EMPLOYMENT TRIBUNALS

Claimant: Ms S Green

Respondent: Department for Work & Pensions

HELD AT: Liverpool **ON:** 27, 28 and 29 September 2017 (In Chambers 11.10.17)

BEFORE: Employment Judge T Vincent Ryan
Mrs J L Pennie
Mr P C Northam

REPRESENTATION:

Claimant: Mr T Kenward, Counsel
Respondent: Mr D Tinkler, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The respondent did not know and could not reasonably have been expected to know that the claimant was a disabled person in the period from 1 February 2016 to 3 October 2016 ("all material times") and her claims that the respondent failed in a duty to make reasonable adjustments and treated her unfavourably because of something arising in consequence of disability fail and are dismissed.

2. The respondent dismissed the claimant fairly for a reason related to capability by reference to health. The claimant's claim that she was unfairly dismissed is not well-founded, fails and is dismissed.

REASONS

1. The Issues

The issues were agreed with the parties at the outset in respect of each of the claims. Such agreement followed on from the judgment of Employment Judge Holbrook sent to the parties on 14 July 2017 that the claimant was a disabled person

for the purposes of section 6 of the Equality Act 2010 during the period from 1 February 2016 until 16 August 2016. Her disabling impairment is depression. The effective date of termination of the claimant's employment was 16 August 2016 and the outcome letter dismissing her appeal was dated 3 October 2016. The agreed issues were as follows:

1.1 Disability discrimination claims –

1.1.1 Whether the respondent had, and what were, any provisions, criteria or practices ("PCPs") applicable to the claimant's employment in the period from 1 January 2016 to 5 April 2016 (the latter date being that of commencement of her period of absence from employment on the grounds of ill health), and whether they put the claimant at a substantial disadvantage which disadvantage could have been avoided by the respondent making reasonable adjustments. The same issues arose in respect of the period from the commencement of the sickness absence on 5 April 2016 until dismissal on 16 August 2016 and beyond to the date of the outcome of her appeal against dismissal, being 3 October 2016. The claimant contended that the applicable PCPs were those listed in her further and better particulars of the statement of claim appearing at paragraph 7 (pages 35-36 of the trial bundle to which all further page references relate unless otherwise indicated), and those set out at paragraph 5 of the claimant's further particulars at pages 49 and 50. In brief summary the alleged PCPs relate the claimant fulfilling the role of a "coach" prior to the commencement of her sick leave, and subsequently during the period of sickness absence being required to return to work within a reasonable time but not necessarily as a coach. The claimant set out in some detail the alleged substantial disadvantage which she says she faced as a result of the PCPs at paragraph 8 on page 36 which was briefly summarised to the effect that the PCPs caused her debilitating depression which led to her absence from work. The reasonable adjustments contended for by the claimant are set out at page 36 paragraph 9 subparagraphs 1-13.

1.1.2 Section 15 Equality Act 2010 – whether the claimant's absence arose in consequence of her disability. The Tribunal had to determine whether the claimant was treated unfavourably because of that absence by the way she was treated by the respondent through the absence management procedure up to and including the decision to dismiss her and dismissing her appeal against that decision.

1.2 Unfair dismissal: – the respondent contends that the reason for dismissal was the claimant's absence due to ill health and was therefore a capability dismissal which is accepted by the claimant. The Tribunal had to determine whether the respondent acted fairly and reasonably in all the circumstances in treating that reason as sufficient reason to dismiss where

the claimant contended that there was unfairness in the investigation, consideration of medical evidence and a failure to consider alternative employment or adjustments. In essence, the claimant contends that there was inadequate consultation and consideration of medical evidence and consideration of alternatives, and adjustments to the role or alternative roles, such that the decision to dismiss was premature coming after four months' absence bearing in mind the claimant's employment record. The claimant had been employed for almost 28 years and was dismissed after four months' absence. The Tribunal had to decide whether at the point of dismissal that decision fell outside the band of reasonable responses of a reasonable employer and whether it should have waited longer.

2. The Facts

2.1 Introductory facts:

2.1.1 The respondent is obviously a large employer. The respondent operates several personnel policies and procedures including a sick leave and sick pay policy (pages 209-227), attendance management procedure (pages 228-270) and these are supported by amongst other things the HR decision maker's guide (pages 202-208). Its managers are trained in the policies and procedures relevant for our circumstances and they have access to the written documentation as well as to support from in-house HR professionals who operate under the title of "Complicated Cases Advisory Service ("CCAS"). Subject to an employee with ill health following the sick leave policies the respondent would apply the attendance management procedure which included consideration of reasonable adjustments, referral to Occupational Health Services and formal and informal action including review meetings, consultation and referral by a line manager to a decision maker. The decision maker could decide to support a continued period of absence, to demote or to dismiss, and guidance was given to both line managers referring to the decision maker and to decision makers who were also provided with various forms and checklists to assist them. At all material times related to the claimant's situation line managers were under considerable pressure from their chain of command, that is their more senior line managers, to refer appropriate cases of employee absence to decision makers. There was no pressure on any of the claimant's line managers to see to her dismissal, either promptly or not, but there was considerable pressure on the claimant's line manager, Fabia Headley, to push on the procedure so that decisions would have to be made by a decision maker, who in this case was Susan Lythgoe.

2.1.2 The claimant commenced her employment with the respondent in 1989 and worked continuously in various roles until her dismissal for a reason related to ill health and her absence due to it on 16 August 2016 when she was dismissed with pay in lieu of notice.

She had an unblemished disciplinary record over 28 years and whatever about the earlier period certainly during the last seven years of her employment, until the final period of protracted absence that commenced on 5 April 2016, she had been absent for only four days due to ill health. The claimant had worked in various roles as an Administrative Officer and then as an Administrative Assistant dealing with incapacity benefit, both of which roles were "non-facing", that is there was no direct face to face involvement with members of the public referred to by the respondent as "customers". She was promoted to a team leader in the respondent's medical services which again was a non-facing role. In 1994 she became a Lone Parent Adviser which was a customer facing role before moving on in 1996 to another non-facing role as a Customer Engagement Team Leader. On 6 November 2014 she took a partial retirement, returning to work on a 17 hour per week basis over a two day period per week, and in December 2014 she became a Benefit Review Officer which was a customer facing role looking into the eligibility of claimants who were lone parents and whether or not beneficiaries of applicable benefits were claiming benefits that they were not entitled to receive.

2.1.3 At the end of 2014/during 2015 the respondent made known that with the introduction of Universal Credit amongst other reforms there would be a new role for the claimant and many of her colleagues. The claimant initially had a customer facing role dealing with Income Support but from January 2016 this was to become a coaching role. The claimant and her peers were to be entitled "Work Coach Advisers" ("WCAs") whose role was to form a relationship with members of the public, advise on benefit entitlement and work towards achieving secure work placements reducing benefit uptake. The WCA role was very different to any customer facing role that the claimant had previously performed, and this required a significant change in skill sets, knowledge and experience. The WCA role required the advisers to acquire a breadth of knowledge in a number of benefits and to be able to answer questions, discuss and advise customers upon them. The claimant did not have a great deal of prior applicable experience in the skill sets or knowledge and experience of handling many of the benefits which were relevant to this role. Her then line manager, Helen Whittaker, reassured the claimant that she would be provided with a training plan, but she was not. Her subsequent line manager, Ms Headley, was unable to explain to the Tribunal why a specific relevant training plan was not devised and given to her as had been indicated by Ms Whittaker. The applicable available training was provision of written and online materials which WCAs were required to self teach, and they were given an opportunity to observe others carrying out the role and to shadow someone experienced and/or otherwise adept (a buddy).

2.1.4 It was known to management, as confirmed by Ms Headley, that a number of the respondent's employees who were switching to the WCA role found it difficult and stressful, and it was known to Ms Headley and others that the claimant was struggling to cope and was evidencing signs of stress and anxiety to a greater extent than many of her colleagues. The claimant frequently and regularly requested adequate training and made it clear that she was not coping.

2.2 Facts relevant to the claimant's disability discrimination claims: -

2.2.1 The claimant had a history of depression for approximately ten years before the change in role and events described above in and from January 2016. She had received treatment over a protracted period and was on medication for her longstanding depressive illness throughout the period relevant to the claimant's claims. The claimant did not inform the respondent that she had mental ill health and did not want the respondent to know of it. She attended work up to 5 April 2016 when she absented herself due to work related stress brought on by her changed role as a WCA in the absence of training that she felt properly equipped her. The claimant wanted the respondent to understand that her state of stress and anxiety in April 2016 had been brought on by her working conditions at that time and what she considered to be a lack of adequate training and support. Her general state of ill health, depression, may have been exacerbated by the stresses and strains of having to convert to a WCA with what she considered to be inadequate training and support (and that is her contention). She felt the respondent was responsible for this exacerbation in her health and she wanted the respondent to be aware of it without having the opportunity to attribute it, or any part of it to or to blame her longstanding underlying depressive condition.

2.2.2 In line with the respondent's procedures regarding sick leave and attendance management it referred the claimant to its Occupational Health advisers who produced reports on 15 April 2016 (pages 64-66); 13 May 2016 (pages 97-98); and 5 July 2016 (pages 140-146). There was a further abandoned referral which resulted in a report dated 11 August 2016 appearing at pages 170-171. In the reports of 15 April and 13 May 2016 the respondent's Occupational Health advisers advised that the claimant did not have an underlying medical condition. It was believed that her symptoms of stress and anxiety developing into depression were reactive to the circumstances of the change of role to a WCA and the claimant's perception that there was a lack of adequate training and support. This was emphasised in the third report which gave a non-committal response to the respondent's direct question as to the claimant's medication and history of medication. In the fourth report of 11 August 2016 the

Occupational Health adviser confirmed that the claimant would not disclose either details of her medication or any information as to whether her condition would amount to a disability under the applicable legislation. The earlier three reports concluded that the claimant was not likely to be a disabled person under the Equality Act 2010. The claimant did not inform the respondent's Occupational Health adviser of her background condition or medication pre-dating her absence from work on 5 April 2016. She did not contradict the conclusions in the various reports that she was unlikely to be considered disabled and those reports, that specifically said it that she did not have any underlying mental health condition. The claimant did not suggest either to the Occupational Health advisers or to the respondent that she was a disabled person, or that she was having any difficulty in performing her day-to-day activities other than attending work after April 2016. At all material times to 5 April 2016, and notwithstanding showing signs of stress and panic resulting eventually in what she describes as "a breakdown", she appeared to function in her day-to-day activities without difficulty. The stress, anxiety and "breakdown" leading to her absence from employment from 5 April 2016 up to and including her eventual dismissal on 16 August 2016 was put down to her reaction the circumstances surrounding transition to the WCA role, with what the claimant perceived to be inadequate training and support. The respondent did not know or suspect, and had no reason to suspect, that the claimant was a disabled person, namely that she had a mental impairment having a substantial long-term adverse effect on her day-to-day activities. The claimant did her utmost to ensure that the respondent was not so aware. The claimant's emphasis was to ensure that the respondent realised that she was suffering stress, anxiety and depression due to the WCA role and the way in which she transitioned to it from January 2016.

2.2.3 In the period from December 2015 until her absence through ill health on 5 April 2016 the respondent provided that the claimant should work as a WCA for 17 hours a week on the two days per week that she attended to perform her duties. The respondent's practice was that staff transitioning to the WCA role would be self taught using available materials in hard copy or online, by asking colleagues for assistance, by observing them and by availing of a buddy system. Following the commencement of the claimant's absence on 5 April 2016 the respondent's practice was that the respondent's management and the claimant would follow the applicable absence management and sick leave procedures as provided in the documentation referred to above. It was a further provision of the respondent that the claimant being absent would return to work in some role, with or without adjustments, retraining, relocation and support within a reasonable time.

2.2.4 The requirement that the claimant work as a WCA until her absence on 5 April 2016 troubled the claimant because she lacked confidence and specialist knowledge and experience in the relevant benefits such that she felt unable to fulfil the customer facing role required of her. She was unable to fulfil it and lacked the expertise and confidence to aspire to fulfil it to a satisfactory level. She was worried that she would not be able to work to the standard required by both customers and her management. The claimant had no experience of many of the benefits relevant to the WCA role and had never been in a position of coaching customers in the way required to achieve the goal set. This work was very different to that of a benefit review officer dealing with lone parents. She was given a full diary of appointments which she found difficult to fulfil and, even when given some leeway between appointments to avail of advice and assistance from colleagues (buddies) or to observe, she felt that there was insufficient time between her appointments to do this effectively. The provision of learning materials and the opportunity to buddy up and to observe did not provide the claimant with the confidence, expertise and experience that she felt she required to fulfil the role. She reacted to this in the way described in the various Occupational Health reports. The respondent then required the claimant to follow the sickness and absence management procedures and it went through a series of consultative meetings with her, provided her with information, referred her to Occupational Health advisers, carried out reviews, followed the pro forma documentation and checklists and guidance leading to a referral to a decision maker.

2.2.5 In May 2016 the decision maker decided to support the claimant's continued absence and not demote or dismiss her. In the light of the claimant's continued absence on 20 July 2016 the respondent continued to follow the absence management procedure and on this occasion her line manager signed off a referral to a decision maker who dismissed her. The claimant appealed within the procedures laid down by the respondent and there was an appeal hearing which she attended and to which she submitted documentation; the appeals officer, Lynn Fell, dismissed the appeal. The procedures gave the claimant an opportunity to submit documentation, make submissions, raise mitigating circumstances, put forward proposals, comment on proposals made, to consider relocation, retraining, demotion. By way of the procedures the claimant's absence was supported for some time following the review and on the decision of a decision maker but subsequently support was withdrawn and the claimant was dismissed. The respondent required the claimant to return to work within a reasonable time without specifying a time limit, but on consideration of all relevant factors at the time the decision had to be made, such as current situation, possibilities for return, prognosis for health, the claimant's own wishes and the respondent's business requirement.

2.2.6 Discrimination arising from disability: The respondent believes, and had reasonable grounds to believe, that the claimant was absent from work from 5 April to her eventual dismissal because of a reactive stress and anxiety condition leading to depression because of the transition to the WCA role with what the claimant perceived to be a lack of support and training. The Tribunal is not medically qualified to say that the absence arose solely because of that or because this reaction exacerbated the pre-existing condition of depression, but either way the claimant was in fact absent because of her mental ill health from the period of 5 April 2016 until her eventual dismissal on 16 August 2016. She was dismissed because of her absence in the circumstances described below in respect of the claimant's unfair dismissal claim, where clearly it is unfavourable to be dismissed but further facts are found below as to whether, as contended by the claimant, the way she was treated through the absence management procedure was unfavourable.

2.3 Facts relevant to the unfair dismissal claim and the allegation that the way the claimant was put through the absence management procedure was unfavourable treatment: -

2.3.1 By February 2016 the claimant was showing such signs of stress and anxiety that on 15 February 2016 a Stress Reduction Plan ("SRP") was put in place in consultation between the claimant and her line manager, Ms Headley. It was reviewed on 29 February 2016. The Work Coach Delivery Model (Number 2) went live at the end of March/early April 2016 and this model was intended to facilitate a transition of a number of benefits, such as employment support allowance, jobseeker's allowance and income support (however a total of some six benefits) to the new Universal Credit and thus the WCA role was to be fully effective. On 4 April 2016 the claimant had a large number of face to face appointments. Following what the claimant described as a "breakdown" and in the absence of what she considered to be suitable and appropriate training and support the claimant commenced her period of absence through stress, anxiety and subsequently depression on 5 April 2016. She remained absent from 5 April 2016 until her eventual dismissal on 16 August 2016.

2.3.2 On 10 May 2016 Peter Jamieson, the respondent's District Manager, queried why the respondent was continuing to support the claimant's absence (page 90A). Whereas he stated that he understood the reason for her continued absence, he could not understand why that absence was being supported (as opposed to there being a demotion or dismissal) when there was no prognosticated return to work date. That email was addressed to, amongst others, Angela Crookall, who was Ms Headley's line manager. Ms Crookall forwarded the email to Ms Headley indicating that this was as she expected but confirming that she

had discussed the matter further with Mr Jamieson who was content for any referral to be deferred until after 24 May.

2.3.3 Line managers were under pressure within the respondent organisation to push “absentees” through the absence management procedure to the point of reaching a decision maker owing to financial considerations and pressures on the delivery of services to customers. The claimant's line manager, Ms Headley, felt that she came under considerable pressure. She had concern for the claimant and wanted to give her every opportunity to recover and if possible avoid the attendance management procedure timetable which would have led to a referral to a decision maker. Ms Headley hoped that the claimant would use her annual leave to break the period of continuous sickness absence and to return following leave in better health and able to continue working. She also discussed with the claimant at some point whether she should consider resignation rather than being put through the procedure. However the Tribunal finds that she was well intentioned to the claimant and motivated by the claimant's best interests. Significantly Ms Headley sent an email to her line manager on 20 May 2016 which appears at page 116B in which she sought advice on how to proceed against departmental advice that too early a referral to a decision maker carried a major risk to the respondent of losing claims at Employment Tribunals following apparent criticism that had been made of referrals to decision makers at the 28 day stage of an absence. Ms Headley noted that any reputational damage to the respondent could be “diminished” because the claimant had refused “back to work support at this stage”. She had sought advice from CCAS. A pro forma Referral to a Decision Maker for Unsatisfactory Attendance was prepared for her and appears at page 117. This included a recommendation of dismissal and a statement that adequate guidance, support and time to improve attendance had been given but that there was no reasonable prospect of the claimant achieving the required level of attendance within a reasonable timescale. Ms Headley did not believe these statements to be true and did not sign the referral on conscientious grounds. Notwithstanding the absence of an endorsed signature the referral proceeded. At this point the claimant's fit note (page 119) referred to her being absent from work through “stress at work”; it did not suggest that she would benefit from a phased return to work, altered hours, amended duties or workplace adaptations. The appointed decision maker was Susan Lythgoe who met with the claimant on 16 June 2016 (pages 132-137). Ms Lythgoe considered the available documentation and the claimant’s submissions and representations. During that meeting the claimant made comments to the effect that she could not see herself returning to work at that time, that she was scared to return to work and “I don’t know if I will get back”. She did not appear open to the

suggestion of a demotion although there is some dispute as to whether she volunteered the information that she felt it would be considered a failure or whether those words were suggested to her and she either agreed or did not demur. In any event Ms Lythgoe decided to support the claimant's continued absence and to neither dismiss nor demote her at that stage. This decision was confirmed by Ms Lythgoe in a letter dated 20 June 2016 (page 138). The matter was to be reviewed regularly and it was made clear to the claimant that the decision could be reconsidered at any time "if it becomes unlikely that you [the claimant] will return to work in a reasonable of time". A further reference was made to Occupational Health advisers who reported, as previously indicated, on 5 July 2017 (pages 140-141).

2.3.4 The claimant remained absent from work and therefore Ms Headley met her again by arrangement on 20 July 2016 to review her absence (pages 147-153). During this meeting there was a full and frank discussion and review. The claimant confirmed that she did not know when she would be coming back to work and it appears from the minutes that she denied being on any medication for her condition. The relevant fit note now still referred to the claimant being absent from work due to stress at work and no recommendations were made to assist the claimant to return (page 154). In the light of all that was said at the review meeting and the current situation on this occasion Ms Headley decided that it was appropriate to refer the claimant's case to a decision maker. She had considered with the claimant the possibility of devising back to work plans, temporary or permanent changes of duties and reasonable adjustments, the possibility of working on alternative sites, with or without a phased return of work. Ms Headley believed from all that the claimant had said that whilst the claimant did not discount any of these suggestions she said she could not consider them "at this time". In July, therefore, and contrary to her opinion on the May review, Ms Headley now felt it was an appropriate referral back to Ms Lythgoe for a decision on demotion/dismissal/supported continued absence.

2.3.5 Ms Lythgoe on behalf of the respondent invited the claimant to a decision maker's meeting (pages 157-158). In response to that invitation, by a letter dated 31 July 2016, the claimant wrote to Ms Lythgoe setting out her position (pages 161-163). In essence, the claimant confirmed her heartfelt conviction that she had an excellent work record over a 27 year period, displaying good work ethic and high standards, and she felt that she deserved not to be dismissed or demoted although she expressly left the decision to Ms Lythgoe. The claimant confirmed that in her view line managers had "crossed the line" by discussing her case amongst themselves and raising with her the possibility of her resignation. This caused her to question Ms Lythgoe's impartiality because she had raised the question to be put to the Occupational Health

adviser as to whether the claimant was on medication. The claimant felt that she had been undermined by being marked down for some of her work in 2015/2016, and whilst she confirmed that she was not prepared to resign neither would she attend the meeting. The Tribunal finds that Ms Lythgoe approached the matter objectively and in good faith, and that her question to be asked of the Occupational Health adviser over the claimant's medication and medication history did not arise from any bias or impartiality against the claimant. It was a genuine and appropriate enquiry as far as Ms Lythgoe was concerned, and it was on a relevant matter.

2.3.6 In the light of the claimant's confirmation that she would not attend a meeting with Ms Lythgoe, Ms Lythgoe raised specific enquiries of her (pages 166-167). She asked the claimant whether she wished to submit any further medical evidence that might impact her decision; whether there were any adjustments that could be made to enable her to return to work, and suggested as possible adjustments a change of site, change of job, retraining and a stress reduction plan. She also pointed out to the claimant that rather than her being not impartial as a decision maker she had actually previously supported a continued absence. The Tribunal notes that this was notwithstanding pressure being placed on line managers to expedite the procedures. The Tribunal finds that no such undue pressure was placed upon Ms Lythgoe as to how she ought to decide the referral.

2.3.7 In response to Ms Lythgoe's request for further information and submissions on the part of the claimant, the claimant replied by email dated 7 August (page 168). She relied on her current fit note, whilst acknowledging that the respondent had provided additional counselling for her for which she was grateful. Significantly, however, the claimant stated to Ms Lythgoe that her concern was "all roads lead back to WCDM (Work Coach Delivery Model 2) and UC (Universal Credit)". She reiterated that she had great concern about returning to the role that caused her stress, adding "I am no longer able to cope with pressure". She reiterated that she had been hopeful about training and a stress reduction plan but felt let down, and that this had contributed to her "breakdown". She acknowledged that if she returned to work she would not necessarily be let down again.

2.3.8 Ms Headley routinely and appropriately re-referred to the claimant to Occupational Health advisers but there may have been an administrative error in respect of the final referral. There is a record of an abortive intervention by Occupational Health at pages 170-171. Clearly the claimant felt that this was an unnecessary referral and she was reticent about her medication and withheld her consent for the release of information regarding advice relating to disability. The appointment was terminated. The

Occupational Health adviser indicated that the referral ought to be amended and rescheduled and recommended discussion between the claimant and management about the matters that led to the claimant's absence. None of those steps were taken because the claimant put no store by the report, and at the same time Ms Lythgoe was unaware of it. She was not aware of it at the time of her decision to dismiss the claimant

2.3.9 Ms Lythgoe went through the forms, being a record of her decision (pages 174-178) and a checklist (pages 181-184) and took advice from CCAS (pages 185-186) and wrote a letter of dismissal dated 15 August 2016 at page 179. The Tribunal finds that Ms Lythgoe's rationale and thought processes, deliberations, considerations and conclusions were conscientiously reached by her as illustrated in this documentation. The Tribunal finds as a fact that the reason that Ms Lythgoe dismissed the claimant is as she stated in her evidence on 29 September 2017 at the Tribunal when she said that the decision was made because there was no realistic return to work date and "the claimant was not seeing me or giving me anything to work with. I had no option. I was not able to see her face to face. There was no realistic reasonable date for return. It was a withdrawal of cooperation around Occupational Health Services. She would not come to see me and she would not take part. That was not the reason for dismissal. The reason for dismissal was that I could not establish a return to work date. There was nowhere else for me to go. I tried to re-engage and I wrote to her with bullet points. What came back did not give a realistic hope of return to work within a reasonable time", and again at a later point of her evidence when re-examined as to why she did not prepare a detailed training plan she said, "Because it was not clear that the claimant would return to work as a coach therefore without detail there was no point. It was possible a report would not be needed. Once the claimant was on the way to return to work then I would firm up and put it in place". The Tribunal finds that Ms Lythgoe's conscientious decision based on all relevant considerations was that the respondent could no longer support the claimant's absence for those reasons.

2.3.10 The claimant was dismissed on 15 August 2016 without notice but with payment in lieu of notice. The reason for the claimant's dismissal was her capability by reference to health and specifically a continued absence from work for a period of just over four months but in circumstances where she did not foresee a return to work within an estimated or given timescale.

2.3.11 The claimant appealed against the decision to dismiss her and that appeal appears at page 187. The claimant relied on her record and management's failure to control her mental health at the outset, that is in January/February 2016 when there was to be the substantial change in her role. The appeal was referred to

Lynn Fell and the minutes of the appeal meeting of 9 September 2016 are at pages 189-194. The Tribunal finds they are a reasonably accurate record. Ms Fell's decision dismissing the appeal is at pages 196-198 which put briefly supported the decision to dismiss because the claimant was not able to return to work or say when she might be able to return to work. The claimant had indicated that she could not cope with a return to work at the time because of pressures, and had made abundantly clear that by this stage she had reached the point where she could not see herself returning to the role of coach dealing with Universal Credit. She had stated that part of her concern was that she foresaw that all routes back to work would lead in that direction. She did not want to return in those circumstances and was unable to do so through mental ill health. The Tribunal finds that as with Ms Headley in referring the matter to Ms Lythgoe, and Ms Lythgoe dealing with the decision, Ms Fell did not at the time that she made her decision come under undue pressure and was not unduly influenced by pressure from her line manager or anyone in the chain of command. Ms Fell, as with Ms Lythgoe and Ms Headley before her, arrived at a conscientious decision on the basis of all available information, including that provided by the claimant.

3. The Law

3.1 Section 20 Equality Act 2010 ("EA") imposes a duty on employers to make reasonable adjustments in certain circumstances. For the purposes of this case what the relevant circumstances are where the respondent had a provision, criterion or practice ("PCP") that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. In those circumstances, an employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. That duty arises only in connection with disabled people as defined by section 6 Equality Act 2010. Prior to today's substantive merits hearing it had been adjudged that the claimant was a disabled person from 1 February 2016 onwards. Paragraph 20 to schedule 8 EA provides that an employer is not subject to a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that the employee is a disabled person and is likely to be placed at the disadvantage contended for.

3.2 By virtue of section 15 EA a person (A) discriminates against a disabled person if A treats that disabled person unfavourably because of something arising in consequence of that person's disability, where A cannot show that the treatment was a proportionate means of achieving a legitimate aim (that is cannot justify it). That provision, however, does not apply if A shows that A did not know and could not reasonably have been expected to know that the employee was a disabled person.

3.3 Section 136 EA provides that if there are facts from which the Tribunal could decide in the absence of any other explanation that a person (A) has contravened the provisions of EA then the Tribunal must hold that the contravention occurred.

3.4 Section 94 Employment Rights Act 1996 ("ERA") confers upon an employee the right not to be unfairly dismissed, the entitlement to which right is subject to, in general circumstances, two years' continuous employment (subject to some exceptions not relevant in this case). Section 95 ERA defines circumstances in which an employee is dismissed and those circumstances include where the contract under which the employee is employed is terminated by the employer, whether with or without notice. Section 98 ERA deals with fairness in the dismissal and provides that to be fair the decision must fall within a number of stated categories, which include capability assessed by reference to health or any other physical or mental quality. Subject to a respondent satisfying the Tribunal that a dismissal was for a potentially fair reason, it is for the Tribunal to determine whether the dismissal was fair or unfair (having regard to the reason shown by the employer) and dependent upon whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating the reason found as a sufficient reason for dismissing the employee. Such questions as fall to be determined shall be so determined in accordance with equity and the substantial merits of the case.

3.5 It is not for the Tribunal to substitute its judgment, saying what it would have done in the circumstances facing both the claimant and the respondent at the relevant time. The Tribunal must assess whether the respondent has acted fairly and reasonably in all the circumstances and whether its actions are within a range of reasonable responses of a reasonable employer. Actions that fall outside that range where no reasonable employer would dismiss are unfair. If the decision to dismiss is within a range where some reasonable employers would but other reasonable employers would not dismiss then it still falls within the range and a dismissal may be fair, notwithstanding any reservations or sympathies that the Tribunal may feel for an individual in circumstances such as described by the claimant in this case. The respective counsel provided the Tribunal with written submissions and they addressed the Tribunal orally in addition. Within their respective submissions both counsel referred to appropriate and applicable authorities and neither took exception to the authorities cited. As the submissions are available to the parties in writing, together with hard copies of most of the cases referred to, the Tribunal will not recite all those references.

3.6 The Tribunal considered particularly the statutory provisions that were applicable and were guided always by the case law authorities cited by respective Counsel, and reached its conclusion on the application of the statutory provisions and principles from authorities as they applied to the case specific facts found above.

4. Judgment

4.1 Disability discrimination: The respondent did not know that the claimant was a disabled person at the material time and could not have known that this was the case. The claimant, for her own reasons, did her utmost to ensure that the respondent would not know and could not ascertain that she was a disabled person. The claimant wanted the respondent to know and understand that the reason for her absence in April was because of the way that her transition to being a WCA was handled, or in her view mishandled, particularly regarding training and support. Nothing witnessed by the respondent or evidenced by Occupational Health advisers would have led the respondent to believe or understand that the claimant was a disabled person. As the respondent did not know that the claimant was a disabled person, and it cannot be said they ought reasonably to have known it, they were not under a duty to make reasonable adjustments and they have a defence to the allegation that they treated the claimant unfavourably because of something that arose in consequence of disability and/or that they failed to make reasonable adjustments; the duty to make such adjustments did not apply.

4.2 Dismissal: The claimant's anxiety and stress from February 2016 onwards was a reaction to her being placed in a substantively new role with what she considered to be insufficient training and support. She had been offered a training plan and it did not materialise. Some steps were taken by the respondent to give her time to get up to speed with applicable regulations regarding various benefits by way of self-studying, and allowing her to observe coaching techniques employed by colleagues and a buddy. Notwithstanding this she came to the point that she could not cope with the pressure of being a coach (WCA) or dealing with the newly implemented Universal Credit. The claimant did not feel able to fulfil the role required of her. That situation made her ill. She was so anxious and distressed at the thought of returning in a coaching role and dealing with Universal Credit that she could not consider returning to work at the date that she was dismissed. She could not even consider or cope with the thought of returning to work in a different role or at a different site or with any one or more of a number of adjustments suggested by the respondent. The claimant had been continuously absent from work for a period of four months as at the date of dismissal. At the date of dismissal neither the claimant nor the respondent had any reason to hope or believe that the claimant would return to work within a reasonable time in any capacity or at any venue. There was considerable pressure on the claimant's line manager to drive the absence procedure through to the point where an absent employee's case would come before a decision maker. There was no pressure on the decision maker or appeals officer to make any decision with a view to terminating the claimant's employment. Ms Lythgoe and Ms Fell decided as they did because the claimant was not in a position to return to work in August 2016 after a four-month period of absence, and it did not appear that she was likely to return within a reasonable timeframe despite the many and varied offers of assistance made to her. The decisions reached by the dismissing and appeals

officers were based on full investigation, thorough consultation, Occupational Health advice, the medical evidence provided orally and by way of fit notes by the claimant, such as it was, and the position that had been reached by all parties in August 2016.

4.3 The Tribunal concludes that the respondent was left with no other option than to sit and wait until some unspecified time when the claimant felt well enough to return to work, but against that was the claimant's repeated assertions that she could not cope with the pressure of working as a coach or with the introduction of Universal Credit and that she feared that any other alternative role or relocation would all lead in the same direction (although this was only her suspicion and was not what she had been told).

4.4 In these circumstances, whilst not every employer would dismiss an employee of 27 years' employment (almost 28 years') after four months' absence it cannot be said that no reasonable employer would dismiss. Dismissal fell within the band of reasonable responses of a reasonable employer.

4.5 In consequence of the above the unanimous judgment of the Tribunal is that all of the claimant's claims fail and are dismissed.

4.6 The Tribunal notes however that bearing in mind the length of the claimant's good employment and the circumstances leading to her absence in April 2016 it has considerable sympathy for her plight; and sympathy for the claimant, however, is not the determining factor. The Tribunal must consider the actions of her managers, particularly Ms Headley, Ms Lythgoe and Ms Fell, who clearly encountered conscientious qualms and concerns during the course of their dealings with the claimant's case, albeit their conclusions were ultimately justified by them. One can only speculate what might have happened had the claimant said at the outset that she had a mental impairment/disability/clinical depression requiring long-term medication, because if she was at that point recognised as a disabled person such status would have triggered a duty to make reasonable adjustments during the transfer of the claimant's role from that of Benefit Review Officer to Work Coach Adviser. The Tribunal makes no criticism of the claimant for her decision to keep confidential to herself relevant considerations at that time; that was a matter for the claimant.

Employment Judge T Vincent Ryan

Date: 22.10.17

JUDGMENT AND REASONS SENT TO THE PARTIES ON
27 October 2017

FOR THE TRIBUNAL OFFICE