that the Company should have taken them.

67. Reading between the lines, we think that what happened at this meeting was that Ms Chaffe succumbed to the forceful personalities of both Mrs Clifford and Mrs Tanisman (WS 56). Understandably, Mrs Clifford and Mrs Tanisman came out of that meeting feeling they had made some progress in the direction of their views (see Clifford WS 35 and 36).

68. In the event, Ms Chaffe did not review her letter of 18 September 2020 to Mrs Clifford. Rather, she wrote to Mrs Clifford on Friday 30 October, maintaining her original position (263-264). Mrs Clifford was invited to attend *"a final capability hearing"* on the next Wednesday, 4 November *"to discuss and make a decision regarding your ongoing employment."* Towards the end of the letter Ms Chaffe summarised the position:

> *"Following the hearing I will consider the process taken to date along with any points that you have raised, including any further reasonable adjustments that you may have suggested and consider whether the Company can accommodate these. I will then consider the ongoing cost and impact that your absence is having on the Company and also consider whether, if we are unable to accommodate any reasonable adjustments, there are any alternative roles within the business. Following consideration of these points, I will then make a decision regarding your ongoing employment with the Company."*

69. As noted above, Mrs Clifford had different expectations of the outcome of the meeting on 30 September 2020. These were the subject of an email to Ms Chaffe on 31 October (265-266). In this email Mrs Clifford maintained that she was fit to return to work but that the *"reasonable adjustments would be helpful where they can be accommodated".* Mrs Clifford protested the short timescale to the final hearing.

70. The meeting took place on 4 November by videoconference. Ms Kerslake's note is at 269-272. Mrs Clifford updated Ms Chaffe on the medical prognosis. Medical intervention (we think surgical) was planned but Mrs Clifford had no date for it. (It seems that Mrs Clifford finally had the necessary treatment in March 2022, since when she has made a full recovery). Ms Chaffe worked through the Company's position as set out in her letter to Mrs Clifford of 18 September 2020.

The points previously disputed remained in dispute and no progress was made on the detail. Ms Chaffe made some notes on a copy of her letter to Mrs Clifford of 18 September. We see this at 243-247. Against the paragraph referring to the possibility of a modified role, Ms Chaffe has written *"joke insulted".* The reference to feeling insulted is also recorded in the minute at 272 after a reference by Ms Chaffe to the modified role. Ms Chaffe's evidence on this is that Mrs Clifford was referring to the whole process (WS 60). However, it seems clear to us that the references were to the modified role, rather than the process.

71. Ms Chaffe's outcome letter dated 11 November 2020 is at 273-277. It can be referred to for its full content. Much of it covered previous ground. The letter dealt with the possibility of alternative employment. It seems from the evidence we heard that that no alternative existed. Rather, the suggestion was that it be created based on 2 days a month, probably in off-the-job training with a phased return and the provision of a tablet. Mrs Clifford was given 7 days to consider this as a temporary role until she could return to her substantive post following further medical intervention for her knee. If the modified role was rejected, the probable outcome would be dismissal.

72. On 16 November 2020 Mrs Clifford sent Ms Chaffe an email seeking clarification of some aspects of the modified role (278). The objective behind some of the questions appears to have been a continuation of the dispute over the detail of the practicality of the adjustments. However, some of the questions went beyond that and were about location, the role and hours. The same day Ms Chaffe replied to confirm the location would be in Newton Abbot but otherwise she had nothing further to add (281). It was Ms Chaffe's view that Mrs Clifford would refuse whatever was offered (WS 67).

73. On 18 November 2020 Mrs Clifford sent Ms Chaffe a substantive reply to Ms Chaffe's letter of 11 November (282-283). Mrs Clifford's summarised her position. Ms Chaffe had failed to adequately consider the reasonable adjustments. Further, Ms Chaffe had not provided the requested information about an alternative role. As a result, Mrs Clifford had insufficient information to make an informed decision on that subject:

> *"At this time, I write to advise that I am not prepared to accept your proposal of a "modified role" within Skills Group due to both insufficient information you have provided to enable me to make an informed decision and the fact that I do not agree with your conclusions. Further, I do not agree with any of the statements you have made surrounding my fitness and accommodation of reasonable adjustments. It would be*

remiss of me in these circumstances to accept your proposed "modification.""

We understand this to mean that Mrs Clifford was refusing the modified role for two reasons. One was that she had insufficient information about it. The other was the continuing challenge to the premise on which the modified role was being offered. Mrs Clifford did not accept that she could not continue in her existing role with adjustments. A third reason emerged in evidence at the hearing before us. Mrs Clifford did not think that the alternative role would have afforded her the adjustments recommended by the occupational health report. Specifically, these were in relation to a guaranteed travel to work time and parking.

74. Ms Chaffe replied on 26 November (290-291) attaching a copy of her letter dismissing Mrs Clifford dated 24 November 2020 (284-289). The letter of dismissal should be read for its full content. Much of it covered old ground. We record:

> *"I am writing to confirm that, following the meeting held on 4th November" …. "it was decided that your employment with Skills to Group Limited (The Company) should be terminated on grounds of capability."*
>
> *"The Company took extensive steps to consider reasonable adjustments and created a modified role for you in order to facilitate your return to work. The modified role offered was the only option which would enable you to return to work whilst your knee remained as it is and for us to satisfy ourselves that we were taking into account, or complying with the following:*
>
> - *Reasonable adjustments proposed by occupational health;*
> - *Further reasonable adjustments which we had considered were necessary in order to facilitate your return;*
> - *Our obligation to you regarding health and safety; and*
> - *Our liability insurance requirements.*
>
> *If we had allowed you to return to your normal role, when you requested in earlier this year, we would have failed in our obligations to you as an employee (regarding health and*

> *safety) and it is likely that our Employee Liability Insurance would have been invalidated." ….*
>
> *"The Company cannot continue to pay full pay to an employee when they are unable to fulfil their contract of employment." ….*
>
> *"Further, as you requested to be placed on furlough leave (which at the time would have increased your pay as you were on Company sick pay), the Company had to take steps to establish whether you were fit to undertake your role as we had no medical evidence from your GP to the contrary (nor did you allow us access to your GP). If we had placed you on furlough leave, then the Company would have been fraudulently claiming furlough grants from HMRC as it is now evident that you were, at the time of your request, and remain unfit for your role."*

The opportunity to appeal was explained. No appeal was forthcoming.

75. The letter of dismissal gave Mrs Clifford 4 weeks' notice. As far as outstanding holiday was concerned, the letter included this:

> *"We are requiring that some of your unused holiday entitlement is taken during your notice period as per your contract of employment. As you have 4 weeks' notice, we require that 3 days holiday is taken per week of notice."*

76. In an e-mail to Ms Chaffe on 14 December 2020, Mrs Clifford disputed the instruction from the Company to take 12 days leave in her notice period (292-293). Mrs Clifford pointed out that this was at variance with the requirements in the Working Time Regulations for notice.

77. The Company has a Staff Sickness Absence Policy and Procedure (333-336) and a Staff Capability Policy and Procedure (342-346). No point was taken on either.

APPLICABLE LAW

78. **Disability Discrimination**

79. Section 4 of the EA, so far as it is relevant, provides:

> *"**4 The protected characteristics***
>
> *The following characteristics are protected characteristics-" ….*
>
> *"disability"*

80. Section 6 of the EA, so far as it is relevant, provides:

> *"**6 Disability***
>
> *(1) A person (P) has a disability if-*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."*

81. Sections 20 and 21 of the EA, so far as they are relevant, provide as follows:

> *"**20 Duty to make 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." ….*
>
> *(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." ….*
>
> *"(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to-*
>
> *(a) removing the physical feature in question,*
>
> *(b) altering it, or*
>
> *(c) providing a reasonable means of avoiding it.*
>
> *(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to-*
>
> *(a) a feature arising from the design or construction of a building,*
>
> *(b) a feature of an approach to, exit from or access to a building,*
>
> *(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or*

(d) any other physical element or quality."

*"**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."

82. Section 15 of the EA, so far as it is relevant, provides:

*"**15 Discrimination arising from disability***

(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."

83. Section 15 of the Equality Act 2006, so far as it is relevant, provides:

"***15 Codes of practice: supplemental**" ….*

"(4) A failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but a code-

(a) shall be admissible in evidence in criminal or civil proceedings, and

(b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant."

84. The scheme of section 15 of the EA (as opposed to section 15 of the Equality Act 2006) is that unfavourable treatment because of something arising in consequence of a person's disability will only amount to discrimination if (in this case) the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim. This is often referred to as "objective justification".

85. The higher courts have considered what section 15 of the EA means and how it should be applied on many occasions. The Equality and Human Rights Commission: Code of Practice on Employment (2011) (the "EHRC Code") also has something to say on the subject. The following principles are relevant:

- The purpose underlying discrimination law "*is to secure more favourable treatment for disabled people and it requires employers to assess on an individual basis whether allowances or adjustments should be made for*

them." (HHJ Richardson in *Buchanan v Commissioner of Police of the Metropolis* [2017] ICR 184).

- The test for objective justification is a two step test. Is there a legitimate aim and, if so, was the treatment a proportionate means of achieving it?

- The test for objective justification is an objective one and not a band of reasonable responses test, familiar in the context of unfair dismissal. Tribunals must engage in critical scrutiny by weighing an employer's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question and are necessary to that end.

- In the case of *Birtenshaw v Oldfield* [2019] IRLR 946 *Soole* J said this: *"The Tribunal's consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly: see O'Brien."*

- The EHRC Code covers *"Discrimination arising from disability"* (that is, section 15 of the EA) in Chapter 5. However, on the subject of *"When can discrimination arising from disability be justified?"* it refers back to Chapter 4 on the subject of *"Indirect discrimination"*. Whilst paragraphs 4.25-4.32 and 5.11 are all relevant, we record the following:

    - *"5.12 It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations."*

    - *"4.29 Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test. For example, the employer cannot simply argue that to discriminate is cheaper than avoiding discrimination."*

- There is no rule that objective justification must be limited to what was consciously and contemporaneously considered in the decision making process. An employer can establish justification by reference to material before the employment tribunal.

However, the burden of proving objective justification becomes more onerous in such circumstances.

86. Section 39 of the EA, so far as it is relevant, provides as follows:

> *"**39 Employees and applicants***
>
> *"(2) An employer (A) must not discriminate against an employee of A's (B)-" ….*
>
> *"(c) by dismissing B;" ….*
>
> *"(5) A duty to make reasonable adjustments applies to an employer."*

87. Section 136 of the EA, so far as it is relevant, provides:

> *"**136 Burden of proof***
>
> *(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."*

88. Section 123 of the EA, so far as it is relevant provides:

> ***"123 Time limits***
>
> *Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of-*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks is just and equitable." ….*
>
> *"(3) For the purposes of this section-*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-*
>
> *(a) when P does an act inconsistent with doing it, or*

(b) if P does no inconsistent act, on expiry of the period in which P might reasonably have been expected to do it."

89. In *Matuszowicz v Kingston Upon Hull City Council* [2009] IRLR 288 the Court of Appeal decided that a failure to make a reasonable adjustment is an omission, not an act. Such an omission starts time running.

90. **Unfair Dismissal**

91. Section 94 of the ERA provides an employee with a right not to be unfairly dismissed by his or her employer.

92. Section 98 of the ERA, so far as it is relevant, provides:

*"**98 General***

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do," ….

"(3) In subsection (2)(a)-

(a) "capability," in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality," ….

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

93. In the case of dismissal on grounds of ill-health, the decision in *K Spencer v Paragon Wallpapers* Ltd [1976] IRLR 373 established that the basic question to be answered, as far as the fairness of the dismissal is concerned, is whether in all the circumstances the

employer can be expected to wait any longer and, if so, how much longer?

94. **Holiday pay**

95. Regulation 15(5) of the Working Time Regulations 1998 (the "WTR") provides that the notice requirements imposed on an employer who requires a worker to take leave may be varied by written agreement. A common contractual variation of this sort is to require an employee to take any outstanding holiday due on termination of employment during their notice period. An example of such a provision being upheld can be found in *Industrial and Commercial Maintenance v Briffa* EAT 0215/08. To achieve the desired result an employer must ensure the contractual obligation is clear and unambiguous.

96. The Tribunal was referred to *East Lindsey District Council v Daubney* [1977] IRLR 81, *Amies v Inner London Education Authority* [1977] ICR 308, *Calder v James Finlay Corpn Ltd (1982)* [1989] IRLR 55, *Barclays Bank plc v Kapur* [1989] IRLR 387, *Sougrin v Haringey Health Authority* [1992] IRLR 416, *Owusu v London Fire and Civil Defence Authority* [1995] IRLR 574, *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686, *Romec v Rudham* [2007] AER 206, *Chief Constable of West Yorkshire Police and West Yorkshire Police Authority v Homer* [2009] IRLR 262, *Royal Bank of Scotland v Ashton* [2011] ICR 632, *Conway v Community Options Ltd* UKEAT/0034/12, *Oxfordshire County Council v Meade* UKEAT/0410/14, *Basildon Academies Trust v Polius-Curran* UKEAT/0055/15, *General Dynamics Information Technology Ltd v Carranza* [2015] IRLR 43 (cited below at [2015] ICR 169) and *Lumsdon v Legal Services Board* [2015] UKSC 41.

CONCLUSIONS

97. **Were Mrs Clifford's claims, that the Company failed to make reasonable adjustments by reference to sections 20, 21 and 39 of the EA, made within the appropriate time limit? Do or would they succeed?**

98. Mrs Clifford claimed that a physical feature, namely available parking facilities, put her at a substantial disadvantage compared to someone without her disability because her mobility was impaired as a result of her disability. Mrs Clifford also claimed that the lack of an auxiliary aid, namely a lighter/aluminium chair put her at a substantial disadvantage compared to someone without her disability in that she needed to sit more because of her impairment.

99. Employment Judge Gray recorded the following in the List of Issues. Neither party has taken issue with it. The claim form was presented on 8 April 2021. Mrs Clifford commenced the Early Conciliation process with ACAS on 24 December 2020. The Early Conciliation Certificate was issued on 4 February 2021 (43 days to be counted between the two). Accordingly, any act or omission which took place before 28 November 2020 is potentially out of time.

100. On 18 September 2020 Ms Chaffe wrote to Mrs Clifford (see paragraph 64 above). Ms Chaffe made it clear that the Company was not going to provide adjustments to tackle either the issue of parking or seating. Applying *Matuszowicz* and subsections 123(b) and 123(4)(a) of the EA, that started time running as far as the failure to make reasonable adjustments claim was concerned. As the cut-off date, working backwards from the presentation of the claim (explained in the preceding paragraph) was 28 November 2020, these claims were a little over two months outside the primary time limit set out in section 123(1)(a) of the EA (suitably extended for conciliation). However, Mrs Clifford made an application that the claims be allowed to proceed on the basis that they were brought within such other period we think just and equitable by reference to section 123(1)(b) of the EA.

101. The decision on exercising the discretion to extend time on the just and equitable ground focusses on the balance of prejudice between the parties. The starting point, however, is to identify the reason why the claims were not brought in time. We understand Mrs Clifford's position to be that she was unaware of the time limits. It is clear from the evidence that Mrs Clifford's legal rights were under consideration at an early stage in the process. For example, on 7 April 2020 Mrs Clifford wrote to say she had obtained advice on her rights and before 23 April 2020 Mrs Clifford was pursuing them through ACAS (see paragraphs 38 and 43 above). When this is added to Mrs Tanisman's support, our conclusion is that Mrs Clifford had the resources to find out about any applicable time limits. Further, on Mrs Clifford's evidence (before it changed as a probable result of coaching) it was Mrs Clifford's assertion that the Company had refused to make reasonable adjustments as early as the end of February 2020. If that was how Mrs Clifford saw it, a claim was something that ought to have been investigated much earlier than the 18 September 2020 date we have identified. There is some prejudice in Mrs Clifford being prevented from pursuing the claim. However, that is counterweighed by the fact that the section 15 EA claim relies on the same factual matrix and no time point prevents Mrs Clifford pursuing that. There is little prejudice to the Company, which has dealt with the issues at this hearing. All in all, we do not exercise our discretion to extend time. We consider that Mrs Clifford had ample resource to discover the appropriate time limits and act on them.

102. These claims must, therefore, be dismissed because they were made out of time and we have no jurisdiction to hear them.

103. However, if we were to be wrong about this, it is proportionate to deal briefly with the issues in the way we would have dealt with them had we had jurisdiction.

104. The Company's knowledge of Mrs Clifford's disability and of the disadvantages referred to below would not have been an issue. The Company did know these things.

105. The substantial disadvantage compared to someone without Mrs Clifford's disability would be made out in respect of both the parking facilities and the seating arrangements.

106. In the case of parking the Company identified possible parking space, either on the road or in public car parks. However, the Company could not guarantee its availability. There would, therefore, have been no step that the Company could take to be sure the disadvantage would be avoided.

107. In the case of the seating arrangements, the Company could have provided Mrs Clifford with a portable light weight/aluminium chair. It would not, however, have been reasonable for the Company to have taken that step because it would have added to the weight Mrs Clifford would have had to carry. That would have run counter to the need to reduce the weight Mrs Clifford had to carry by, for example, the provision of a tablet instead of a laptop (which the Company did agree to do).

108. Therefore, these claims of a failure to make reasonable adjustments would have failed even if they had been in time.

109. **The claim that the dismissal was an act of discrimination arising from disability**

110. We now come to the bones of the case. It is about the dismissal and (borrowing the words of HHJ Richardson in *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169) *"the extent to which an employer was required to make allowances for a person's disability"*.

111. Dismissing Mrs Clifford, potentially falls within subsection 39(2)(c) of the EA.

112. The Company accepts that it knew of Mrs Clifford's disability at the relevant times. It also accepts that the dismissal was unfavourable

treatment because of Mrs Clifford's inability to return to her job in consequence of her limited mobility, attributable to her disability.

113. Therefore, the claim for discrimination arising from disability by reference to section 15 of the EA is made out, if the Company cannot show that the treatment was a proportionate means of achieving a legitimate aim.

114. The test is a two step test. Is there a legitimate aim? If so, was the treatment a proportionate means of achieving it? It is for the Company to show evidentially both the legitimate aim and the proportionate means.

115. Legitimate aim

116. Mrs Clifford accepted that the Company's concern to ensure her health and safety in the workplace was a legitimate aim. However, it is appropriate for us to make brief findings on the subject.

117. Possible legitimate aims are thoroughly pleaded by the Company at 95. Evidentially, however, we need look no further than the aims expressed by Ms Chaffe in her correspondence with Mrs Clifford. In her letter of 30 October 2020 to Mrs Clifford, Ms Chaffe only mentioned cost and the impact of Mrs Clifford's absence on the business (paragraph 68 above). However, in the dismissal letter of 24 November 2020, Ms Chaffe put forward health and safety concerns and possible consequences of any breach of those on the Company's liability insurance together with cost as reasons underlying the Company's decision making.

118. This is not a case where the Company relies principally on economic grounds. What the Company asserts is that its main concern was Mrs Clifford's health and safety in the workplace. The evidence supports that. In our view, the legitimate aim is made out.

119. Was dismissing Mrs Clifford a proportionate means of achieving the legitimate aim of ensuring that Mrs Clifford's health and safety in the workplace was safeguarded?

120. The test is objective and it is for the Tribunal to apply. We must engage in critical scrutiny by weighing the Company's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question and are necessary to that end.

121. HHJ Richardson in *Buchanan* identified that the purpose underlying discrimination law "*is to secure more favourable treatment for disabled people and it requires employers to assess on an individual basis*

whether allowances or adjustments should be made for them." Whether sufficient allowances or adjustments to meet the "proportionate means" test were made is the fact specific issue we must decide.

122. We record that, in reaching a conclusion on the claim of discrimination arising from disability (and the claim of unfair dismissal we come to below) we have taken no account of Mr Phillips' letter of 27 August 2020 (see paragraph 61). The Company had no contemporaneous knowledge of that letter and its actions are not to be judged with the benefit of that hindsight. The letter, however, would have been highly relevant on the subject of compensation if Mrs Clifford had succeeded in any of her discrimination or the unfair dismissal claims.

123. At this stage, we remind ourselves of the facts in summary form.

124. Mrs Clifford had been absent from her post for some 22 months before her dismissal. After 12 of those months, Mrs Clifford indicated her wish to return to work. Whilst Mrs Clifford's initial motivation for this was not driven by a wish to be furloughed, on the balance of probabilities, that became her aim. The Company did not want to put itself in a position in which it was furloughing a person who was unfit for work because its understanding was that was not permitted by the furlough scheme rules. Equally, it did not want Mrs Clifford to return to work when she was medically unfit to do so, because that would have been an issue in terms of her health and safety in the workplace. The Company, therefore, commissioned a health and safety consultant to speak to Mrs Clifford and advise the Company on his findings. The health and safety consultant reported back to the Company. Mrs Clifford disputes the content of that report but, on a balance of probabilities, it contained no material inaccuracies. It was not, however, the answer Mrs Clifford wanted to hear. At the same time, the Company asked Mrs Clifford to produce evidence of her fitness for work from her own medical advisers. Mrs Clifford did not do so. It is a fair conclusion that, again, this was because Mrs Clifford feared the wrong answer. Having failed to obtain clearance for Mrs Clifford to return to work either from the health and safety consultant (other than in an alternative role) or Mrs Clifford's own medical advisors, the Company opted for an occupational health report. In the meantime, Mrs Clifford had been suspended on full pay, effective 2 April 2020. The occupational health report, in terms, identified adjustments which would need to be made to allow Mrs Clifford to return to work in her former role. Ms Chaffe referred the possibility of the making of those adjustments and the question of whether they would achieve their aim whilst providing a safe place of work for Mrs Clifford, to the Assessment Group. On our findings, the Assessment Group was impartial. The Assessment Group

decided that the Company could not deliver the adjustments in a way that guaranteed Mrs Clifford's health and safety in the workplace. Although, at the time, taking detailed issue with that conclusion, Mrs Clifford does not now disagree with it. Rather, Mrs Clifford says that the risks were either non-existent or so small that the Company should have taken them. That was the ground that was fought over from the date Ms Chaffe summarised the Company's conclusions in a letter to Mrs Clifford on 18 September 2020 until Mrs Clifford was given notice by letter dated 25 November 2020.

125. Whilst the process is not the focus of the balancing exercise, it does demonstrate some of the issues that contribute to that exercise. Looking at the detail of the evidence summarised in paragraph 124 above, it seems to us that there are two specific areas of necessary enquiry.

126. The first of these is best expressed as a question. Was the Company's interpretation of what it had to do to secure a safe place of work for Mrs Clifford over rigorous to the point that it was disproportionate? Our starting point in answering this is Soole J's direction in *Birtenshaw*: *"The Tribunal's consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly: see O'Brien."*

127. The decision that the Company could not make the adjustments in a way that delivered a safe place of work for Mrs Clifford was made by the Assessment Group. We have referred to this above (see paragraphs 51-58 and 63). The Assessment Group appears to have acted rationally and responsibly and, according to the Assessment Group the substantial degree of respect urged by Soole J, we see no grounds for doubting the decision made. Indeed, Mrs Clifford agrees there was no guarantee that a safe place of work could be provided for her. We cannot, therefore, agree with Mrs Clifford's further argument that, notwithstanding, the Company should have taken whatever small risk was involved. That was a matter properly left to the Assessment Group, which had decided otherwise.

128. The second area of enquiry is whether the Company did enough to explore alternatives for Mrs Clifford. The possibility of alternative roles was mentioned by Mr Peters and the Assessment Group. We think this is best considered by answering three questions. Was there an alternative role? What did Ms Chaffe do to give Mrs Clifford the opportunity to consider any such role? What was Mrs Clifford's view of any such role?

129. Was there an alternative role? On the evidence, no such role existed. Rather, it was to be created as a two day a month off-the-job training role based at the Company's premises in Newton Abbot. It was intended to be temporary pending surgical intervention on Mrs Clifford's right knee, which, hopefully, would allow a full return to work.

130. What did Ms Chaffe do to give Mrs Clifford the opportunity to consider any such role? What was Mrs Clifford's view of any such role? We have made detailed findings of fact on this subject at paragraphs 70-73 above. Ms Chaffe originally outlined the role in her letter to Mrs Clifford on 11 November 2020. This was accompanied by a 7 day deadline for acceptance or refusal. On 16 November 2020 Mrs Clifford asked for more detail. Ms Chaffe's response the same day was to give details of the location but otherwise to say that she could not add to her letter of 11 November. That was not helpful. However, Ms Chaffe did not believe that Mrs Clifford had any interest in a 2 day a month role, which Mrs Clifford had described as a joke and insulting. Rather, Ms Chaffe saw this as a continuation of the argument about whether there was any real risk in making the adjustments. In our view, there was justification for Ms Chaffe's viewpoint. This is confirmed in Mrs Clifford's comments in her email of 18 November 2020 (see paragraph 73 above). To this must be added the evidence that Mrs Clifford did not believe the role would accommodate all the adjustments recommended by the occupational health report.

131. Our conclusion, therefore, is that what the Company did about alternative employment was, on balance, proportionate, although by no means beyond criticism.

132. Turning to the overall applicable test and balancing exercise, the Company's principal justification for dismissing Mrs Clifford was that it could not ensure a safe workplace for her. The impact of dismissal was significant for Mrs Clifford. Mrs Clifford lost any prospect of returning to the job she had enjoyed and been successful at. From the Company's perspective, there was no credible timescale for the surgical intervention that would probably improve matters for Mrs Clifford and enable her to return to her role. Further, contrary to the Company's conclusions, Mrs Clifford was insisting that she could return to her role and the Company should take any small risk to her health and safety in the workplace. In the meantime, Mrs Clifford was on full pay. Mrs Clifford had co-operated with the occupational health report but had otherwise refused to help by providing any views from her own medical advisors. In these circumstances, it was proportionate for the Company to achieve its legitimate aim by breaking the deadlock. There were other courses of action open to the Company that would have lessened the impact on Mrs Clifford. We have mentioned the possibility of alternative employment. Mrs Clifford had no real interest in a two day

a month job which, in any event, she did not think addressed the recommended adjustments. The Company could have elected to ask Mrs Clifford to leave matters as they rested, with Mrs Clifford suspended on full pay. That, however, would not have resolved the issue nor would it have provided a way forward to resolving it. It is our conclusion the Company has shown that dismissing Mrs Clifford was a proportionate means of achieving its legitimate aim in all the circumstances.

133. Mrs Clifford's claim of disability related discrimination is, therefore, dismissed.

134. **The unfair dismissal claim**

135. It is for the Company to show a permissible reason for the dismissal and it puts forward capability. On the evidence, the Company has shown that to be the principal reason for the dismissal.

136. We also accept that the Company genuinely believed that Mrs Clifford was unfit for her role because no adjustments could be made that would guarantee her a safe workplace and that this would remain so for an indeterminate time. The Company could not reasonably be expected to wait longer before dismissing Mrs Clifford in the absence of a credible timeframe for treatment.

137. There was a reasonable investigation through the means of the Peters' Report, the occupational health report and the deliberations of the Assessment Group. Ms Mclean and Ms Chaffe consulted with Mrs Clifford. In Ms Chaffe's case this was always difficult because she was the bearer of bad news and unwelcome questions. The essential problem with the consultation was that it was an argument from two opposing points of view. Ms Chaffe's position was that the Company could not make adjustments that ensured a safe place of work for Mrs Clifford whilst Mrs Clifford sought to persuade her that the Company should take the risk. There was no meeting of the minds because their respective positions did not change.

138. In the circumstances, dismissal was within the range of reasonable responses. We repeat our findings in paragraphs 128-131 above on the subject of possible alternative employment.

139. There was a failing in that Mrs Clifford was not, despite asking for them, provided with copies of the notes from the two meetings of the Assessment Group. However, the findings were set out in Ms Chaffe's letter of 18 September 2020 to Mrs Clifford and the minutes would have added nothing to the picture. In context, although it is good practice to

provide such material to an affected employee, this did not put the procedure outside the band of a fair procedure.

140. Mrs Clifford's claim of unfair dismissal is, therefore, dismissed.

141. **The holiday pay claim**

142. To recap, the contract of employment included this: *"12.9 The Employer reserves the right to require you to take any unused holiday entitlement during your notice period,"* and the letter of dismissal included this: *"We are requiring that some of your unused holiday entitlement is taken during your notice period as per your contract of employment. As you have 4 weeks' notice, we require that 3 days holiday is taken per week of notice."*

143. We see no ambiguity. The Company reserved a right and exercised it. Applying *Industrial and Commercial Maintenance v Briffa* the contractual provision varied the Company's obligation to give notice under regulation 15 of the WTR. As in that case, we note that the health and safety purpose of the WTR is to ensure that workers take sufficient paid holiday. This purpose has been fulfilled in this case. Mrs Clifford was not required to attend work during her notice period. Mrs Clifford was not signed off sick during that period and we do not see that the fact that she was technically suspended whilst clarifying her fitness to work affects the position.

Employment Judge A Matthews
Date: 9 February 2023

Judgment & reasons sent to the Parties:
22 February 2022

FOR THE TRIBUNAL OFFICE