mf

EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Wild**

Respondent: **London Borough of Newham**

Heard at: **East London Hearing Centre**

On: **19-22 March 2019**

Before: **Employment Judge Barrowclough**
Members: **Mrs G Bhatt**
Mr P Pendle

Representation

Claimant: Mr M Gavin (Trade Union Representative)

Respondent: Mr A Ross (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The Claimant's complaint of direct discrimination (s.13 Equality Act 2010) fails and is dismissed.

(2) The Claimant's complaints of (a) discrimination arising from a disability (s.15 Equality Act 2010), and (b) failure to make adjustments (s.20) both succeed.

(3) The Claimant's complaint for consequential loss arising from the Respondent's delay in paying her a redundancy payment and pay in lieu of notice succeeds, and the Respondent is ordered to pay the Claimant £1,776 in relation thereto.

(4) A remedy hearing in relation to the Claimant's successful complaints will take place on 7 August 2019, with a time estimate of one day.

CASE MANAGEMENT ORDER

1. The Claimant is to provide full disclosure by list of any and all attempts made, and steps taken to mitigate her financial loss following the termination of her employment on 31 January 2018 through obtaining alternative employment or work, such list to be served no later than **3 May 2019**.

2. The Claimant is to disclose full medical notes and records concerning all treatment she has received for her back, leg, neck and feet and any related medical conditions from any medical practitioner, including but not limited to her GP, hospital and consultant, chiropractor and physiotherapy, such documentation to be disclosed no later than **3 May 2019**.

3. The parties are at liberty thereafter to appoint a jointly instructed physician to prepare a report concerning the Claimant's current ability to undertake work/employment, and, insofar as possible, to comment on her ability to have done so from 31 January 2018 to date. Any such report is to be commissioned by way of joint instructions no later than **17 May 2019**, the report to be produced no later than **14 June 2019**, any questions arising to be submitted to the physician by **28 June 2019**, and responded to by **12 July 2019**.

4. The Claimant is to provide an updated schedule of loss, providing in particular full details of the pension losses which she seeks to recover, to be served no later than **17 May 2019**.

REASONS

1 By her claim, presented to the Tribunal on 8 May 2018, the Claimant Mrs Lisa Wild initiated a number of complaints against her former employer, the London Borough of Newham. Those included claims for notice pay of £4,885.68, a redundancy payment, and of direct and indirect disability discrimination, discrimination arising from a disability, and a failure to make reasonable adjustments. The Respondent resisted all such claims, albeit matters were progressed following the preliminary hearing before Employment Judge Burgher on 30 July 2018, when the issues to be determined at this full merits hearing were helpfully identified. In summary, the Respondent then accepted that, as a result of an administrative oversight, the Claimant had not in fact been paid either the notice monies or a redundancy payment to which she was lawfully entitled, together amounting to approximately £15,000, following the accepted termination of her employment on 31 January 2018; and those sums were finally paid to the Claimant on 23 October 2018. There remains before the Tribunal a claim for consequential loss arising from those delayed payments, which we determine hereafter. Secondly, and at the preliminary hearing itself, the Respondent accepted that the Claimant did at all relevant times have a qualifying disability, namely continuing back, leg and foot pain following surgery for a prolapsed disc which the Claimant had undergone on 15 July 2016. Thirdly, the indirect disability discrimination complaint was discussed and subsequently withdrawn by the Claimant, who represented herself at that hearing; and a number of 'conceptual difficulties' in relation to her direct discrimination claim were

pointed out to the Claimant. Fourthly, and as noted, the issues arising in the Claimant's ss. 15 and 20 complaints were identified and set out in the resulting case management orders. Following that hearing, the Claimant was permitted to amend her claim, as is set out at page 59A in the agreed bundle.

2 The Claimant latterly worked as a Complaints and Members Enquiries Officer, dealing with and responding to complaints and enquiries from councillors and senior members of staff, which role she had undertaken from 2009 onwards, and was continuously employed by the Respondent for in excess of 27 years up until termination on 31 January 2018. That role was office based in the main, albeit with very occasional external site visits. The Claimant was part of a team of approximately fifteen individuals undertaking broadly similar roles, in what sounds to us like an open-plan office; she had no fixed workstation and worked a three-day week, one of which days she was working from home. The Respondent accepts that the Claimant's employment was terminated on 31 January 2018 when she was made redundant under the Voluntary Release Scheme ('VRS') which the Council operates; the Claimant had then been continuously absent from work due to ill-health since about 9 May 2016, for the first 13 months of which absence she had received full pay in accordance with the Respondent's sickness absence policy, albeit thereafter and for the remainder of her absence the Claimant received no pay.

3 We heard evidence over the first two days of the full merits hearing from the Claimant; from Ms Eve Anderson a strategic HR business partner who provided HR assistance to the Respondent; and from Mr Martin Gibbs, formerly the head of the Claimant's department, and who himself left the Respondent's employment by reason of redundancy more or less simultaneously with the Claimant. We also heard closing submissions from Mr Ross on behalf of the Respondent and from Mr Gavin on behalf of the Claimant, to both of whom we express our thanks.

4 We find the following to be the relevant facts. In broad terms, the events giving rise to the Claimant's claim commenced with her undergoing surgery for a prolapsed disc in July 2016, albeit she had been signed off work for about two months leading up to that event due to her back problems. The Claimant attended OH appointments at work both before and after her surgery, but thereafter remained absent from work at home. There was no substantive contact between the Claimant and her employers following her surgery, apart from her attendance at the Respondent's offices on one day in September 2016 in order to fit her with a suitable chair for her anticipated eventual return, up until Mr Gibbs' home visit to meet the Claimant on 21 December 2016. As noted, Mr Gibbs was the head of the Respondent's Complaints and Members Enquiries department, who had retired from that role and his employment earlier in 2016, but had resumed his former role shortly thereafter on a temporary basis (repeatedly extended) and at the Respondent's request. Mr Gibbs, who had approximately 20 years' experience as a manager with the Respondent, had proposed that his meeting with the Claimant on 21 December should be classed as a combined stages 1 and 2 meeting under the Respondent's sickness absence policy; but the Claimant preferred that it be simply a stage 1 meeting, as was her accepted right. Following the meeting, Mr Gibbs wrote to the Claimant by email, summarising the matters then discussed and agreed.

5 Before continuing with the chronology, it may be helpful if we deal with and record our findings concerning two general issues. The first relates to the Claimant's state of health. From the evidence we heard, it seems clear to us (and the contrary was not suggested) that the Claimant's operation in July 2016 and her subsequent follow-up medical care was only partially successful at most in curing or relieving the Claimant's symptoms and back and associated problems; and that she remained in considerable pain and discomfort, for which she was prescribed significant medication, at least up until September/October 2017, when the Claimant commenced a course of treatment with a chiropractor on a private fee-paid basis which, she says, was of considerable assistance. The fact that it was only in about July 2017 that it was belatedly discovered that the Claimant had fused vertebrae in her neck may very well have contributed to her continuing problems. At the time of the hearing before us, nearly three years after the initial problems arose, the Claimant could still not sit for prolonged periods in a chair without having to stand up; and though fully mobile, appeared to be restrained, or at least very careful, in her physical movements.

6 Secondly, it was not suggested at any time or by anyone that Mr Gibbs' motivation and his intentions in all his dealings with the Claimant were anything other than to assist her and, if at all possible, to ensure that she did not leave the Respondent empty handed, in the sense of obtaining a redundancy payment, which recognised the Claimant's lengthy service with the Respondent. Mr Gavin openly accepted and acknowledged that to be the case. It was also abundantly clear from the email correspondence in the bundle which we have read that there was a warm and indeed a cordial relationship between the Claimant and Mr Gibbs, who was we accept doing the best that he could, at least by his own lights and as he thought, to assist the Claimant in difficult circumstances which were not of her making.

7 Reverting to the chronology of relevant events, a second meeting, described as a stage 2 meeting in the Respondent's sickness absence policy, took place on 1 February 2017, at the Claimant's home with once again only herself and Mr Gibbs being present. Mr Gibbs did not in fact write to the Claimant with a summary of their discussions at that meeting until two months or so later, on 5 April 2017, when he accepted and acknowledged that the Claimant's medical issues were continuing and that she was currently unable to return to work, and recorded that they had agreed to keep in touch. By the time that email had been sent, the Claimant had attended a further OH appointment, from which the report dated 14 February 2017 resulted, a copy of which is at pages 67 to 69 in the bundle. As can be seen, the OH physician's opinion was that disability legislation would apply both to the Claimant's back condition and to her resulting psychological issues. Mr Gibbs accepted that, notwithstanding those conclusions, he did not contact the Respondent's HR department or to take any further steps as a result of the indication that the Claimant had at least one disability.

8 The next meeting between the Claimant and Mr Gibbs took place on 11 April 2017. The reason for that meeting was because, as Mr Gibbs had become aware and as he had already informed the Claimant, a review of the Claimant's department's operations was being mooted by the Respondent, which would or at least might impact on her role and that of all her colleagues, as well as upon the roles of the three members of its management team, including Mr Gibbs himself. Mr Gibbs thought that that review might amount to an opportunity, or in his words might be manipulated, to benefit the Claimant as being an employee on long-term sick leave, and therefore went to see her.

9 Having heard Mr Gibbs' and the Claimant's evidence, we found both to be honest and credible witnesses doing their best to assist the Tribunal; and we are in no doubt that at their meeting on 11 April, the Claimant was presented by Mr Gibbs with two possible alternative and available routes or courses of action in respect of her continuing employment with the Respondent. The first such alternative was for the Claimant to proceed to a stage 3 sickness absence meeting, which Mr Gibbs indicated might well be chaired by his colleague Mr Ron Springer. Mr Gibbs made it clear to the Claimant that other managers employed by the Respondent, including Mr Springer, might well take a significantly more robust view of the Claimant's long-term sickness absence, which had by then been ongoing for some 11 months, at such a meeting to the sympathetic approach which he had adopted; and that there was a significant risk that the Claimant might be dismissed at the conclusion of any such meeting due to her prolonged ill-health absence.

10 The other possibility was to try to manipulate, to adopt Mr Gibbs' expression once again, the forthcoming departmental review, whereby the Claimant might be made redundant through activating the Respondent's VRS scheme. That would have the obvious benefits for the Claimant of receiving a significant redundancy payment, as well as contractual notice pay, on termination if, as both Mr Gibbs and the Claimant erroneously believed at the time, her redundancy could be characterised as being compulsory rather than voluntary.

11 What Mr Gibbs did not do was to implement stage 3 of the Respondent's sickness absence procedure, which would necessarily have involved a further OH meeting with and report on the Claimant. Nor did Mr Gibbs ever raise with the Claimant the possibility of redeployment on medical grounds within the Respondent undertaking, either as part of the earlier stage 2 outcome or of any stage 3 meeting. It is clear and was not contested that such a possibility is required to be addressed and considered at both such stages of the Respondent's sickness absence procedure. Instead, he left the Claimant to consider and reflect upon what he presented as the only two available options open to her, and simultaneously wrote to the HR department, telling them more or less what he had advised the Claimant and asking if an HR representative could contact the Claimant to discuss not only her options, but also the likely figures on any redundancy termination. It is clear and accepted that in fact there was no follow-up to Mr Gibbs' request from the Respondent's HR, and that the Claimant was not contacted as Mr Gibbs had requested. Nor did HR respond to the Claimant's request for them to outline the options available to her, following her meeting with Mr Gibbs on 11 April.

12 In any event, the Claimant proceeded to seek external advice concerning the likely financial benefits she might receive on a redundancy termination, and she and Mr Gibbs remained in regular contact after their meeting on 11 April. It is plain from Mr Gibbs' email of 10 May 2017, a copy of which is at page 99 of the bundle, that he was resisting pressure from others within the Respondent Council to convene a stage 3 meeting for the Claimant, since he considered that to be premature because the Claimant was still undergoing a course of medical treatment, that such a meeting would be of no assistance to the Claimant, but rather raise the serious risk of her being dismissed under the Respondent's sickness absence procedure.

13 The Claimant subsequently participated in a further (and final) OH meeting on 25 May 2017, giving rise to a further report, copied at pages 115 and 116. The sole question or issue which Mr Gibbs then raised was whether the Claimant could return to her current role with the Respondent: the OH physician concluded that such a return might be possible at some point in the future, but that it was too early to give any definitive answer or to say when such a return might be possible.

14 Meanwhile, the Claimant continued to seek medical assistance for her continuing symptoms, pain and discomfort. Unfortunately, her progress and recovery was delayed for a number of reasons. These included the unavailability of the Claimant's hospital consultant, who had herself sustained a debilitating injury; a hiatus whilst the suitability for the Claimant of medication to be administered by way of spinal injection was established; and as already noted the belated discovery of fused vertebrae in the Claimant's neck. Additionally, and following on from their meeting on April 11, both Mr Gibbs and the Claimant sought and were provided with information, including the likely benefits, should the Claimant decide to pursue the potential redundancy option.

15 The Claimant then wrote to the Respondent's HR in September 2017 asking for details of her pension entitlement, which it turned out they were unable to provide. It should be noted that, for no doubt readily comprehensible resourcing reasons, the HR department within the Respondent undertaking is stretched and under pressure. *'A very lean operation'* is how Ms Anderson described it to us, with approximately fifty people in HR providing assistance in relation to about 8,000 staff working for the London Boroughs of Newham and Havering. It is plain to us that pressure of work impacted significantly on the level of support and assistance which the Respondent's HR personnel were able to provide to the Claimant from July 2016 until the termination of her employment in January 2018, and indeed thereafter.

16 The Claimant finally saw her pain consultant Dr McCartney on 29 September 2017, subsequently updating Mr Gibbs in an important email on 18 October (pgs.173-174). In a nutshell, the Claimant told Mr Gibbs that Dr McCartney had advised her that it would not be in her best medical interests to resume her current role with the Respondent, due to the amount of sitting involved; but that she anticipated that at some point in the future the Claimant would be able to undertake some form of work which involved sitting, standing and walking. Additionally, the Claimant had been made aware for the first time of the fact of her fused neck vertebrae, which explained at least in part her continuing pain and discomfort; and the Claimant reported that she had started consulting a chiropractor on a private, fee-paying basis. Finally, the Claimant said that the discovery in particular of the additional problems related to her neck had helped her to decide about her future, and what the best course for her was; and that she was accordingly applying for voluntary release from her employment, and had completed the relevant application form, which was attached. In effect, the Claimant was choosing to apply for redundancy as part of the anticipated departmental reorganisation.

17 In December 2017, and following a chasing email from the Claimant, who had not heard from him for some time, Mr Gibbs sent the Claimant a further copy of that application for signature. By that stage, the Respondent's internal review, on which Mr Gibbs believed the Claimant's suggested redundancy termination to be contingent,

had been approved and was being put into effect; and on 22 December 2017 the Claimant's redundancy application was approved by the relevant Council managers. As matters turned out, only the managerial tier in the Claimant's department, which included Mr Gibbs, was deleted as a result of that review; although, had the Claimant and two of her colleagues not then effectively volunteered for redundancy, there would have had to be a competitive interview process for the remaining posts at their level.

18 The Claimant, who had been advised by Mr Gibbs that her application had been approved, thereafter repeatedly sought written confirmation from the Respondent of her position, including ratification of her redundancy termination and of her last day of employment, and details of her financial entitlements on termination; unfortunately with little, if any, positive result. She corresponded with the Respondent's HR department in particular about the non-payment of either notice monies or any redundancy payment, but without obtaining any clear or satisfactory response. Accordingly, in late February 2018 the Claimant contacted ACAS and subsequently issued these proceedings. We were told that the reasons for the Respondent's failure to pay the Claimant those sums (a redundancy payment and pay in lieu of notice) to which it was only belatedly accepted she was entitled, was a mistaken belief that they had already been paid, coupled with what appears to have been an internal disagreement within the Respondent's HR department as to whether notice pay was in fact payable at all. It was only in the Respondent's letter of 13 August 2018, following the preliminary hearing in these proceedings in the previous month, that the Respondent's error was accepted and acknowledged, an apology put forward together with confirmation that those sums would be paid shortly. Subsequently, the Respondent wrote to the Claimant on 13 September 2018 confirming the sums to be paid, and putting forward an open offer of settlement of £5,000 in relation to any claims by the Claimant against the Respondent (which the Claimant did not accept); and the notice and redundancy monies due were finally paid to the Claimant on 23 October 2018.

19 Having summarised the relevant facts, we turn to consider the various complaints advanced by the Claimant. We deal first with the allegation of direct discrimination. That was effectively abandoned by Mr Gavin in his closing submissions on the Claimant's behalf; rightly so in our judgment, since as Mr Ross correctly points out, there was no evidence called or led, nor any witnesses cross-examined, concerning the treatment of any real or hypothetical comparator to the Claimant who was not similarly disabled. In reality, this was a misconceived complaint, and we have no hesitation in dismissing it.

20 We consider next the Claimant's consequential loss complaint. In real terms that is represented by the solicitors' bill totalling £1,776 which the Claimant incurred in taking advice and for work done in bringing and progressing these proceedings against her former employer, up until the belated payment of the notice and redundancy monies on 23 October 2018, nearly nine months after the termination of the Claimant's employment on 31 January that year. The Claimant in fact incurred significantly higher legal costs relating to these proceedings; that figure is agreed to represent her costs until payment was made by the Respondent.

21 Mr Ross submits that that sum is not recoverable, since generally it is only in exceptional cases, falling within Rule 76 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, that costs will be ordered against a party,

where for example a party has behaved unreasonably or vexatiously in the bringing or conduct of proceedings. Mr Ross contends that this is not such a case. Mr Gavin disagrees. He submits that in metaphorically having beaten her head against a brick wall in unsuccessfully trying to obtain over a period of months monies to which she was indubitably entitled from the Respondent, the Claimant had exhausted all options which were open to her, and had little alternative but to instruct solicitors and commence proceedings in order to recover those sums. It was only significantly later, and despite the Claimant's entitlement to either any redundancy payment or notice pay being disputed in the ET3 Response, that the Respondent accepted liability and ultimately paid the sums due to her. Mr Gavin submits that the Respondent's behaviour in so acting should be characterised as unreasonable, that this is a case falling within Rule 76, and that the costs incurred by the Claimant until payment was made are recoverable.

22 It seems to us, with all due respect to Mr Ross and Mr Gavin, that they are mistaken in treating the Claimant's consequential losses arguably flowing from late payment of the sums to which she was lawfully entitled as being simply the costs of issuing and pursuing proceedings for their recovery (as well as for other complaints); although in the circumstances of this case they obviously overlap. We find that the Claimant has indeed sustained consequential loss arising from the Respondent's late payment of her notice and redundancy payments, amounting to and consisting of £1,776 solicitors' costs; and that such loss was direct and foreseeable and not too remote a consequence of the Respondent's breach in its failure to pay those sums in a timely manner. There is no requirement in relation to such loss that the Respondent must have acted unreasonably, or in some other manner as described in Rule 76 of the 2013 Regulations. Accordingly, there must be judgment in the Claimant's favour for that sum. In case we were wrong in coming to that conclusion, we make clear that we would in any event find that this is a case in which the Respondent did behave unreasonably, as defined in Rule 76(1)(a), in not paying the Claimant what it ultimately had to accept were her lawful entitlements until nearly nine months after the termination of her employment, and that accordingly we would have made a costs order in the Claimant's favour for £1,776.

23 Accordingly, the complaints under sections 15 (unfavourable treatment because of something arising in consequence of the Claimant's disability, which cannot be justified) and 20 (a failure to make reasonable adjustments) of the Equality Act 2010 remain to be determined.

24 The Claimant's case, as ably put on her behalf by Mr Gavin, is essentially the same under both complaints. In essence, Mr Gavin submits, because the Respondent, in the person of Mr Gibbs, failed to fully apply the provisions of stage 2 of the Respondent's sickness absence policy, or to invoke stage 3 of the same policy, in the belief that he was thereby benefiting the Claimant, and because he did not then know or communicate the full provisions of that policy, the Claimant was not alerted to or informed of, and ultimately denied the opportunity of applying for, the possibility of medical redeployment; and did not attend an OH assessment as part of stage 3 at which such potential medical redeployment would have had to have been raised with her. Instead, the options presented to the Claimant were either to apply for voluntary release – essentially redundancy, or face the prospect of dismissal at the conclusion of the sickness absence procedure, with no financial benefit other than notice pay. That

amounts, Mr Gavin contends, to unfavourable treatment within s.15, which arose from Mr Gibbs belief, which he openly accepted during his evidence, that the Claimant would not be able to return to her existing role in the foreseeable future, or indeed ever, because of her continuing medical issues, which the Respondent has accepted as amounting to a disability within s.6 Equality Act 2010. In relation to s.20, Mr Gavin submits that the physical requirements of the Claimant's role were such that, as the medical evidence in the form of advice from OH and her own consultant confirmed, she could no longer undertake it, thereby placing her at a significant disadvantage when compared with those who were not disabled. The Respondent, a substantial employer, should have made efforts, as required by its own policies, to find the Claimant different work which would have accommodated her disability and supported her in an alternative role as part of a medical redeployment.

25 Mr Ross' submissions on the Respondent's behalf are comprehensively and clearly set out in his closing skeleton argument (Exhibit R-4), and we hope we do them no injustice in simply highlighting what seem to us to be the main points raised with respect to ss.15 and 20.

26 In relation to the Claimant's complaint of discrimination arising from a disability, Mr Ross contends that any complaint of being made compulsorily redundant, rather than the Respondent following its sickness absence procedure must fail, since it is now accepted by the Claimant that she voluntarily applied for redundancy by means of the Respondent's VRS scheme. Secondly, there is no causal link between any failure on the Respondent's part to follow its own sickness absence procedure with the Claimant's inability to undertake her existing role at work. Finally, Mr Ross submits that the Claimant was not in fact being pressurised by the Respondent to choose how she wished to proceed in the light of her lengthy and continuing sickness absence. If anything, the contrary is true since, as the Claimant ultimately accepted in her evidence, Mr Gibbs, with whom she had a positive relationship, was doing his best to help her, including resisting the holding of a Stage 3 sickness absence meeting, which the relevant procedure envisages usually taking place much earlier, when viewed in the context of the Claimant's continuous absence on full pay for a period of some 13 months. Turning to the s.20 duty to make adjustments, Mr Ross's main submissions are (a) that there was no prospect of the Claimant returning to work for the Respondent in any role right up to the time of termination of her employment, when she was still taking medication for nerve pains; and (b) that there was no evidence that any alternative roles would have alleviated the disadvantages arising from the Claimant's disability, and no realistic suggestions have been identified or put forward by the Claimant, even after she stopped receiving sick pay in June 2017.

27 Looking first at the Claimant's s.15 complaint of discrimination arising from a disability, we find the relevant treatment to which the Claimant was submitted not to be redundancy, whether compulsory or voluntary, as an alternative to the Respondent's sickness absence procedure being applied, as Mr Ross submits, but rather to be that the Claimant was presented by Mr Gibbs with only two possible courses of action as being available to her. Those were to seek a redundancy termination, and whether characterised as compulsory or voluntary matters not in our view, by seeking voluntary release following the Respondent's departmental review, or alternatively to take her chances at a stage 3 sickness absence meeting, with the very significant risks of being dismissed at its conclusion. It is obvious which course was being urged by Mr Gibbs,

and indeed he said that he and the Claimant were working together in order to get her either a redundancy payment or early retirement on medical grounds (which was, it is agreed, then mistakenly believed to be potentially available), rather than dismissal under the sickness absence procedure. Mr Gibbs agreed that he did not refer the Claimant to the Respondent's Employee Assistance Programme, nor did he consider or raise with the Claimant the possibility of medical redeployment: he had overlooked or forgotten the references to that option in the Respondent's procedures. That treatment, in effect the availability of a simple choice between redundancy and a stage 3 meeting only, was unfavourable to the Claimant, since it excluded the possibility of medical redeployment, which is specifically envisaged as being part of both stages 2 and 3 of the sickness absence procedure and also under the Respondent's disability policy and procedure. It was also identified at the Preliminary Hearing before EJ Burgher as an issue to be determined. Accordingly, in our judgment there is a causal link between the Respondent's failure to follow its own sickness absence procedure and the Claimant's inability to resume her existing role with the Respondent because of her ongoing medical problems, which are accepted as amounting to a disability. Had it not been for the Claimant's inability to return to her existing role, we are in no doubt that Mr Gibbs would not have acted as he did.

28 The fact that medical redeployment of the Claimant was not considered by the Claimant, and in our judgment should have been, is not simply an academic or sterile conclusion since, as was made clear to the Respondent in the Claimant's email of 18 October 2017, simultaneous with the submission of her request for voluntary release and before it had been considered and approved, Dr McCartney, the Claimant's pain consultant, believed that there was at least a possibility that the Claimant could return to work for the Respondent in some capacity at some point in the future. That opinion in our view goes a long way to rebutting Mr Ross's submissions in relation to the s.20 duty to make adjustments. In addition, the Respondent is a substantial employer committed to trying to ensure that disabled employees can undertake appropriate roles with it, and the scope and range of possible alternative roles within an organisation such as the Respondent is obviously wide, and in her evidence to us Ms Anderson readily accepted that there were many that involved requirements for standing, sitting and walking, which Dr McCartney identified as being desirable. Thirdly, the fact that the Claimant's health and overall medical condition did not improve significantly until October 2018, when she was finally able to have the long delayed steroid spinal injection, does not undermine the possibility of her further employment in an alternative role with the Respondent. Had the Respondent considered redeployment and investigated the Claimant's medical condition, for example by means of the further OH appointment mandated by their own procedure, the reason for delay would have been known, and it is possible that effective treatment could have been accelerated.

29 It is of course not certain that a suitable alternative role for the Claimant within the Respondent undertaking could have been found, or that the Claimant would have been physically able to undertake any such role and, if so, when; or that she would have been willing to do so, although from our assessment of the Claimant's evidence and from what she said in her 18 October 2017 email in particular, we think the likelihood is that she would at least have had a shot at any reasonable alternative role. But in our judgment, it cannot properly be said that there was no prospect at all of the Claimant returning to work in any role, or that there were no alternative roles within the

Respondent which would have alleviated the disadvantages of the Claimant's disability; and we find that it was reasonable and in accordance with its own policies and procedures to expect the Respondent to have explored alternative roles on medical redeployment which would or might have accommodated her disability.

30 For these reasons, in our judgment both the Claimant's complaints under ss.15 and 20 Equality Act 2010 succeed. For the avoidance of doubt, we make plain that we do not consider that the Respondent's actions are capable of justification under s.15(1)(b). Whilst they may have had a legitimate aim in trying to ensure where possible a fully operational workforce, Mr Gibbs' treatment of the Claimant in effectively reducing the options presented to her as being available was not a proportionate means of achieving it. It follows that there will need to be a Remedy Hearing in relation to those successful complaints, and we make directions for the steps to be taken in preparation for that hearing.

Employment Judge Barrowclough

8 May 2019