Case No: 1807269/17

EMPLOYMENT TRIBUNALS

Claimant: **Ms N Mawdsley**

Respondent: **East Riding of Yorkshire Council**

Heard at: **Hull** **On: 15 and 16 May 2018**

Before: **Employment Judge Maidment**
Members: **Mr M Weller JP**
Mr K Smith

Representation
Claimant: **Mr P Morgan, Counsel**
Respondent: **Mr B Frew, Counsel**

RESERVED JUDGMENT

The Claimant's complaints alleging a failure to make reasonable adjustments pursuant to Section 20 of the Equality Act 2010 and unfavourable treatment arising from a disability pursuant to Section 15 of the Act are well founded and succeed.

The Claimant's complaint of unauthorised deductions from wages is dismissed upon her withdrawal of it.

REASONS

The Facts

1. The Claimant's complaints are all of disability discrimination. She lodged her Employment Tribunal complaint on 18 December 2017 and remains in the Respondent's employment. It was confirmed by the Respondent that no point was being taken that any of the Claimant's complaints were brought outside of the applicable time limits. The Claimant has confirmed her withdrawal of a complaint in respect of an alleged unauthorised deduction from wages in respect of sick pay entitlement. It is admitted by the Respondent that the Claimant was at all material times a disabled person by reason of her suffering from rheumatoid arthritis, an above the knee amputation of her left leg and dyslexia.

2. The Claimant's primary complaints are of an alleged failure on the Respondent's part to comply with a duty to make reasonable adjustments. The relevant PCPs identified are, firstly, a requirement for a social worker in the Looked After Childrens ('LAC') team to carry out their full duties, secondly a requirement to undertake work-related travel and, finally, a requirement to work in an office environment with high level of noise (this final PCP relates to the Claimant's dyslexia impairment only). In terms of reasonable adjustments sought, these are identified as the redeployment of the Claimant to a suitable office based (i.e. non travelling) role, with some examples being given, but ultimately reliance being placed solely on redeployment to the position of adult social worker at the Bridlington/Scarborough hospitals.

3. The Claimant then brings a freestanding complaint of discrimination arising from disability in respect of the withdrawal on 26 July 2017 of an offer of redeployment to the aforementioned hospital role.

The Evidence

4. The Tribunal had before it an agreed bundle of documents containing some 645 pages. Having identified the issues with the parties, it took some time to privately read into the witness statement evidence exchanged between the parties and relevant documents referred to.

5. The Claimant's UNISON union representative, Mr Paul Swarbrick gave evidence first followed by the Claimant herself. The Tribunal then heard on behalf of the Respondent from Tom Denham, formerly a Human Resources Adviser and Rebecca Leeman, LAC Team Manager.

6. Having considered all the relevant evidence the Tribunal makes the findings of fact set out below.

The Facts

7. The Claimant had been employed by the Respondent since 11 September 2004 and from May 2010 was employed as a Children's Social Worker within the Bridlington LAC Team. In November 2016 the Claimant's base moved to Beverley and she reported to Rebecca Leeman, LAC Team Manager.

8. The Claimant is a disabled person by reason of her suffering from rheumatoid arthritis, an above the knee amputation to her left leg and dyslexia. Those impairments caused her difficulties with a range of activities requiring strength and dexterity in her hands and wrists as well, as with her mobility and spelling/concentration. That was not in dispute.

9. The Claimant was referred to occupational health who produced a report dated 14 August 2013 stating that the Claimant might benefit from a different keyboard for use with her laptop and also reporting that the Claimant had become increasingly tired recently and would like to discuss the possibility of reducing her hours.

10. A further occupational health report of 21 January 2014 noted that the Claimant was then currently progressing a request for early retirement on the grounds of ill-health. However, the Claimant remained in the Respondent's employment, as explained below. A subsequent letter to the Claimant from Julie Harwood, her previous manger, of 20 February 2014 referred to them having discussed a list of aids and adaptations provided to the Claimant which was said to include a specific chair, hand rest, VDU stand, stool, dyslexia package, extra support for dyslexia (of which the Claimant had attended three sessions), easy access to the workplace on one level with no stairs and disabled parking.

11. The Claimant said in cross-examination that she had not received the dyslexia package or all of the functioning adaptations until sometime later. She said that Julie Harwood did not allow her to go to all of the extra support meetings due to her high workload.

12. By the point of this letter the Claimant had in fact been absent from work since 10 October 2013. At a case conference held with her on 26 February 2014 options were discussed for a possible return to work of the Claimant. This included her returning to her substantive full-time post with a phased return of up to 6 weeks together with any additional aids recommended by occupational health. However, if ill-health retirement was approved notice would be given to the Claimant of her leaving employment. If it was not approved then notice of termination might be given on the grounds of "*unresolving ill-health*". It was recorded that the Claimant had expressed a wish to return to work part-time. The Claimant confirmed that her GP was now happy to support a return to work, but not full-time and with a phased return and reasonable adjustments in place. She said that she felt better now and would like to work 4 days per week or compressed hours. She did not believe she would meet the criteria for Tier 1 ill-health retirement. It was recorded that the statement of the Claimant's GP contradicted what he originally stated in support of her ill-health retirement application. The Claimant repeated her request to return on part-time basis confirming that she was able to carry out all aspects of her role.

13. When asked in cross examination about this possible contradiction, the Claimant referred to her sickness having in part been related to the bullying behaviours of a previous manager who had now left.

14. The Claimant in fact remained absent from work until 31 March 2014 and returned on a full-time basis. She had one day's absence due to a stomach upset on 13 November 2014 but no further absences until 3 June

2015. The reason for this absence was recorded as being stress. An occupational health report was produced dated 20 July 2015 which recorded the Claimant as attending counselling which she found to be beneficial. The occupational health advice recorded that the Claimant had advised that she now wished to be considered for ill-health retirement. The opinion was given that the Claimant remained unfit for work in any capacity and the Claimant advised that this was likely to continue for the foreseeable future.

15. The Claimant, however, attended a case review meeting on 2 December 2015 where the Claimant expressed a hope to return to work on 5 January 2016 on a 3 day per week basis. This was dependent upon a job share partner being found for the Claimant. The Claimant told the Tribunal that she had wanted to reduce her working days down to 4 days per week but the Respondent said that was not feasible in the context of them having to try to recruit an individual to just cover 1 rather than 2 days per week. The Claimant's reduction in working hours to 22.5 per week was confirmed in a letter to the Claimant of 26 January 2016. A further occupational health assessment took place on 24 February 2016 which recorded that the Claimant had requested consideration for ill-health retirement, but now wished to remain at work on a part-time basis. The Claimant had been signed off as fit to work, but was using her outstanding holiday leave until a return to work on a phased basis from 21 March 2016. The letter also confirmed that a trolley bag had been provided and a recommendation for pen grips to be purchased to assist the Claimant in her duties.

16. The Claimant indeed return to work on the 3 day per week basis. The Claimant attended regular monthly supervision meetings with Ms Leeman which provided an opportunity for her to raise any matters of concern in terms of her health and welfare. These included meetings on 21 March, 13 April, 4 May, 27 June, 25 July, August, 7 September, October and 1 November 2016 and 24 January, 20 March, 11 April and 25 April 2017. The Claimant in fact from summer 2016 worked an extra day each week, which the Claimant considered was necessary because of the high workload and she felt indeed that she was effectively doing a full-time job within part-time hours. Ms Leeman agreed to reduce working days back to the original 3 days per week from 24 November 2016. The Claimant said in the supervision that she had been happy to work the extra day as it would help the service and also she felt it was part of her agreed working pattern that she would show such flexibility.

17. The Claimant agreed that in general terms she was supported by the LAC team. The Claimant, however, had expressed at her supervision in August 2016 that she was struggling to complete court statements to a standard which satisfied Ms Leeman. She said to the Tribunal that she did the best she could but that this was never good enough for Ms Leeman, who compared her to people who did not suffer from dyslexia. She said that she felt that Ms Leeman put her down in keeping telling her to do the

statements again and saying at one point that she would give one of the statements to a student to amend.

18. The Claimant also at the August 2016 supervision raised the issue of her travelling and Ms Leeman's evidence was that she said that the Claimant's trips should be spread out rather than be concentrated in any one week. The Claimant's evidence was that a significant amount of work-related travel was necessary in her LAC role, involving her driving to meet with children in the Respondent's care and their placement families. The evidence was that in December 2016 she had completed 964 business miles, in January 2017 631 business miles, including a 220 mile round trip to Bury, in February 2017 she completed 684 business miles including another trip to Bury and in March 550 business miles including another such trip. In April she had completed 648 business miles. The Claimant said that, when required to go to Bury, she would not arrive home until sometimes as late as 8:30 pm working effectively, she said, a 12 hour day. She could in theory take back extra hours as additional time off but said that she never got the chance to do so in the context of her working only a 3 day week.

19. The Claimant had not made any specific complaint or raised a particular concern regarding her ability to cope with work when she went back working 3 days per week, but said that she felt there was no point complaining about something which could not be changed

20. At the supervision on 24 January 2017, the Claimant raised issues regarding noise levels in the office. Subsequently noise screens were put in place and staff were advised not to shout across the office so as to keep noise levels down. The Claimant worked in a large open plan area accommodating around 40 staff. By March 2017 an issue arose regarding deadlines given to the Claimant to complete work plans which she was struggling with. Reference was made by Ms Leeman to the Respondent's policies regarding capability and conduct. The Claimant's view was that the work took her a bit longer because of her dyslexia and she needed both more time and a quiet environment to complete her work.

21. By the April 2017 supervision Ms Leeman had taken advice from human resources and discussed implementing an informal action plan to review the Claimant's performance on a weekly basis for a period of a month.

22. The Claimant was then absent again from work due to her rheumatoid arthritis from 26 April 2017 until a return only on 4 January 2018 after her submission of this Tribunal complaint on 18 December 2017. As a result of the Claimant's sickness absence, Ms Leeman emailed occupational health and human resources on 23 May requesting a review meeting because the Claimant remained off sick and had confirmed that her GP would not sign her fit for work and that she had stated that she wanted to pursue ill-health retirement again. It was noted that the Claimant's working

hours had been reduced to 3 days per week but that the Claimant had explained that she had tried this for 1 year and her health was deteriorating.

23. Around this time the Respondent was experiencing difficulties with its occupational health advisor such that referrals could not be completed within usual timeframes.

24. A case review meeting did take place with the Claimant on 23 June 2017. Mr Denham, Human Resources Adviser, was present to take notes. The Claimant was accompanied to this meeting by her union representative, Paul Swarbrick. Following the meeting, Ms Leeman wrote to the Claimant confirming what had been discussed. This was sent some 4 weeks after the meeting from Mr Denham's notes of it which were written up to form the basis for Ms Leeman's letter, again, some time after the meeting itself.

25. The meeting was said to be a review in line with the Respondent's attendance at work policy, but the Respondent discussed options for the Claimant given that she did not anticipate being able to return to her current post. The Claimant referred to the criticism of her written work and that she was not able to do any more.

26. It was recorded that the Claimant stated that, despite the reduction in her hours, she had found when finishing work on a Wednesday evening that she required extensive time to rest and recover which was impacting on her quality of life outside of work. There was a discussion regarding any further adjustments, but it was recorded that the Claimant said that she felt there was nothing at this stage which could be done. It was agreed that the Claimant would be put on the Respondent's redeployment register to explore whether any other roles were available. The possibility of submitting a further application for ill-health retirement was also discussed, it being explained that before such application could be considered there needed to be a full exploration of the options to retain the Claimant in employment. Should, after exploring redeployment options, the Claimant be unsuccessful in finding an alternative role, then her application for ill-health retirement would be progressed. Mr Denham considered that the main focus of the meeting did turn to ill health retirement, but that was due to the Claimant giving the impression that she was suffering from a permanent incapacity.

27. The Claimant was adamant that she had raised her problems with driving at this meeting albeit no reference was made to that within Ms Leeman's summary. Mr Swarbrick also recalled driving being mentioned, including the length of time spent driving and the distances covered, but Ms Leeman was of the view that it had not been. Mr Denham was unclear in his recollection saying that he didn't recall any *"in depth"* conversation about travel. When Mr Denham drafted the subsequent ill health retirement application he referred to lifting items out of the Claimant's boot,

conceding that this had been discussed although not referred to in the letter confirming the discussions. The reference here to unloading the Claimant's car makes it more likely that the issue of the Claimant driving the car had also been mentioned. He said that the letter was "*a summary*" containing the key (not all) information. As part of a subsequent grievance appeal, Mr Denham had been asked whether office noise and driving had been discussed at a second meeting in September. He confirmed that they had been. He then said that driving probably had been mentioned earlier than that and at the June case review. He said they had probably discussed driving but at the time they had the impression that the Claimant was unlikely to return to work. When Mr Swarbrick wrote subsequently to Mr Smith of Human Resources on 8 August, as described below, referring to the Claimant's issues with travel (correspondence Mr Denham saw at the time) Mr Denham did not respond and suggest that this had never been discussed. The Claimant's and Mr Swarbrick's evidence was straightforward and Mr Denham's own evidence suggests that their account is more likely than not to be accurate. The Tribunal finds that the Claimant's difficulties with the amount of driving involved in the LAC role were referred to at the review meeting.

28. The Claimant met with Ms Potter of human resources after the 23 June meeting to discuss the redeployment process and complete a form to include, amongst other things, the Claimant's preferences in terms of possible redeployment. This recorded the Claimant's current hours of 22.5 per week and the health issues she suffered from. It referred to her mobility, needing to use a walking stick, her need to use a lift rather than walk up multiple flights of stairs, her dyslexia and the impairments in her movement of her elbows and wrists due to her arthritis. As regards unacceptable work, the Claimant referred to wanting no manual work and nothing which involved long periods of walking or long distances. She also did not want to work in a loud busy office saying that she needed her own desk and was *"not agile working without a base"*. In terms of what was acceptable she referred to a job in adult social care or the fostering/adoption team. In terms of grade she said that she would not want a grade lower than SCP 35 unless there were increased hours and would consider a job at SCP 31 in the right role. She referred to wanting a minimum of 22.5 hours up to a maximum of 30 hours per week. The Claimant accepted that within this form she did not make any reference to driving, she said, not realising that the form was so important or viewed rigidly saying that she changed her work preferences later to be more specific.

29. The Claimant was provided with a Personal Liaison Contact ('PLC'), initially Graham Shields. However, prior to his appointment, as part of the redeployment process, the Claimant was made aware by human resources of 3 possible alternative roles. The Claimant applied for one of the roles, of social worker with the adult services hospital team working out of Bridlington and Scarborough hospitals on a full-time, 37 hours per

week, basis. Mr Shields shortly thereafter became aware of the Claimant's application.

30. In the meantime, Mr Denham, had commenced drafting an ill-health retirement application form on behalf of the Claimant which he emailed through, partially completed, to Ms Leeman for her consideration on 12 July. The application was for the Claimant to be allowed to retire on enhanced benefits on the basis of her being permanently incapable of discharging her duties in her normal occupation. The form explained the adjustments which had been made to the Claimant's role including the shorter working week, but recorded then that the Claimant did not feel able to return to work and did not envisage a return being possible. It was recorded that the Claimant had been added to the redeployment register but that, whilst this option had been made available, it was unlikely that a suitable alternative would be found whilst the Claimant experienced the same levels of discomfort in her hands due to arthritis.

31. However, the Claimant attended an interview for the hospital social worker role with Mr Scott Rayner, Team Manager, on 14 July. He emailed Mr Shields on 14 July confirming that he would offer the Claimant a 4 week work trial in this position. He went on to say: *"I do have some concerns about her well-being as she expressed that pressure and performance measurement in her current role had led to her current absence from work. Hospital roles do require high levels of personal resilience and I would not want this to further impact on her. However, we did explain the role and she appeared keen to accept the job."* The Tribunal accepts the Claimant's evidence that she told Mr Rayner about her health issues and finds that Mr Rayner was aware that the Claimant was in the Respondent's redeployment pool on the basis of long-term ill-health absence. The Claimant said that she discussed with Mr Rayner the level of performance needed in the new role including in respect of report writing which was not so substantial and crucial as that involved in writing statements for use in court. The Claimant, in discussion with Mr Rayner, was of the view that the hospital role was not similar to her current position.

32. Mr Shields informed Mr Denham of the Claimant's job application on 18 July 2017. Mr Denham requested details of the role applied for as he was concerned that it was of a similar nature to that which she currently performed and she had said she was no longer able to undertake.

33. Mr Denham spoke to the Claimant briefly by telephone on 18 July to understand where she was coming from in applying for the hospital post. There was no discussion, on the balance of evidence, about the differences between the 2 roles. Her application was at variance with Mr Denham's understanding of her capabilities. It was left that the Claimant would speak with her GP as regards her fitness to return to work. Mr Denham also spoke to Mr Rayner but without disclosing to him any information about the Claimant's health.

34. Mr Denham telephoned the Claimant on 25 July and expressed his concerns. The Claimant had by then obtained a further fit note from her GP which provided confirmation that the Claimant might be fit for work with amended duties and workplace adaptations. The Claimant's doctor recorded their discussion regarding a changed workplace (office based) with normal adaptations in place as regards her chair and computer keyboard as well as a dyslexia screen. He recorded on the fit note that this was on the basis of a trial period from 31 July 2017. Mr Denham did not feel the need to seek any further clarification or consider a referral at that point to occupational health. The Claimant in cross-examination was again adamant that, whilst the doctor did not refer to this, she had explained that the role was for 37 hours per week. Her uncontested evidence was that a trial had been agreed with Mr Rayner because the role was so different from her existing position. She also referred to her understanding of 'office-based' as meaning that she would stay in one building each day i.e. she would work in either offices or wards in the Scarborough hospital or in the Bridlington hospital, but not otherwise travelling around to see clients. The Claimant referred to the hospitals as being disability adapted environments already, where she would be able to get around on a level using lifts where necessary.

35. Mr Denham did not agree with the Claimant's assessment of the role regarding it not as (in his interpretation) an office based role but one where she would need to be mobile across the hospital. Again, the Claimant described the need for her to be mobile in the hospital role to be completely different to the need for her to drive around the county and beyond in her LAC role. Mr Denham also thought that there was a *"complicated office arrangement"* at the hospitals with the need for the Claimant to share an office with NHS employees based on site. The Claimant said that an office was shared with two nurses and two social workers but each had their own desk and apart from Wednesday mornings it was rare that everyone would be at work at the same time. Again, the Claimant's current role involved her working in an open plan space with around 40 others.

36. On 26 July Mr Denham wrote to the Claimant referring to their telephone conversation the previous day. He referred to her application for the position within the hospital team having been made under the redeployment policy following the case review at which she had said that she did not foresee a return to work to her substantive 22.5 hours post. He went on: *"When reviewing the duties of your substantive post against that of the full-time social worker post whilst they do sit within different services there are no appreciable difference in the duties. Therefore should you be fit to return to the full-time post it is considered reasonable that you would also be in a position to return to your substantive duties on 22.5 hours per week and therefore your eligibility for redeployment no longer applies. I appreciate that you may be disappointed by this decision but I would like to reassure you that should you return to your substantive post on Monday*

31 July 2017 you will continue to be supported… I would like also to confirm that whilst application for the post of Social Worker within the Hospital Team will no longer be considered as a redeployee situation it will continue to be considered in the wider recruitment process with other applicants." Mr Denham also confirmed to Mr Shields that at this moment in time the Claimant was not eligible for redeployment.

37. Again, the Claimant profoundly disagreed with Mr Denham's assessment that the two jobs were similar. In evidence, she referred to the new job involving her working fixed hours of 8:00 a.m. to 4:30 p.m. travelling one way to and from work. She would work in a downstairs office on the level and be able to plan the assessments she had to carry out. She could then reach to the hospital wards using the lifts and in the adapted hospital environment and then be able to sit at a patient's bedside. She would not need to carry or lift significant items. Unless she was travelling to Bridlington instead of Scarborough there would be no additional travel involved. No longer would she be running after children when taking them out on visits or travelling to between 5-7 foster carers on a working day including travelling to places as far afield as Bury. She felt that she wanted to continue as a social worker and Mr Denham had taken away her opportunity and choice. The new role would be in a quieter working environment without the need to complete court documents and care plans.

38. Mr Denham's view was that the Claimant's abilities remained unclear and it was appropriate to review whether she could still do her current role. He did not see this as somehow starting the process from scratch (as was put to him) in that earlier conversations with the Claimant would still inform their new discussions.

39. The Claimant telephoned Mr Denham to express her frustration and disagreement with his decision. She outlined the differences she saw in the respective roles to Mr Denham.

40. On 8 August 2017 Mr Swarbrick emailed Mr Denham stating that he had rejected an alternative post which would have better accommodated the Claimant's disabilities. He said this would have ensured she remained at work and would have been better for her financially due to the increase in hours. He asked for the reasons for Mr Denham's decision to be put in writing.

41. Rather than provide them or reconsider his decision, Mr Denham saw this as an appeal against his decision which was therefore to be escalated. The correspondence was passed to Mr David Smith, Head of Human Resources. Mr Swarbrick emailed Mr Smith on 22 August saying that the new post offered the Claimant the opportunity to apply reasonable adjustments which she could not in her substantive post. Mr Smith responded on 30 August stating that Mr Denham had been concerned

about the Claimant's suitability for the post applied for. Mr Swarbrick said then that he had been at the case review meeting and that the reduction in the Claimant's hours of work in her LAC post had been due to the inability to make reasonable adjustments to it to allow her to use the dyslexia equipment and due to the impact on her of the amount of travel. He said: *"Her successful application for the 37 hour Adult Social worker post involved an intrinsically different job in terms of travel and location which enabled Nicola to accept. In effect Reasonable Adjustments through Redeployment."* Mr Smith again responded to Mr Swarbrick on 12 September 2017. He referred to the Claimant as having said there were no adjustments which could be made to her substantive role to facilitate a return to work, but that number of further adjustments could be explored such as ensuring she could use the dyslexia equipment through prearranged administration time in a quiet space or with prearranged working from home. He said that this might also reduce the amount of travel. He referred to the redeployment form as expressing a wish to consider a maximum of 30 not 37 hours per week.

42. Mr Smith instructed Mr Denham to conduct a further case review meeting which was arranged for 29 September. The Claimant also took the opportunity to revise her redeployment preference form saying in evidence that she had not realised that what she originally stated would be treated as gospel and that she could not vary what she had said. The new form included as an unacceptable role one which involved significant driving over and above the current role especially where long distances were required. She revised the maximum number of hours she was able to work each week to 37 per week. At the case review meeting the Claimant said that *"distance driving"* was the main concern for her and in the current role driving long distances had led to her feeling exhausted. Ms Leeman said that the Claimant's diary could be managed to avoid consecutive days of significant driving. As regards contact work, the Claimant explained that the children's activity centres she had to visit were not controlled by her and it could be difficult for her to walk longer or in environments which were not suited to her walking difficulties. Ms Leeman said that changes had been made within the service and a new contact team based at Beverley would be responsible for the majority of contact sessions. There was discussion then of the office environment and the Claimant outlined, point by point, the adjustments she believed were required.

43. It was agreed that a further occupational health referral would be made which was submitted on 10 October. The Claimant's access to the redeployment register recommenced and the Claimant was assigned a new PLC, Philip Arnell, due to the retirement of Mr Shields. As a redeployee the Claimant applied for 5 roles, four of which were social worker positions. An occupational therapist role she applied for was not one for which she possessed the necessary qualifications.

44. The Claimant's occupational health appointment took place in fact on 10 November. Their report was produced on 27 November which outlined

that the Claimant felt unable to return to her substantive post adding that from a medical perspective an increase in hours had the potential to increase fatigue and for increased symptoms from the Claimant's rheumatoid arthritis and fibromyalgia. The Claimant, in cross examination, said that her expressed desire for part-time hours when she saw occupational health was with reference to her current role. The Tribunal accepts such evidence as consistent with the Claimant's view of the hospital role. She couldn't, in her view, do the hours in the current role but the suitability of the alternative hospital role made working, indeed longer hours, a lot easier. The report concluded the Claimant was fit enough to return to work and that of the posts applied for, the hospital post provided the opportunity for some adjustments, that there would not be a need for work to be undertaken in client homes and the working environment in the hospital was favourable to the Claimant in terms of her ability to use lifts. An individualised risk assessment was recommended to be carried out of the hospital position.

45. Mr Denham wrote to the Claimant on 28 November noting her preference to undertake the work trial within the hospital team. He said they would look to arrange a meeting with Mr Rayner in advance of her starting to discuss the need for any relevant training. He said that he would propose increasing the trial to a 5 week period with the first week allocated to the Claimant's induction. The Claimant would not necessarily be required to work full-time hours during that induction week and the trial period could then be reviewed at the end of the third week worked on full-time hours to decide whether any further extension beyond the 5 week period was required.

46. In the meantime, the Claimant had lodged, on 5 October 2017, a formal grievance relating to the redeployment process citing discrimination based on her disabilities and referring to the failure to assess her conditions, refer her to occupational health and the unilateral withdrawal by human resources of a successful job offer through redeployment. The grievance was investigated by Grace Davidson, Service Manager and the Claimant was invited to a meeting which took place on 16 November. The response to the Claimant's grievance was issued on 1 December. As part of the grievance outcome it was outlined that despite reservations from management and occupational health, taking into account the insistence and petitioning by the Claimant and her trade union representative, the Claimant would be supported in a work based trial as a redeployee in a role of her choosing.

47. A further case review meeting took place on 5 December before Mr Denham who was by now aware of the outcome also of the Claimant's grievance i.e. that she would be considered for full-time social worker roles. The Claimant expressed still that her preference was to work a trial in the hospital social worker post and she was informed that the other vacancies which had been held pending a decision would be released for open recruitment.

48. The Claimant attended the hospital site on 5 January 2018 and prior to her induction was involved in a safety assessment with Mr Denham and Rob Couch, Principal Safety Officer as well as Elaine Kirby, a social worker based in the hospital team. A chair similar to that used by the Claimant in her previous post was identified for her. A number of suggestions were made by Mr Couch in terms of the Claimant's desk layout including space for the provision of a larger screen. Solutions were to be looked into as regards voice recognition. They then undertook a tour of the hospital site including some of the main wards where the Claimant would be required to work. Mr Denham still considered that the Claimant would be required to walk significant distances (up to 10 – 15 minutes to the furthest ward) but he noted that the Claimant navigated the site well and lifts were available throughout. There were a number of doors to open on site but, again, these were not thought to pose a significant difficulty.

49. The Claimant's trial period in the hospital role started, as agreed, on 8 January 2018. A review of the trial took place on 8 February which included Mr Rayner and Mr Denham together with Mr Swarbrick. The Claimant and Mr Rayner stated that things had gone well and the Claimant said that she felt like should settle into the role well and was not experiencing any difficulties with regards to fatigue or tiredness. Mr Rayner explained that he was pleased with the quality of the work the Claimant was producing. In the week following the meeting, the Claimant was confirmed in post on the basis of the completion of a successful work trial and the redeployment process ended accordingly.

50. The Claimant appealed the grievance outcome on 14 December and this was heard by Mr Kevin Allen, Service Manager on 17 January 2018. His outcome was provided on 5 March 2018.

Applicable Law

51. The duty to make reasonable adjustments arises under Section 20 of the Equality Act 2010 which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

> *"(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."

52. The Tribunal must identify the provision, criterion or practice applied/physical feature/auxiliary aid, the non disabled comparators and the nature and extent of the substantial disadvantage suffered by the Claimant. 'Substantial' in this context means more than minor or trivial.

53. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

54. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which as well as the employer's size and resources will include the extent to which taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

55. In the case of **The Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation when it deals with reasonable adjustments is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."* Pursuant, however, to **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**, there only needs to be a prospect that the adjustment would alleviate the substantial disadvantage, not a 'good' or 'real' prospect.

56. It is not permissible for the Tribunal to seek to come up with its own solution in terms of a reasonable adjustment without giving the parties an opportunity to deal with the matter (**Newcastle City Council –v- Spires 2011 EAT**).

57. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the Respondent to have to take in order to prevent the PCP/physical feature/lack of auxiliary aid creating the substantial disadvantage for the Claimant. This is an objective test where the Tribunal can indeed substitute its own view of reasonableness for that of the employer. The Tribunal accepts Mr Frew's submission that this is not an assessment to be conducted with hindsight, but must be based on all the information the Respondent actually had at the point the duty arose or which it ought reasonably to have obtained or considered. It is, however, also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

58. In the Equality Act discrimination arising from disability is defined in Section 15 which provides:-

> *"(1) A person (A) discriminates against a disabled person (B) if –*
> *A treats B unfavourably because of something arising in consequence of B's disability, and*
> *A cannot show that treatment is a proportionate means of achieving a legitimate aim."*

59. Applying the legal principles to the facts, the Tribunal reaches the following conclusions.

Conclusions

60. It was made clear on behalf of the Claimant that she had no issues with the Respondent's actions once her grievance had been upheld and an effective block was removed on her starting in the adult social worker hospital position. Her complaints focused on the decision of Mr Denham on 26 July 2017 to revoke the Claimant's membership of the redeployment pool and revert to a discussion regarding a return to work in her original LAC role.

61. The Tribunal has already concluded on the balance of evidence that the Respondent was aware as at 23 June of the Claimant's (very real) physical difficulties in travelling to different locations and for longer distances. The Respondent was also aware of the Claimant's concerns regarding a noisy environment and how this impacted her ability to concentrate and complete her work due her being impaired by dyslexia.

62. The PCPs relied upon by the Claimant were relevant to her working situation and applied to her role. The Claimant's existing LAC role and the duties involved in performing it created a substantial disadvantage for her when compared to a non-disabled employee and this was a disadvantage of which the Respondent was indeed aware. The disadvantage arose, as already referred to, when travelling to different homes of children across

the county as well as travelling out of the county, less regularly, but further afield. She was also finding it difficult to work in a noisy office environment which in turn impacted on her ability to use voice recognition dictation. The current role involved a requirement to produce formal written reports for use in court hearings with the significant pressure that these be carried out timely and accurately. The LAC team was short staffed and the Claimant's workload, together with that of her colleagues, significant. Whilst the Respondent had made adjustments in the Claimant's working environment up to 23 June, it was clear to the Respondent as at that date that the Claimant was still significantly disadvantaged and struggling to return to work in her existing role. A duty to make reasonable adjustments certainly arose at the review meeting on 23 June as indeed the Respondent recognised at the time.

63. The Respondent recognised that the Claimant's impairments did not mean that she could not do any job of a social work nature, hence the investigation of redeployment opportunities. Whilst the Claimant had expressed a wish to apply for ill-health retirement (and the redeployment process was a necessary stage to pass through before that could be granted) it was indeed a mechanism whereby an alternative role might be identified which would alleviate any disadvantage and in turn avoid the need for an employee to leave the Respondent's employment. It was a process which might lead to the identification of a reasonable adjustment.

64. The contents of the redeployment form into which the Claimant inserted her preferences were never intended to impose strict boundaries on the roles available to the Claimant - the Respondent offered her roles as part of the process which did not match her exact preferences. A further duty to make reasonable adjustments might have arisen in respect of any vacant role applied for and its job description. The hospital adult social worker role in Scarborough/Bridlington was of course offered to the Claimant for her consideration through redeployment on a 37 hours per week basis even though the Claimant had initially expressed that the maximum working week she was looking for was limited to 30 hours.

65. The Claimant identified this role as one which might suit her in terms of her disability impairments and she was offered the role after an interview by Mr Rayner whose decision it was which person to appoint to that role. The Claimant was open regarding her health issues and that she was seeking redeployment because of her inability to return to work in her existing LAC social worker role. Mr Rayner thought the role might be appropriate for her.

66. The hospital role constituted an alternative which held out a very real prospect of the Claimant being able to remain in the Respondent's employment. It involved her working more regular hours and effectively shorter working days (albeit an increase in overall weekly hours). It involved less travel with only the need to travel to 1 of 2 sites habitually

with an occasional need to attend the local town hall for reporting purposes. Otherwise, the Claimant was to be based on a single site each day she worked, able to travel around the site on level ground with the use of lifts to reach higher floors. The hospital environment was adapted to assist a person with physical disabilities. The role the Claimant would undertake involved talking to patients where she could sit at their bedside. The need for more physical interaction with young children was no longer there. The office environment involved a small office which, whilst it might be quite full if all 5 employees who used it were there at any one time, was usually occupied by a smaller number. Certainly, it appeared to provide a very different work environment to the open plan environment she had been used to at Beverley which catered for around 40 employees. The Claimant still had to write reports but they were of a less critical nature in terms of accuracy and less detailed than the court reports she had been required to prepare.

67. Mr Denham rightly recognised that the hours in this role were longer in circumstances where the Claimant had been struggling in her current role on reduced hours, but it ought reasonably to have been clear to him that it was, at its lowest, just as important what the Claimant did within her hours as the number of hours she worked.

68. Of course, where there was a concern as to whether or not this hospital role would remove or alleviate the Claimant's disadvantage or if, for instance, it might have even risked damaging her health and safety, the Respondent had it open to it to allow her to have a trial in the position which of course was part of its own redeployment policy, together with scope to in fact extend any trial period.

69. If Mr Denham had felt there to be a lack of understanding on his or the Claimant's part regarding the roles, he ought reasonably to have explored that further with her and Mr Rayner, he could have referred her to occupational health to see how they assessed her capacity to complete the hospital role and if, for instance, they could see any adjustments which might be made to that new role which would assist her or he could have requested further information from the Claimant's GP. He could have arranged for a risk assessment to be quickly carried out on site as was indeed quickly progressed once the Claimant had succeeded in her grievance. Since the 23 June 2017 case review, the Claimant had spoken to Ms Potter, Mr Rayner, her GP and Mr Shields. None of these had indicated that the Claimant could not do the hospital role. Mr Denham did not seek any clarification from the GP or ask Mr Rayner to review his decision. There was no necessary contradiction in the GP's comments as he was saying that the Claimant was unfit to return to work in the LAC role but might be able to return to the alternative hospital role. The reality of the situation was that Mr Denham took the Claimant off the redeployment register because he thought she was being inconsistent and disingenuous regarding her capabilities and that she was using the process to avoid reverting to her substantive LAC role in circumstances where it might be

the case that she was capable of returning to work in that role. Within a very short time of Mr Denham telling the Claimant that the hospital role was no longer an option for her, the Claimant had called him and suggested how she saw the hospital role as different and beneficial to her. Mr Denham did not look into the points she made any further.

70. The Tribunal considers that allowing the Claimant to return to work in the hospital role was a reasonable adjustment and that, if there had been a will and positive attitude on the part of the Respondent, the Claimant would have been able indeed to commence an induction prior to working a trial period within that role by 31 July. Any further information could have been obtained and workplace assessments undertaken by that date.

71. The Claimant's complaint therefore regarding the Respondent's failure to comply with its obligation to make reasonable adjustments is well-founded and succeeds.

72. The Claimant's complaint of unfavourable treatment arising from her disability also succeeds. Mr Denham's withdrawal of the offer of employment in the hospital role made to her by Mr Rayner was either because he thought she was unfit for the hospital role or because he thought that it was now evidently the case that she was fit to perform her LAC role. In either case his decision arose out the actuality of and his view of the Claimant's limitations and the disadvantages she suffered because of her disabling conditions affecting her mobility and ability to write reports. There can be no argument but that the withdrawal of the offer amounted to unfavourable treatment given that the Claimant had secured an offer of employment as part of the redeployment process in a role which she reasonably believed she would be able to undertake and which would prolong her employment. The removal of that possibility caused the Claimant not insignificant annoyance and upset.

73. The Tribunal can accept that the Respondent had a legitimate aim (as relied on by Mr Frew) in ensuring that the Claimant was able to carry out her work for the Respondent safely and efficiently and that her capability was fully assessed. However, it did not act proportionately in withdrawing the offer of the hospital role. Indeed, allowing the Claimant to undertake the hospital role was itself a reasonable adjustment which ought to have been implemented. The Claimant, from the evidence before and available to the Respondent at the time, was fit to commence working in the hospital role given the differences in the role and how it removed a number of key disadvantages the Claimant had experienced in the LAC role.

Employment Judge Maidment

Date 19 July 2018