EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104645/2016

Held in Dundee on 21, 22, 23, 24 February and 11 April 2017, with a members' meeting on 15 May 2017

Employment Judge: **Ms M Robison**
Members: **Ms J Torbet**
Ms A Shanahan

Ms Alison Doran **Claimant**

HM Revenue and Customs **Respondent**
NE98 1ZZ

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

i) the respondent has unlawfully discriminated against the claimant contrary to the provisions of section 15 and section 21 of the Equality Act 2010;

ii) the respondent shall pay to the claimant compensation totalling Eleven Thousand, Five Hundred and Eighty One Pounds and Sixty Three Pence (£11,581.63).

REASONS

Introduction

1. The claimant lodged a claim in the Employment Tribunal claiming disability discrimination. The respondent resisted the claims. While the respondent accepts that the claimant is disabled in terms of section 6 of the Equality Act 2010, it denied disability discrimination and in particular that the claimant's dismissal was for a reason arising from her disability or that it had breached of the duty to make reasonable adjustments.

2. At the final hearing, the Tribunal heard evidence from the claimant and for the respondent from Wendy Taylor, team leader and the claimant's some-time line manager; Robert Milligan, operations manager and dismissing officer; and Valerie Gudgeon, appeal chair.

3. The Tribunal also heard evidence from the claimant's trade union representative, Sean Reid. This was at the request of the claimant's representative, although the Tribunal had indicated that we considered that in the circumstances his evidence would be helpful. We were initially told that Sean Reid's line manager, Graeme Thow, would not give him permission to attend the Tribunal. This resulted in additional administrative procedures and delays which we consider could and should have been avoided. In future, the respondent should ensure that permission is given to witnesses whom the Tribunal considers to be relevant to attend without the need for a witness order.

4. The Tribunal was referred to documents from a joint file (referred to by page or document number as appropriate).

5. After the hearing, the Tribunal considered the evidence and submissions at a members' meeting which took place on 15 May 2017.

Findings in Fact

6. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

Background

7. The claimant was employed by the respondent as an administrative assistant (customer services consultant), from 8 June 2015 until she was dismissed, effective 4 May 2016. The claimant was based at Sidlaw House, Dundee in the respondent's contact centre, which deals with calls from the public in relation to the tax credits scheme. The call centre helpline was open Monday to Friday 8 am to 8 pm and Saturday 8 am to 4 pm.

8. The claimant was engaged following an extensive recruitment exercise which followed from concerns about the level of customer satisfaction regarding the helpline. A specific business need was identified for call handlers to be available at times of high demand, and in particular later in the day. Around 250 employees were engaged on a shift work basis following that recruitment drive, to ensure business service levels were maintained, specifically at weekends and evenings.

9. The claimant was initially engaged on a full-time temporary fixed term appointment from 8 June 2016 to 31 May 2016 (page 24). Her contract stated that she was engaged to work 42 hours per week (including five hours of paid meal breaks and two complimentary breaks of 15 minutes during each shift). Her employment was subject to the successful completion of a probationary period of 12 months (page 27). It was expected that her appointment would be made permanent on the completion of the probationary period.

10. The claimant and other members of her team worked the same weekly shift pattern, namely Monday 9.30 to 18.00, Tuesday 11.30 to 20.00, Wednesday 11.30 to 20.00, Thursday 10.30 to 19.00, Friday 10.00 to 18.30, with one Friday in six, 11.30 to 8 and one Saturday in every 6, from 8.00 to 16.00 replacing the Friday shift.

11. The claimant was diagnosed with type 1 diabetes in 2011 (see GP report page 387). Since diagnosis and prior to working for the respondent, she had worked in 9 to 5 jobs and she considered that she had managed the condition well without any particular medical concerns. This involves ensuring that her blood sugar levels are stable, which is controlled by eating appropriately and by insulin, to avoid blood sugar levels dropping in order to avoid having a "hypo" (hypoglycaemia).

12. The claimant informed the respondent of this condition before commencing her employment.

Relevant respondent human resources policies

13. The respondent has a large number of human resources policies, a number of which were relevant in this case. The following policies are of particular relevance:

14. HR15008 – Probation – dealing with poor attendance (old) (document 93). This is the policy which was in force at the time of the claimant's dismissal. At page 238, that document set out the *"consideration points"* which would normally give rise to a *"discussion of concern"* (DOC). These are stated to be a guide for consideration only, taking account of the individual circumstances. The *"consideration points"* are 5 working days or 3 separate episodes of absence periods, at which time managers should consider whether formal action is appropriate.

15. Of particular relevance is what is stated on page 242 regarding action at the end of the review period where the probationer's attendance has been satisfactory, in which case it is stated that the manager requires to *"write to the probationer to confirm that their attendance has reached a satisfactory level; this must be maintained for 12 months, even if their appointment is confirmed; and if their attendance becomes unsatisfactory within that period they will normally be given a final warning under Stage 2 of the Managing Poor Attendance procedure".*

16. HR15008 – Probation – dealing with poor attendance (new) (document 92). Of particular relevance is the guidance under *"review period"* on page 231 and *"the probationer's attendance has been satisfactory"* where it states, *"use the template letter to confirm that: their attendance has reached a satisfactory level; this must be maintained for 12 months; the letter also explains that if their attendance becomes unsatisfactory again before probation is confirmed, you will prepare a report to the Decision Maker who will consider ending employment. Note: once probation has been confirmed, if a jobholder's attendance becomes unsatisfactory again within that 12 month period, they will normally be given a final warning under Stage 2 of the Managing Poor Attendance procedures".*

17. HR83005 Disability - reasonable adjustments (document 100).

18. HR27017 Disability related sickness absence (document 97). This document sets out the procedure for dealing with disability related sickness absence which is considered to be a reasonable adjustment. Managers can discount some or all of the absence for the purpose of managing attendance where that is reasonable.

19. HR83006 Disability adjustment leave (DAL) guidance (document 101). This is also a reasonable adjustment but differs from the above policy. DAL is considered when the jobholder needs paid time off for disability related assessment but would otherwise be fit for work.

20. HR32004 Alternative working patterns: part-time working (document 99). Staff can make a request for a permanent alternative working pattern, which includes a change of hours or shifts.

19. The respondent also has a policy in relation to so-called *"temporary restriction on attendance"* (TRA). This allows employees to request a temporary change to attendance patterns for a short-term domestic or personal problem of up to 12 weeks (page 371).

20. The following policies were also referred to during the course of the hearing:

- HR27003 Attendance management procedure (document 94).
- HR27018 Sickness absence: jobholder cannot reach or maintain a satisfactory standard (capability) (document 98).
- HR15002 Probation – policy overview (document 102).

Initial sickness absences

23. On Friday 19 June 2015, when the claimant was undertaking training, she left work around 11.45 due to her sugar levels being really low which caused her to feel unwell. She was absent for a half day.

24. On 22 June 2015, a return to work meeting was conducted by May Coller. It was agreed that an occupational health referral would be completed when the claimant started in her new team.

25. Also on 22 June 2015, the claimant and May Coller met to discuss her *"unsatisfactory level of attendance"* (page 37). The claimant was advised that *"formal action will be considered if satisfactory attendance is not sustained".* She was told that *"a written warning would be the first stage of formal action and if this did not result in sustained satisfactory attendance a referral to the decision maker would be the next course of action. The result of this could lead to the termination of employment".*

26. On 13 July 2015, the claimant signed an informed consent form, consenting to a referral to occupational health.

27. On 20 July 2015, the claimant was absent for one day due to an ear infection.

28. On 21 July 2015, a return to work discussion took place (page 46). Reference was made during the course of that meeting to the possibility of the claimant

getting time off to attend a course which had been recommended to her to help her with diet and managing her diabetes condition.

29. By letter dated 21 July 2015 (page 44) the claimant was invited to a formal Stage 1 of poor attendance meeting. That meeting took place on 23 July 2015 and was conducted by Chris Brown. Also in attendance were Michael Jackson (union rep) and George McGregor (who took minutes). A note was taken of that meeting (pages 52-54). The purpose of the meeting was to decide whether a written warning under the probation policy should be issued.

30. This meeting took place despite the fact that the claimant had not been absent on three occasions or for 5 days, which were the usual consideration points. However her line manager Wendy Taylor considered the individual circumstances and was concerned about two absences so soon after she had commenced employment.

Occupational health assessment and reasonable adjustments

31. On 28 July 2015, the occupational health assessment took place (by telephone), and a report was produced of the same date (pages 62-64) by Mr Nigel Thornton, occupational health adviser.

32. In that report, he stated under *"Current Health Situation"* that *"Ms Doran has been diagnosed with Type 1 Diabetes for a number of years and recently had an episode of low blood sugar at work that required her to leave for the day. Ms Doran is under the care of her GP for the condition and is hoping to commence an education course at her local hospital to assist in the control of her condition. Ms Doran reports that episodes of low blood sugar are very uncommon in her case but she has made colleagues aware of her condition.... Since starting her new role with differing start and finish times Ms Doran has noticed that her blood sugar is harder to keep controlled than previously when she undertook a more rigid working pattern".*

33. Under *"Capability for Work"*, he stated that *"In my opinion Ms Doran is fit to undertake her contracted role. Some people with type 1 diabetes do find that changes to start and finish times at work and irregular eating patterns can cause some difficulty in maintaining good control of their blood sugar levels. Ms Doran reports that she wants to be able to maintain her current working pattern and not let her diabetes impact on normal day to day activity, but it would be sensible for management to consider whether she can be provided with regular meal break times that do not vary significantly from day to day in order to assist with maintaining a regular routine. Alternatively reducing the variation on her start and finish times may also assist Ms Doran in controlling her blood sugar levels. It is a decision of management as to whether either of these alterations is feasible in the workplace. These alterations would likely be necessary for the foreseeable future".*

34. Under *"Outlook"*, he stated that *"Type 1 Diabetes is a long term condition for which current mainstream medical treatment is designed to control the condition rather than provide a cure. Certain events such as common infections like a cold or chest infection can make control of blood sugar more difficult and it is foreseeable that in these events a person with Diabetes may be absent from work and lead to a slightly higher rate of absence compared to someone without the condition. There is unfortunately no reliable predictor of any potential future absence and I am therefore unable to predict the frequency or duration of any such absences".*

35. Under *"Disability Advice"*, he confirmed that in his opinion Ms Doran's condition was likely to be a disability of the purposes of the Equality Act.

36. On 28 July 2015, a follow up discussion took place with Wendy Taylor (page 65). While the claimant stated that she was currently happy with her shift pattern, the following adjustments were put in place:

- complimentary breaks and lunches at times to help establish an appropriate eating pattern; (this meant that the claimant could use 1.5 hours of breaks however she wished)

- consideration to be given to whether the business could support her attendance at the course on diet;
- time off for specialist treatment and investigations in relation to her medical conditions.

37. By letter dated 31 July 2015 from Chris Brown, the claimant received a written warning letter for poor attendance (page 66). She was placed on formal review between 31 July 2015 and 30 October 2015, during which time she was expected to reach and maintain the required standard of attendance. She was told that she may fail the review if there are further absences, in which case consideration would be given to terminating her employment.

38. However, the claimant was not absent during this period and after the third review meeting on 3 November 2015 (note page 75), she was advised by Wendy Taylor in a letter dated 2 November 2015 (sic) that she had successfully completed the stage 1 review period. In that letter she stated that, *"I must advise you whilst in your Probation period, if your attendance again becomes unsatisfactory within the next 12 months, you will normally be referred to the Decision Maker which could ultimately result in end of employment".*

Claimant's concerns and further absences

39. On 1 December 2015, the claimant e-mailed Wendy Taylor to advise that she believed that the late shifts were affecting her health because they were impacting on her ability to control her diabetes. She asked her to consider a change of shifts. She said that she was using annual and flex leave because she was finding that she was very fatigued after taking "hypos" during the night. She said that she needed routine in her life and diet which she was not getting with the late and mixed shifts. Her doctor had said that this is causing her to feel unwell and tired all of the time. She said that she had always worked 9 to 5, and that she has not been able to get used to the shifts because her *"body does not like it"*. There was a discussion about completing an AWP application to request a permanent change of shifts.

40. Between 4 and 8 December 2015, that is three working days, the claimant was absent from work for reasons related to her diabetes.

41. On 7 December 2015, Wendy Taylor telephoned the claimant for a progress report and noted that she stated that *"she has been having hypos since Friday and sugar levels are all over the place...also feeling stressed about things at work and when she is asking for help from team leaders she feels some team leaders are not accommodating. She states she likes her job but due to her condition is finding things difficult. Also she is worried she is using AL etc.....Alison states has no issue with shifts but it is her body not liking them"* (page 80). She asked Wendy Taylor to consider a temporary change of shifts, finishing by 6 pm.

42. Wendy Taylor then spoke to her operations manager, Graeme Thow, who advised that he could not authorise the change of shifts because of the business needs at the time.

43. On 8 December 2015, she telephoned the claimant again (page 81). During that call, she advised that they could not put temporary shifts in at that time.

44. On 9 December 2015, the claimant met with a Norman Tyrell (page 82). She advised him that she had been very unwell with her sugar levels being unstable which have been affected by her current shift pattern upsetting her body clock and insulin levels, making her feel nauseous and very tired. She advised that the diabetic nurses she had consulted at Ninewells Hospital said that her eating times were affecting her insulin levels. She advised that her medication had been altered and she considered that was slowly making a difference.

45. Also on 9 December, the claimant attended an "Equality Act Meeting" with Norman Tyrell the purpose of which was to consider whether the three day absence could be discounted under the Disability Related Sickness (DRSA) policy (page 84). Norman Tyrell took account of the fact that the claimant had 4.5 days absence over 3 separate occasions in the last 12 months. He did not discount the 0.5 days on the 19 June 2015 because she had stated in her

return to work interview that she had been rushing about, and it was her responsibility to manage her condition. The sickness absence of 20 July 2015 was not discounted because it did not relate to her disability. Taking into account the adjustments in place, he was not prepared to discount the three days because the business could not support it.

46. On 14 December 2015, Wendy Taylor met with the claimant to discuss the agreed adjustments (page 87). The claimant advised that she found the 7 and 8 o'clock finishes most difficult because these affected her sleeping patterns. She advised that she was due to see a specialist and that no further support was necessary at that time.

47. On 21 December 2015, the claimant met Wendy Taylor for an "Equality Act Meeting" (page 91), at which the most recent sickness absence from 4 to 8 December was reviewed. At this meeting, taking account of the adjustments etc, she reversed the decision which had been made by Normal Tyrell on 9 December because she disagreed with him, acknowledging that the claimant's condition was unpredictable and she thought that the business could support it.

48. The claimant was absent from work from 29 January 2016 to 28 February for reasons related to her diabetes. The claimant was of the view that it took her three weeks to stabilise her condition which had been disrupted by working the shift irregular patterns.

49. Wendy Taylor contacted the claimant by telephone on 29 January 2016 (page 97) and 1 February 2016 (page 98) to discuss her absence. Following a further discussion on 2 February 2016 (page 99), Wendy Taylor sent the claimant by e-mail a *"good AWP example"* of the application form (page 100), which was an application to request a permanent change in shift patterns.

50. By letter dated 2 February 2016, the claimant's GP wrote that *"She has informed me that she is having difficulty with her blood sugar control; I can confirm she is diabetic. She feels her blood sugars are more difficult to control*

when she does not have a regular routine in her day to day life, which includes shift work" (page 101).

51. On 3 February 2016, Wendy Taylor again telephoned the claimant to ask about her progress (page 102).

52. On 8 February 2016, Wendy Taylor contacted OH (page 104), to ascertain whether another OH referral was necessary, but the OH nurse stated that another referral was not required because the issues were the same as in July 2015 (page 104). She then called the claimant (page 105) who advised that her GP had signed her off for another week (to 15 February 2016) (page 106).

53. On 12 February 2016, the claimant came into work for an informal face to face meeting with Wendy Taylor. The claimant was accompanied by her trade union representative (Sean Reid). Notes were taken by Norman Tyrell (page 107-108). The claimant reported at that meeting that her situation was improving and the "hypos" had stopped in the middle of the night and that this was because in the last two weeks she has had breakfast, lunch etc at the same time. She said that regular meal times with a constant shift pattern would benefit her health, so it was agreed that Wendy Taylor would seek approval for a TRA to change her shift pattern to 9 – 5 for 4 weeks, with Thursdays to accommodate appointments with the dietician. This would be in place while consideration was being given to an AWP. Wendy Taylor gave her a blank AWP and a completed sample.

54. On 13 February 2016, Wendy Taylor telephoned the claimant (page 109) to advise that the TRA would run for only one week, and not four as previously indicated, because that *"would not benefit her in the long run in the event for any reason the AWP was not accepted and a TRA cannot be extended and she would be expected to revert to her current shift pattern right away"*. Wendy Taylor thought that it was unlikely that the AWP would be granted, and that it could take as long as 6 weeks to be determined, and she thought it would be worse for the claimant on return if she had been allowed an altered shift pattern

for a longer period. In particular, she thought it might result in her going off sick again.

55. Although the claimant was due back on 15 February 2016, she did not return that day. When Wendy Taylor telephoned her, she advised (page 110) she was on anti-depressants for anxiety which was due to her diabetes and that she had another appointment with her GP, who signed her off until 29 February 2016 (page 115).

56. Wendy Taylor contacted the claimant by telephone on 17 February (page 117) and on 20 February (page 118) and on 22 February (page 119). Wendy Taylor had however already prepared a letter on 19 February 2016 (page 121) to advise the claimant of a meeting to take place on 26 February to discuss her absences. That letter was dated 22 February (page 120). Prior to the meeting which took place on 26 February, Wendy Taylor contacted OH to ask whether ill health retirement was an option, but she was told it was unlikely the claimant would qualify (page 122).

57. The meeting on 26 February was attended by the claimant's union rep Sean Reid, with notes being taken by Graeme Thow (page 123-124). The purpose of the meeting was to discuss what could be done to facilitate a return to work and confirm a return to work plan (page 125-127). An agreement was reached that the claimant could start at 9.30 for the first week of her return. A stress risk assessment was also undertaken (page 128 -137).

Return to work

58. On 29 February 2016, the claimant returned to work, having been absent for 21 working days during this period. The claimant had two meetings with Wendy Taylor, one recorded as a return to work discussion (page 138), and the other was a so-called "Equality Act Meeting". Wendy Taylor had however already at least started to complete the form relating to that meeting on 15 February 2016 (page 111). Wendy Taylor advised the claimant that this absence would not be discounted, taking account of the adjustments made, the fact that the claimant

had attended the diet course on 18 February, that no new medical advice had been given and there were no changes in her condition, and the fact that the business could not support it.

59. By letter dated 1 March 2016, Wendy Taylor wrote to the claimant to advise that, as previously warned, because she had been absent for 21 days since completing the stage 1 review period, she had decided to refer her case to a decision maker and to recommend dismissal on the grounds of unsatisfactory attendance.

60. By letter also dated 1 March 2016, Wendy Taylor wrote a letter to an unknown "decision maker", advising of her recommendation (page 141), enclosing so-called "decision making tool" form. In that form Wendy Taylor set out the history and concluded, *"I do feel that with the support been offered it not been fully utilised and therefore not fully helping herself in terms of the course she mentioned and AWP form being sent to change shifts. She has had a DOC and she completed Stage 1 review successfully without any sickness absences. I have also discounted the sickness absence in December and no further action was taken at that time. Yet we are at the stage just over 8 weeks later where Alison is off again with an uncertainty of a return to work date"*.

61. Although that form was dated 1 March 2016, it had been at least partially completed before that date and not appropriately updated given the reference to the claimant still being off work and to the fact that she had not taken the course (which she had attended on 18 February).

62. By letter dated 3 March 2016, the claimant was invited to a meeting with the decision-maker, Rob Milligan (page 147).

63. A Temporary Restriction on Attendance (TRA) was granted from 7 March to 14 March allowing for a 9.30 start time to 18.00, Monday to Wednesday, Thursday 11.30 to 20.00, and Saturday 8.00 to 16.00 (page 154). It states *"TRA will be reviewed on the Monday of the second week. Old shift pattern put in but possibly will be changed"*.

64. Around this time, the claimant lodged a grievance regarding lack of support of her line manager, Wendy Taylor. Subsequent to that an informal meeting did take place with Wendy Taylor and Graeme Thow, although there is no written record of that meeting. The claimant's union representative subsequently agreed that this should be considered as part of the dismissal process.

65. The claimant submitted the AWP form on 9 March 2016.

66. On 9 March 2016, the claimant and her union representative met with Wendy Taylor to discuss reasonable adjustments while waiting for the decision on the AWP request. Wendy Taylor followed up that meeting with an e-mail in which she stated that *"We talked about taking your lunch break at a time that suited you based on your sugar levels. You advised me that you require stability throughout your day so taking lunch when it suited you isn't an adjustment that will currently help you. You also confirmed that you could not think of any other adjustments that might help you while at work while you are waiting on a decision on your AWP"* (page 155).

67. On 12 March 2016, following a meeting, Wendy Taylor confirmed the TRA for week commencing 14 March and 21 March with later starts, but reverting to normal shifts week commencing 28 March (page 169). The claimant indicated in response that she did not agree with the proposal and considered that Wendy Taylor was ignoring the advice of her GP (page 170).

Dismissal and appeal

68. On 9 March 2016, the so-called "Decision-makers meeting under HR15008 Probation: dealing with poor attendance" took place when the claimant was accompanied by Sean Reid and notes were taken by Dawn Maslouh (pages 159-161). The claimant's union rep had lodged written representations (pages 149 – 150) for that meeting on the claimant's behalf. Those written representations included a claim that there was a failure to follow guidance in HR 15008 Probation: Dealing with poor attendance under review period. In

particular, following that procedure the claimant should have been given a final written warning under Stage 2 Managing Poor Performance (MPA) Procedure.

69. During the course of that meeting, the claimant expressed concern that the reasonable adjustments in place were not working, and that she was only capable of working shifts similar to a 9 – 5 pattern.

70. Rob Milligan set out his views in a "Deliberations Document" (pages 162- 164) and "Decision Making Process/Deliberations" (pages 165-166). He consulted the documentary evidence relating to meetings etc and also obtained computer print outs which gave very detailed information about the claimant's break times. He contacted the claimant for further information about her condition, and she sent him information prepared by a colleague who also had type 1 diabetes.

71. His note included the following conclusions:

- despite giving her the flexibility to have breaks as and when required, she had adhered to the same routine of taking lunch between 3.5 and 4 hours after the start of any shift. He would have expected to have found evidence of the claimant attempting to maintain regular meal-times/breaks irrespective of shift start times.
- Medical advice suggests that regular mealtimes is key to managing blood sugar levels, and does not support the claimant's assertion that irregular shifts and late shifts in particular are the main contributor to her difficulties.
- Despite the manager recommending the "carbs and cals" course on 28 July 2015, the claimant did not attend that course until 16 February 2016.
- With regard to the claimant's assertion that her GP had recommended that she does not work late shifts, in fact the GP letter states that this is what she has reported to the GP. Despite the claimant's line manager discussing a change to the shift pattern via the Alternative Working Pattern (AWP) process on 1 December 2015, and providing an application form to complete, she did not submit this until March 2016.

- On the suggestion that MPA2 would follow successful completion of MPA1 in Probation, this had been clarified by HR and that the guidance is incorrect and was to be re-written. Correct process is to refer to DM while JH remains within probationary period, which was followed
- Claimant's assertion that she is incapable of working anything other than a traditional day shift is not backed up by the medical evidence.
- OH does also offer an alternative of "reducing the variation on her start and finish times may also assist Ms Doran in controlling her blood sugar levels" and this would be considered via the AWP process taking into account Business Needs.
- the department have been reasonable in making adjustments and in providing support for the claimant, who has failed to be pro-active in attempting to manage her condition, or changing her shift pattern, and therefore he supported the manager's recommendation to dismiss on the grounds of unsatisfactory attendance.

72. By letter dated 30 March 2016 the claimant was informed of his decision to dismiss her and of her right to appeal (page 186). The claimant set out her grounds of appeal in a letter to the appeals manager, Valerie Gudgeon (pages 194 – 200).

73. An appeal hearing took place on 31 May 2016, at which the claimant was represented by her trade union representative, Sean Reid. Notes were taken by Steve Kyle (pages 202 – 204).

74. By letter dated 15 July 2016, the claimant was informed of the decision not to uphold the appeal (page 212). A copy of the appeal officer's deliberations was enclosed (pages 213 – 217). In that document, in relation to the complaint that procedures had not been correctly followed, she stated that *"It is my view and that of HR casework, that the probation guidance was not incorrect but perhaps could have been more clearly worded. As AD acknowledges herself, the initial guidance referred to has since been updated"*.

75. With regard to the claimant's complaint that her grievance was not investigated, she noted that the claimant's trade union rep had asked for the grievance to be dealt with as a supplement to the representations submitted within the decision making process, and she considered that this was dealt with appropriately with Rob Milligan.

76. Valerie Gudgeon concluded that, given the *"last absence was 21 days; when looking at the requirements of the business, consideration points and the adjustments already made, it would not have been reasonable to expect the business to discount an absence of this length. She was made aware how to apply for an alternative working pattern in December 2015 but chose not to submit the application until March 2016 during which time she incurred further sickness absence. AD chose not to progress her AWP application timeously or in the correct matter....it would also be unreasonable to expect such an application to be approved on a temporary basis prior to the aforementioned application process being concluded....responsibility was hers to demonstrate she could provide a satisfactory level of attendance. From the information available including the support in place, it was reasonable to decide that AD could not achieve this standard"*.

77. Apart from the absences, the claimant's performance was otherwise satisfactory (page 206).

78. The claimant secured new employment commencing 15 September 2016. That employment was terminated by mutual agreement on 28 November 2016.

Relevant law

79. Section 15 of the Equality Act states that a person discriminates against a disabled person if he treats the disabled person unfavourably because of something arising in consequence of that person's disability; unless it can be shown that the treatment was a proportionate means of achieving a legitimate aim.

80. Section 20 sets out the employer's positive duty to make reasonable adjustments to address disadvantages suffered by disabled people. This duty broadly arises when a disabled person is placed at a substantial disadvantage by the application of a PCP, by a physical feature, or by the non-provision of an auxiliary aid. A failure to comply with the duty amounts to discrimination under section 21(2). In this case the relevant requirement is to take such steps as is reasonable to avoid the disadvantage where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage.

81. The duty arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. What is reasonable in any given case will depend on the individual circumstances of the disabled person. The test of reasonableness in this context is an objective one (*Smith v Churchill Stairlifts plc* 2006 ICR 524 CA) and the focus is on whether the adjustment itself can be considered reasonable, not whether an employer's process for determining that question was reasonable *(Royal Bank of Scotland v Ashton* 2011 ICR 632 EAT). An adjustment from which the disabled person does not benefit is unlikely to be a reasonable one *(Romec Ltd v Rudham* EAT/0069/07). However, there does not have to be a good prospect of an adjustment removing a disadvantage for that adjustment to be reasonable *(Noor v Foreign and Commonwealth Office* 2011 ICR 695 EAT). The question is whether the adjustment would be effective in removing or reducing the disadvantage the claimant is experiencing as a result of their disability, not whether it would advantage the claimant generally. To assess the effectiveness of a proposed adjustment, it is best practice to consult the disabled employee, who is most likely to know whether the adjustment would make a difference. Alternatively, or additionally, expert opinion, such as medical or occupational health advice, could be obtained on the probable effect of any proposed adjustment.

Claimant's submissions

83. Mr Russell produced skeletal submissions which he supplemented with oral submissions. He had indicated during the hearing that he was not relying on the

respondent's failure to provide regular and consistent break times (see the ET1).

84. Mr Russell highlighted concerns about the evidence of the respondent's witnesses and urged the Tribunal to accept the evidence of the claimant in preference to the evidence of the respondent's witnesses.

85. With regard to the s15 claim, this hinges on the question of proportionality. There was no evidence before the Tribunal about the individual impact of the claimant's dismissal. The respondent failed to implement reasonable adjustments contended for prior to dismissal, dismissal was thereby disproportionate and the s15 claim must succeed.

86. In particular, Mr Russell submitted that should the Tribunal make a finding that it was the old policy that was in play at the relevant time, then the section 15 claim should succeed, because the claimant should have been at stage 2 of the absence management procedure. Further, the claimant was given a warning without hitting the consideration point and the matter is compounded by the lack of the Equality Act meeting. Had the one day's absence been discounted, the claimant would have been left with half a day's absence over one occasion which Wendy Taylor said would not have attracted any warning. This was a disproportionate decision which meant that she was later referred straight to the decision maker when she hit the trigger following her 21 days of disability related illness in February 2016. The claimant was dismissed without having the main adjustment contended for and suggested by OH put in place. Nor did the Tribunal hear evidence about why the respondent could not justify tolerating/discounting the 21 days disability related sickness. The justification for discounting absences is not clear, as highlighted by the fact that Wendy Taylor was able to overturn Norman Tyrrell's decision without giving a rationale, which suggests that it is at the discretion of management. Should any of the adjustments contended for under section 20/21 succeed then the section 15 claim should succeed because dismissal would not be proportionate.

87. With regard to the reasonable adjustments claim, Mr Russell submitted that the Tribunal can substitute their own view. It is an objective exercise. He argued that the PCP in this case is twofold, namely the attendance targets set by the absence policy and the requirement to work the continuous rotating shift pattern. The substantial disadvantage is the dismissal. Relying on the case of *Fareham College Corporation*, he argued that the comparison is with those who are not disabled, and that the policies had a disparate effect on those with Type 1 diabetes. Mr Russell set out the factors which the Tribunal could rely on in determining the reasonableness of the adjustments contended for, and relied on the fact that the respondent is one of the largest employers in the UK with the full resources of the Government behind them.

88. With regard to the respondent's argument that the claimant delayed in making an AWP application, this approach is fundamentally wrong, because the onus is on the respondent to meet the requirements of the reasonable adjustments duty. This should not be subject to an application process, or require a business case for it to be granted, and the timescales to consider the application run contrary to the requirements of the duty. When engaged, the requirement to make adjustments should be prioritised. Wendy Taylor also stated that there was a high likelihood that the claimant was not going to get her request; this cannot be said to be complying with the duty to make the reasonable adjustment.

89. Mr Russell invited the Tribunal to find that the conclusions of Rob Milligan in finding no evidence of the claimant attempting to maintain regular meal times or being proactive in managing her condition was unreasonable. He was relying on an OH report which was 8 months old. OH was approached without further consent or knowledge of the claimant. The claimant repeatedly advised that her GP and the specialist diabetic nurses were concerned about the impact the shift pattern was having on her diabetes. Mr Milligan wrongly assumed that the key to the claimant's difficulties was in maintaining regular meal times, regardless of the shift she was working. The claimant was at pains during her evidence to say that the management of her condition was not as straight forward as this. His decision is not supported by any medical evidence and

goes against what he was being told by the claimant, her GP and OH. Many different websites providing information about Type 1 diabetes, many of which recommend avoiding shift work; and the OH report recommends alterations which included reducing the variation of her start and finish times. There was a failure to make this recommended adjustment and the information regarding her shift pattern was effectively ignored by Mr Milligan without good reason.

90. With regard to the respondent's assertion that the claimant failed to take issue with the shift patterns before December 2016, the claimant was making an effort to adjust to the shift patterns and the respondent was aware that she was using annual leave and STAR days to cover periods of disability related illness. The e-mail of 1 December 2015 is of crucial importance, because the claimant makes it crystal clear that she is not coping and cannot manage the shift pattern. This is the point at which the respondent was under a duty to make the reasonable adjustment.

91. Mr Russell invited the Tribunal to find that the respondent had failed to the following reasonable adjustments which would have avoided dismissal i) fixed working pattern/flexible working, including TRA; ii) discounting disability leave/increase tolerance level; iii) management under capability procedure and iv) apply disability adjustment to the 21 day absence in February. Whilst a reasonable adjustment passport was never put in place, the Tribunal has not heard enough about this to determine that the failure would have avoided substantial disadvantage.

92. Mr Russell also referred the Tribunal to the case of *Smith v HMRC*, which is a decision of the employment tribunal in which Rob Milligan and Valerie Gudgeon gave evidence. He referred the Tribunal to a schedule of loss. In regard to injury to feelings, he asked the Tribunal to take account of the emotional impact of the decision which was clear from the way she gave evidence.

Respondent's submissions

93. Mr Gibson lodged written submissions which he supplemented with oral submissions. In his written submissions, he set out the background and the issues and proposed findings in fact.

94. With regard to the s15 claim, Mr Gibson accepted that the claimant was dismissed on grounds of unsatisfactory attendance and that the respondent thereby treated her unfavourably because of something arising in consequence of her disability. However dismissal was a proportionate means of achieving a legitimate aim. The legitimate aim is to provide the public with an efficient and effective telephone advice service during the entire period of its opening hours. This requires operatives to attend work regularly and carry out their full duties, and work outwith a standard 9-5 shift pattern. Dismissal to free up a post to allow the organisation to hire someone who could is a proportionate means of achieving the legitimate aim.

95. The dismissal of the claimant in particular was proportionate because of the past and future impact her sickness absence had and was likely to have on the ability of the organisation to achieve its new aim. The respondent had recruited 250 new employees to work a non-standard shift pattern. If staff were off sick, this had an impact on colleagues and on service provision. The claimant had exceeded to a very significant extent the consideration points, so it was proportionate to dismiss her given her absence record.

96. The claimant's averment that as a large employer the respondent could easily have accommodated the claimant on a 9-5 shift pattern from around 1 December 2015 is not supported by the evidence:

- this does not take account of the impact on business efficiency of not having a member of staff on the non-standard shift pattern. If one member worked 9-5 only, that would leave a service provision gap and had a negative impact on colleagues who have to do more of the unpopular shifts.
- the claimant failed inexplicably to submit the AWP application to work a standard shift until after the 21 day absence. In any event there was no

guarantee that it would be granted. Wendy Taylor thought it unlikely because this was not what the claimant was contractually required to do and it had serious impact on business efficiency.

- The claimant initially stressed that she did not want to change her shift pattern and did not make the request for a change until five months after she started.
- The claimant failed to follow occupational health advice to take her meal breaks at set times. In contrast, the respondent followed occupational health advice and put in a mechanism which would have prevented the claimant's absence.

98. Consent was sought and obtained for the occupational health assessment and no other consent was necessary. Additional contact by the respondent was by way of clarification and management advice. The evidence of the claimant's diabetic nurse upon which the claimant relies (page 82) *("they advised that the time when she is eating is affecting her insulin levels"*) supports the respondent's reasonable adjustment. In any event, the claimant in evidence accepted that the adjustment did not prevent her from regular meal times. The medical evidence did not support her contention regarding the problems caused, with her GP only setting out what she felt, not his view. The OH report was clear that *"workplace adjustments should be focused on enabling Ms Doran to have regular meal times as this is likely to assist her in maintaining good control of her blood sugar levels".*

99. With regard to the failure to make reasonable adjustments, while the respondent accepts that the claimant was placed at a substantial disadvantage by the application of the respondent's absence management policy, they do not accept that she was placed at a substantial disadvantage by the application of the shift patterns. This is because these alone did not make it more likely that the claimant would have some difficulty in maintaining good control of her blood sugar levels. The respondent did follow OH advice as set out in the report. While two alternatives were suggested in the OH report, it was a matter for management which of the alternatives was feasible and the respondent

decided that she could not work 9-5. However, no PCP requiring irregular meal times was applied to her.

100. The respondent immediately made a reasonable adjustment, which was to provide regular meal breaks. The claimant failed to take advantage of this adjustment for a period of five months, during which time she was only absent for half a day, before indicating on 1 December 2015 that the late shift was affecting her health and she would like a change of shifts. This raises the obvious question whether it was the late shifts or the failure to eat at regular times which was affecting the claimant's health. If the claimant had followed medical advice her absences would have been avoided.

101. Ms Taylor explained why she did not feel that a change to the claimant's shift pattern was a reasonable adjustment because the claimant should have completed the AWP form for a permanent shift change; there was a very definite and specific business need to have call centre employees work non-standard shifts; the TRA was for people returning to work after a long period of absence, it was not a suitable mechanism in these circumstance; she spoke to her manager but was told that a temporary shift pattern could not be put in place for good business reasons.

102. The claimant was absent for 21 days and the evidence supports the contention that the business could not support such a lengthy period of absence. One person taking an absence did have a significant impact on service provision, especially during the busy twilight period of 5 – 8 pm.

103. With regard to remedies, Mr Gibson argued that causation is broken by the fact that the claimant started another job on 15 September 2016 which she gave up of her own volition. Any compensation for loss of earnings must therefore be restricted to the period 4 May 2016 to 14 September 2016. That job was a direct customer facing role and by all accounts just as demanding a position, and as this is a less serious case of discrimination, injury to feelings should be restricted to £1,000.

Tribunal's discussion and decision

Tribunal's observations on the witnesses

104. We considered the claimant to be an honest and credible witness, although we found her evidence unclear in places and it appeared to the tribunal that this was because the claimant had difficulty at times expressing herself due to her emotional response, for example in relation to the issue of when she needs to eat.

105. We considered Sean Reid to be an impressive witness, considering the lack of notice coupled with the fact that he was required to recall events from a year ago. We noted that he was careful not to speculate or give answers about events about which he did not know and we found his evidence to be wholly credible and reliable.

106. With regard to Wendy Taylor, while entirely understandable given that she was giving evidence at the request of her employer, we got the impression that she was being cautious with her answers which came over as rehearsed. While we appreciated that she was nervous, she had a tendency to avoid answering direct questions in places because she was being careful about the answer, and over thinking what the answer should be and she became hesitant when she realised that she might say something inappropriate. This was clear to us for example from the fact that, in answer to a perfectly appropriate question from Mr Russell, asked in a reasonable tone and style, she got rather upset and said *"I don't know where you're going with that"*. We should say that we understood that Mrs Taylor's actions were motivated by a strong desire to defend her employer, and we make no criticism of that motivation.

107. With regard to Rob Milligan, while we considered him to be a credible witness, we were of the view that he took a rather tick box or mechanistic approach to his task, without standing back and giving consideration to the significance of the decision in the round. We also found Valerie Gudgeon to be a credible and

reliable witness, and we found her evidence to be helpful in giving us a clearer overview of the approach which the respondent took.

Tribunal's deliberations and conclusions

108. In this case the claimant claims that she has been discriminated against for reasons which relate to her disability, in particular under section 15 and section 21 of the Equality Act.

109. We initially gave consideration to whether it was appropriate to consider section 15 or section 21 first. Although there is no longer a specific provision making a requirement to consider the reasonable adjustments duty first (unlike DDA s3A(6)), where there is a link between the reasonable adjustment required and a claim of discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification' (see *Dominique v Toll Global Forwarding Ltd EAT/0308/13*). However, it is unlikely that disadvantage which could be prevented by a reasonable adjustment could be justified (see *Dominique* case and *General Dynamics Information Technology Ltd v Carronza UKEAT/0107/14* as well as the EHRC Code of Practice para 5.21).

110. We therefore considered it appropriate to consider the reasonable adjustment duty first.

Section 21 Failure to make reasonable adjustments

111. Mr Gibson helpfully conceded (as might have been expected given the implications of the decision of the Court of Appeal in the case of *Griffiths v DWP* [2015] EWCA Civ 1265) that the claimant was placed at a substantial disadvantage by the application of the respondent's absence management policy.

112. While Mr Gibson did not accept that the claimant was placed at a substantial disadvantage by the application of shift patterns, we did not accept that

submission because the evidence (including the OH report) indicated that shift patterns could impact adversely on disabled people with the claimant's impairment. The disadvantage created by the lack of a reasonable adjustment is measured by comparison with what the position would be if the disabled person did not have the disability (see EHRC Code of Practice, para 6.16). Had the claimant not been disabled, the shift patterns would not have disadvantaged her.

113. The focus of our enquiry therefore was on whether the respondent had failed to make reasonable adjustments to remove that substantial disadvantage.

114. In this case the respondent argues that the adjustments which were made by them were reasonable and that no other adjustments were required. The respondent relied on OH advice and put the recommended adjustment in place immediately.

115. The key question for the Tribunal is whether the adjustments which the respondent put in place were sufficient, or whether there were other adjustments which it would have been "reasonable" for the respondent to put in place in order to meet the requirements of the duty.

116. We noted that Mr Russell, quite rightly, accepted that the respondent had put in place an adjustment allowing the claimant to take regular meal breaks, and he is no longer contending that the implementation of a reasonable adjustments passport is a reasonable adjustment which would have avoided the disadvantage.

117. We agreed with Mr Gibson that dealing with this issue under the capability procedure or the DAL procedure was an adjustment which would not have addressed the substantial disadvantage.

118. We also agreed with Mr Gibson that an adjustment which discounted disability leave or increased the tolerance level and the application of disability adjustment leave to the 21 day absence, given the way that the respondent

dealt with the issue of disability related sickness absence, amounted to the same thing.

119. With regard to Mr Russell's contention that a reasonable adjustment would have been to introduce a *"fixed working pattern/flexible working, including TRA"*, we understood this to mean that a reasonable adjustment would have been to permit the claimant to work a fixed working pattern, but not flexible hours, and in particular a standard 9 to 5 shift.

Reasonable adjustment: standard work pattern

120. We first considered the request to introduce a fixed working pattern, specifically that the respondent should have permitted the claimant to work a standard 9 to 5 shift.

121. Much was made of the fact that the claimant delayed in making an application for an alternative working pattern (AWP) under policy HR32004. We noted that the claimant did not submit the application until 9 March 2016 and initially it was not clear to us why she should have delayed in submitting that application. However, it became apparent from Mr Reid's evidence that the union is slow to advise its members to make such an application because it results in a permanent change of hours, and that the claimant was relying on their advice. It also became clear that this particular policy was introduced for the respondent to meet its obligations under the flexible working regulations. We agreed with Mr Russell that there should not be a requirement for a claimant to make an application in order to be afforded a reasonable adjustment. If an adjustment is considered to be reasonable, it should not be dependent on the claimant making an application for the adjustment to be considered. In any event, it was clear from the evidence that, in Wendy Taylor's view at least, it was not likely that the claimant would be granted the change.

122. The respondent also relied heavily on the occupational health report when it came to deciding what adjustments were reasonable. We noted that in the occupational health report it was stated that *"some people with type 1 diabetes*

do find that changes to start and finish times at work and irregular eating patterns can cause some difficulty in maintaining good control of their blood sugar levels", and continued *"it would be sensible for management to consider whether she can be provided with regular meal breaks times that do not vary significantly from day to day in order to assist with maintaining a regular routine. Alternatively reducing the variation on her start and finish times may also assist Ms Doran is controlling her blood sugar levels"*.

123. Mr Gibson relied on the fact that the report states that *"it is a decision of management as to whether either of these alterations is feasible in the work place"*. He stressed that these were alternatives. He stressed that it was not being suggested that the respondent should implement both adjustments. The respondent had immediately put in one of the reasonable adjustments, and the claimant had not taken advantage of it. That was sufficient for the respondent to discharge their duty. There was no duty on them also to implement changes to shift times as well.

124. We considered this to be semantics and an inappropriately pedantic take on the recommendations of the respondent's occupational health advisers.

125. With regard however to the adjustment that was made, the respondent's conclusion, that the claimant was not taking meal breaks at appropriate times despite the adjustment, was based on a detailed analysis of when the claimant took her meal breaks, available from computer print outs considered. The respondent was thus of the view that the claimant had failed to take advantage of the reasonable adjustment which was afforded to her. They were of the view that it was her responsibility to do so and therefore that she was the author of her own misfortune. That failure to take advantage of the reasonable adjustment offered absolved them of the responsibility to consider others, even an alternative proposed in their own OH advice.

126. The claimant stressed that the respondent knew when she took her breaks, but they did not know when she ate or took her meals. She said that she might not be hungry, or that her blood sugar levels might be ok, and that would depend

on her habits as well as what and when she ate, and that her needs can vary from day to day. As we understood her evidence, she would eat when her *"body told her to"*. She frequently said in evidence that she was happy with the shifts, but that her *"body did not like them"*.

127. While it was not entirely clear to us from the claimant's evidence what exactly she meant by this or why she had apparently not significantly adjusted her break times, she seemed to be suggesting that the regular meal breaks were necessary but not sufficient to control her diabetes. In any event, we did not consider it appropriate for the respondent to rely entirely on the fact they had introduced one form of reasonable adjustment as a reason not to consider other adjustments which were recommended as an alternative when the adjustment was apparently not effective. We took the view therefore that the change of shift patterns should not have been so readily discounted by the respondent.

128. The respondent did not consider it necessary or appropriate to implement even a temporary reduction (or change) in hours, or TRA as it is known. The claimant made a specific request for a change in shift to assist in her return to work following the absences in December 2015. Graeme Thow advised that he could not authorise the change in shifts because of the business needs at the time, apparently based on the call demand throughout the day. We were not made aware of any further reasoning or analysis to justify this decision. At one point to facilitate a return to work after the long absence in February, Wendy Taylor agreed to seek approval for a TRA for a 9 to 5 shift pattern for 4 weeks, but that was approved for only one week. Wendy Taylor said, rather counter-intuitively it seemed, that this was because the four week period would not benefit her in the long run, and was likely to result in her going off sick again. This seems to be on the basis that she was highly unlikely to get the permanent AWP adjustment, so it would be worse for her to have to revert to her old shifts after one week rather than four.

129. Clearly, by this stage the claimant thought that she would benefit from an adjustment to her shifts. She relied on advice from her GP and diabetic nurses.

However, the respondent ruled out that possibility because a) she had not asked for an AWP b) they had already implemented what they considered to be sufficient reasonable adjustments and the claimant had not taken full advantage of that; c) she took the job in the knowledge she would have to do the twilight shift; and d) otherwise the business needs did not permit that adjustment. In particular, taking into account the business needs of the organisation, the business could not support such a change for the claimant. The claimant and around 250 others had been taken on specifically to cover the times when the helpline was particularly busy, and in particular to cover the *"twilight"* shift. Mr Gibson stressed in submissions that this was significant.

130. However, we considered that the respondent took the wrong approach to the question of reasonable adjustments. The respondent apparently prioritised the business needs over the circumstances of the individual. When it comes to the reasonable adjustments analysis, which is not the same as the objective justification question, the starting point is the situation of the individual and the extent to which the substantial disadvantage caused to the disabled person could have been prevented by the adjustment.

131. The EHRC Code of Practice at paragraph 6.23 states that, *"what is a reasonable step for an employer to take will depend on all the circumstances of each individual case"* and confirmed that the test is an objective one (6.29). The Code states at paragraph 6.28 that the following factors should be taken into account: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer's financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment; The type and size of the employer.

132. The focus here seemed to be on the respondent's business needs. Little focus seems to have been given in this case to the specific needs of the individual and the extent to which putting the adjustment in place would prevent the disadvantage. An inappropriate onus was placed on the claimant to apply for

and justify adjustments. The difficulty for the respondent, in relying on the fact that the claimant should have applied for an AWP, is that the AWP policy is not designed as a reasonable adjustment at all, and Wendy Taylor operated on the basis that she was unlikely to get it in any event. We noted that in evidence that Mrs Taylor and Mr Milligan took the view that they had to treat everyone the same in fairness to all staff. But that is on the basis that the claimant is one of many hundreds of members of staff, the majority of whom are not understood to be disabled, to whom the reasonable adjustments duty does not therefore apply.

133. The respondent has, rightly, conceded that the claimant is a disabled person for the purposes of the Equality Act. Employers are under a duty to take positive steps to prevent substantial disadvantage to disabled people through making reasonable adjustments. Disabled people are in a different position from other members of staff. Different polices and principles should apply to them. This might mean that more favourable treatment is afforded to them than others. Baroness Hale in *Archibald Council v Fife* [2004] UKHL 32, when discussing the equivalent and almost identical provisions of the Disability Discrimination Act, stated that the Act *"entails a measure of positive discrimination, in the sense that employers are required to take steps to help disabled people which they are not required to take for others"*. She continued, *"It is also common ground that employers are only required to take those steps which in all the circumstances it is reasonable for them to have to take".*

134. The question for us then is whether or not it would have been reasonable for the respondent to take the step of changing the claimant's shifts. The respondent is a very large public sector employer with significant financial and other resources. The fact that the claimant was taken on, along with around 250 others, to address a particular business need, while an issue to take into account, is not a central consideration, when she was a disabled person for the purposes of the Act.

135. The claimant's position is that that the change in shift would have made the difference or prevented the disadvantage to the claimant. She had previously

worked in 9 to 5 jobs and been able to manage her condition. Although she had made every effort to comply with the shift regime, she had come to the conclusion that this was not possible. We noted that Mrs Taylor in evidence stated that if the claimant had submitted the AWP sooner, then she may have avoided the absence in February, apparently recognising that changed shifts could have made a difference. The respondent cannot know whether it would have prevented the disadvantage, because they did not permit the claimant to alter her shifts, even for a trial period.

136. We consider that, taking all of the circumstances into account, including the factors set out in the EHRC Code of Practice, it would have been reasonable for the respondent to have given the claimant a change of shifts, even just for a trial period. We thus consider that the respondent failed properly to take account of the fact that they had a duty to make reasonable adjustments because the claimant was a disabled person.

Reasonable adjustment: discounting further absences

137. We went on to consider whether, with or without that adjustment to the shifts, a further or alternative adjustment would have been to discount more sickness absence. It is quite clear, from recent decisions such as *Griffiths* and indeed the EHRC's code of practice that employers are not obliged to discount all sickness absence for disabled people. Rather employers must discount, as a reasonable adjustment, such sickness absence as is reasonable in the circumstances, taking account of the situation of the particular individual.

138. Indeed, we noted that the respondent's disability related sickness absence policy required managers to *"treat each case individually, taking account of the severity of the condition and any changes; and have a clear understanding of the business needs of the area where the disabled jobholder works; speak to your own manager if unsure. Avoid generalising about HMRC or your business area as a whole: the decision must be justifiable in relation to that person's circumstances and job at that time and the impact on the jobholder's wider team and service delivery"*.

139. We do not consider that the decision makers in this case properly followed that policy. We consider that they inappropriately stressed too heavily the weight to be given to the business needs in the assessment of reasonableness. In any event we accepted Mr Russell's submission that there had been a complete failure in this case to take into account the business needs of the area where the disabled jobholder works. Rather the managers in this case fell into the trap of generalising about HMRC and the business area as a whole. Indeed, we noted that there was a tendency for the managers to repeat the mantra *"the business could not support it"* without having the evidence to support that conclusion. There was some indication that account might be taken of overall call numbers, but there was no evidence that decision makers had *"a clear understanding of the business needs of the area where the disabled jobholder works"*.

140. We considered that the fact that Mrs Taylor could overrule Mr Tyrell's decision that absences should not be discounted highlighted the fact that the respondent's approach to this question lacked objectivity, apparently giving the impression that it was a matter left to a manager's discretion.

141. Further and in any event, we noted that the standard sickness absence policy was also applied to the claimant. This was a policy which was designed to deal with people who are ill. That policy was applied to the claimant, who received a written warning after only one and a half days of sickness. The warning was issued to her on 31 July, after it had been confirmed by occupational health that the claimant was disabled for the purposes of the Equality Act. We should record here that we did not consider it significant to the outcome of this case that the respondent did not revisit the first half day's absence, because the written warning was not apparently taken into account by Mr Milligan in his decision-making.

142. Mr Gibson made an issue of the claimant not raising concerns about the shift until December 2015. We recognised however, that the claimant was under a great deal of pressure not to be absent; she was well aware of the respondent's attitude towards absences; and we heard evidence that she was using annual

leave and so called STAR days (where a member of staff phoned in in the morning to find out if they could take leave), as well as flexi when she was feeling ill so that she did not breach the absence policies.

143. We can fully understand that the respondent should have a strict sickness absence policy, and the fact that sickness absences can impact on the number of calls answered and the workload of the other staff. It is important for the respondent to have in place clear policies to deal with sickness absence robustly and quickly, and to ensure that there are not those who are exploiting the sickness absence policy.

144. However, we consider that the respondent has failed to properly take into account the fact that the claimant was a disabled person. Chris Brown issued the warning regardless of other information which would by then have been on the claimant's personnel file. We came to believe that the problem was because the sickness absence policy and the other policies which related to the respondent's duties under the Equality Act were not integrated when it came to the treatment of disabled people. Had there been a section of the standard sickness absence policy which gave guidance on how to deal with disabled members of staff then it may have been easier for managers to implement policies appropriately.

145. We noticed that the policy relating to absence management in probation is about dealing with people who are ill (or whose absences are otherwise unexplained). Here, the claimant had a disability. The absence management policies appeared to run in parallel with the disability related absence policies, with staff being dealt with separately under both, apparently causing more work for managers. The probation absence policy states that the manager should consider whether the absence relates to a disability (page 227) but does not give any specific advice about that. The absence management procedure refers to reasonable adjustments (p247) but does not appear to suggest that one adjustment might be to not follow that guidance (page 257). The DRSA sickness absence policy allows for discounting of sickness absence, considered in isolation from the standard sickness policy. The policies seemed

to require managers to compartmentalise issues when dealing with the same person. It seemed that managers would have separate meetings with staff, on the same day, under different policies without doing any joined up thinking. For example, when the claimant returned to work after the long absence in February, it seems she had a return to work meeting, and an "Equality Act" meeting, while at the same time being recommended for dismissal because of the unsatisfactory attendance.

146. The respondent's approach to "discounting" under a policy which was separate from the sickness absence policy, and on an absence by absence basis, seemed to mitigate against the correct approach being taken in respect of absences of a particular individual who was disabled at critical points, such as when considering dismissal.

147. In this case, Wendy Taylor advised the claimant that the 21 day absence would not be discounted. That view was subsequently endorsed by Rob Milligan. Mrs Taylor gave a number of reasons. She said that she was taking into account adjustments already made. However, we noted that the DSRA policy stated that managers should involve the disabled person when considering appropriate adjustments. Here, as discussed above, no account was taken of the views of the claimant, or indeed the alternative suggestion of OH. We noted too that the OH advice stated that one might expect a person with type 1 diabetes to have a slightly higher absence rate than someone without the condition.

148. She took account of the fact that the claimant had attended the diet course on 18 February, although that might have suggested that some days at least should be discounted, or that the decision should be deferred to assess whether attending the course had made any difference.

149. She stated that that no new medical advice had been given and there were no changes in her condition. The DSRA policy states that the manager should obtain occupational health advice if the condition is new or fluctuating unless it is clear and current enough. We do not accept that it could be said with

confidence that the claimant's condition had not changed, and therefore we considered that Wendy Taylor ought to have obtained an up to date OH report before coming to that conclusion (although we did note that at one point she consulted OH to ask if that was necessary).

150. Further, she said that the business could not support that level of absence, but, as discussed above, Wendy Taylor did not have the relevant evidence to allow her to come to that conclusion. Further it was not clear to us why consideration was given to discounting at least some of the 21 days. We noted that the DSRA policy states that managers could refer the matter to their manager if they consider it reasonable to discount more than 5 days sickness absence in any 12 month period.

151. We noted too that is appeared that Mrs Taylor was completing forms before meetings or discussions had taken place. While this may be in the interests of efficiency, at the very least this gives the impression that matters had been pre-judged and that all relevant factors have not been fully considered.

152. We concluded that the respondent failed in its approach to the discounting of the disability absences. As discussed above, we considered that the respondent focussed too heavily on the business needs of the organisation, rather than the reasonableness of the adjustments or the extent to which the disadvantage could have been prevented by them. In making these decisions focussing on the business needs of the organisation, the decision makers did not in any event have the information which they should have had to allow them to determine whether or not the business could in fact "support" the absences.

153. Taking account of the circumstances of the respondent, as well as the situation of the claimant, we considered that it would have been a reasonable adjustment to discount further absences in this case. We concluded therefore that, in this regard, the respondent has failed to comply with the requirements of the duty to make reasonable adjustments.

Section 15 – Discrimination arising in consequence of disability

154. The respondent conceded that dismissal was unfavourable treatment amounting to discrimination arising in consequence of disability. The focus for our deliberations then was the question of whether or not dismissal this was a proportionate means of achieving a legitimate aim.

155. Before turning to that however, we deal with the issue raised by Mr Russell regarding the old and new probation policy. While we have found that the old policy was in place, and the wording of that clearly indicated that the claimant would have been considered under stage 2, we did not consider that the approach taken was related to or arising from disability. Rather it related to an error which was made in the original policy, which is now corrected. We did not consider this to be of significance in our deliberations overall, as we do not consider that it would have impacted on the ultimate outcome in this case. However, we did note that it would have been helpful if the exact date when the amendment had been made was clear, in line with the practice for HR policies of other large public sector organisations.

156. We should record here too, given that it was raised in Mr Russell's submissions, that we did not consider it significant in this particular case that the claimant's grievance was dealt with in the context of the dismissal process (indeed it appeared that the claimant's trade union representative had agreed to that). Nor did we consider it of significant that the respondent did not get further informed consent before getting further advice from OH.

157. We had no hesitation in agreeing that the aim or business need was legitimate, namely *"to provide the public with an efficient and effective telephone advice and query service during the entire period of its opening hours"*, as articulated by Mr Gibson.

158. The key question, as is often the case when considering this issue, is the proportionality question. As discussed above, the fact that we have concluded that the respondent failed in its reasonable adjustments duty is a factor which

we require to take into account as part of the balancing exercise when considering questions of justification. We were conscious however, that it is considered unlikely that disadvantage which could be prevented by a reasonable adjustment could be justified. In this case, had the claimant's shifts been altered, even for a trial period, or had more of her absences been discounted, then dismissal would not have resulted at the point that it did.

159. Nevertheless, we considered whether dismissal was proportionate in this particular case, giving careful consideration to the respondent's rationale for dismissing the claimant. We noted that the respondent concluded that the business could not support the level of absence of the claimant. We considered that greater weight could be given to the business needs when considering this proportionality question than when considering whether adjustments were "reasonable". However, as discussed above we were of the view that the decision makers in this case had made their decisions without having a clear understanding of the business needs of the area where the disabled jobholder works, as is required by their policy. We did not consider that the fact that the claimant was taken on in a cohort specifically recruited to cover the twilight shifts should be given the amount of weight in the proportionality assessment contended for by the respondent. As discussed above, the position is very different for members of staff who are disabled, whom the respondent owes a positive duty.

160. We have stated that Mr Milligan took an inappropriately mechanistic approach to his task, without stepping back and considering the decision he was making in the round. We noted that in coming to his decision he relied on the medical evidence which he had, concluding that the claimant's assertions were not backed up by medical evidence. We did not consider that to be clear cut, and we noted that Mr Milligan did not believe he required further medical evidence, even thought the medical evidence that he was relying on was some eight months old. He said that the issue of an alteration to the claimant's shift would be considered via the AWP process, even thought that focuses on the business case and does not take account of the claimant's circumstances in the way that the question of reasonable adjustments would be assessed. In any event, he

did not consider it appropriate to defer his decision to ascertain what the outcome of that process might be, or for other reasonable adjustments to be tried. He also relied in coming to his decision on the fact that the claimant had not herself been proactive in relation to meal breaks or applying for an AWP, and we considered that to be inappropriate for the reasons discussed.

161. With regard to the appeal, again we concluded that Mrs Gudgeon applied the wrong tests given that the claimant was disabled. She focused too heavily on the business needs of the organisation, and placed too much responsibility on the claimant in respect of pursuing reasonable adjustments.

162. The respondent is a very large public sector organisation with significant financial and other resources, and we considered that it therefore has the resources to accommodate disabled staff where reasonable adjustments were required. Changes should be made in the workplace, where reasonable, to ensure that disabled people can continue to work. The claimant clearly enjoyed her work; she was keen to continue; she used annual leave to try to mitigate against absences and there was no complaint about her performance. The reasonable adjustments duty of the Equality Act is designed precisely so that disabled people should be able to continue working notwithstanding disabilities.

163. The respondent having failed in its duty to make reasonable adjustments, and there being no other countervailing factors weighing in the balance which the respondent could rely on to justify the unfavourable treatment, we concluded that dismissal was disproportionate and not objectively justified. We therefore find that the claimant has been unjustifiably discriminated against for reasons arising in consequence of her disability.

Remedies

164. We then turned to consider remedy. We accepted Mr Gibson's submission that the chain of causation in respect of losses was broken when the claimant obtained alternative employment on 15 September 2016. Thus compensation for loss of earning accrues from the date of dismissal, that is 4 May 2016 to

15 September 2015, that is for 19 weeks. The parties agreed that the claimant's net weekly wage was £293.11. The total sum due then for loss of wages is £5,581.63.

165. With regard to injury to feelings, we accepted that the decision has had a negative impact on the claimant, and has impacted on her self-confidence. We noted that when she was revisiting events giving evidence in Tribunal that she was clearly emotional and frustrated. We got the impression that she liked the job and indeed that she was keen to keep it, and indeed that she performed well in it. We heard that she had maintained friendships she had made there. However, we also took into account that she had not been in the job for very long and that she was able to obtain another job relatively quickly. In these circumstances, we gauged injury to feelings to be at the top of the lowest updated "Vento" band, which is £6,000.

166. We therefore find that the claimant has been unlawfully discriminated against and is entitled to compensation totalling £11,581.63.

Employment Judge: Muriel Robison
Date of Judgment: 8 June 2017
Entered in Register: 8 June 2017
and Copied to Parties