EMPLOYMENT TRIBUNALS

Claimant:	**Miss C Sutton**		
Respondent:	**Sheffield Children's NHS Foundation Trust**		
Heard at:	**Sheffield**	**On:**	**6, 7 and 8 September 2017 5, 6 and 7 December 2017 in chambers**
Before:	**Employment Judge Rogerson**		
Members:	**Mr M D Firkin Ms A S Brown**		
Representation			
Claimant:	Miss A Hashmi, Counsel		
Respondent:	Ms L Bairstow, Counsel		

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal succeeds.
2. The Claimant's complaint of a failure to make reasonable adjustments succeeds.
3. The Claimant's complaint of unfavourable treatment arising from disability, in relation to her dismissal, and the retrospective application of the adjusted target succeeds. All other complaints of discrimination arising from disability fail, and are dismissed.
4. A telephone Preliminary Hearing will be listed to make the appropriate case management orders for a remedy hearing in relation to the successful complaints.

REASONS

Issues

1. A list of issues had been agreed by the parties prior to this hearing in relation to the complaints made by the Claimant of a failure to make reasonable adjustments, discrimination arising from disability and unfair dismissal.

2. For the "disability" discrimination complaints it was accepted that the Claimant was a 'disabled person' within the meaning given by section 6 of the Equality Act 2010 by reason of three physical/mental impairments of :
    - Endometriosis.
    - Neuropathic chronic pain.
    - Migraines.
3. The Respondent's witnesses accepted they had actual knowledge of disability when they received occupational health advice about these conditions, dated 11 December 2015, in about January 2016.
4. The 'material time' in respect of the alleged discriminatory treatment is from January 2016 until the claimant's dismissal on the 20 December 2016.
5. In summary the Claimant complains that the Respondent applied to her its 'managing attendance policy' in a way that placed her at a substantial disadvantage as a disabled person, which triggered the Respondent's duty to make reasonable adjustments to the policy, which they failed to do to remove that disadvantage.
6. The 'provision criterion or practice' (PCP) applied was the requirement for the Claimant to attend work and to maintain a certain level of attendance to avoid being put at risk of disciplinary sanctions including dismissal (the sanction imposed in this case).
7. The Claimant, as a disabled person is said to be put at a substantial disadvantage, in comparison with non disabled employees because her disability was the main reason for the absences that put her at risk of dismissal.
8. The Claimant is not required to identify the reasonable adjustments that should be made for her complaint to succeed. It is for the Tribunal to decide whether the duty is triggered, when it is triggered and what if any reasonable adjustments should have been made.
9. However, it is helpful to know what reasonable adjustments the Claimant requested at the time and contends should have be made at the time of :

    9.1 Discounting her disability related absences.

    9.2 Setting an attendance target of less than 10% in the period March to June 2016, or putting it another way, setting an adjusted target for a longer period of time to take into account her disability.

10. The Claimant contends that if reasonable adjustments were made she would not have been dismissed and her 20 year employment would have continued. The consequence of the failure to make reasonable adjustments is dismissal.

Applicable Law

11. Helpfully, in relation to the disability discrimination complaints Miss Bairstow provided the Tribunal with the cases of:-

    11.1. **Griffiths** and the **Secretary of State for Work and Pensions** 2015 EWCA Civ 1265.

11.2. **Williams** v **The Trustees of Swansea University Pension and Assurance Scheme and Swansea University** 2017 EWCA 1008.

11.3. **Chief Constable of West Yorkshire Police** v **Homer UK** EAT/0191/08.

12. We applied the guidance given in those cases and the applicable law which is set out in sections 20 and 21 of the Equality Act 2010 ('EA 2010') for the reasonable adjustments complaint. Section 15 of the 'EA 2010' for the discrimination arising from disability complaints and section 98(2) and (4) of the Employment Rights Act 1996 for the unfair dismissal complaint.

13. Dealing firstly with the guidance in the case of **Griffiths.** At paragraph 16 of the Court of Appeal's judgment, Lord Justice Elias refers to the case of General Dynamics Information Technology Limited v Carranza 2015 ICR 169 and in particular to paragraph 32 of HH Judge David Richardson's 'succinct' explanation of the relationship between section 15 and section 20:

> *"The focus of these provisions is different. Section 15 is focused upon making allowances for disability … unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. Sections 20 to 21 are focused upon affirmative action if it is reasonable for the employer to have to do so it will be required to take a step or steps to avoid substantial disadvantage*".
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> At paragraph 18 the duty to make reasonable adjustments is explained by reference to the statutory provisions: *"schedule 8 to the Equality Act deals with reasonable adjustments in the context of work. Paragraph 2(b) provides that the reference to a disabled person is to an "interested disabled person" and by paragraph 4 (read with the appropriate table) that means an employee of the relevant employer. So the section 20 duty is owed by the employer to his employees. However the duty does not arise if the employer does not know and could not reasonably be expected to know that the employee is disabled (Schedule 8 paragraph 20, sub paragraph (1)(a)). The effect of section 21 is that a failure to comply with the section 20 duty to make reasonable adjustments amounts to an unlawful act of discrimination.*
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> At paragraph 26 of the judgment the Court of Appeal examined the inter-relationship between section15 and section 20 'EA 2010':
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> *"An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment – say allowing him to work part-time – will necessary have infringed the duty to make adjustments but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made the dismissal will not be justified*".
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> The Court of Appeal also referred to the statutory Code of Practice on Employment published by the EHCR, which we also referred to during

the course of this hearing and in our deliberations. We note that courts are obliged to take that code into account where it is relevant.

14. Chapter 6 of the code is concerned with the duty to make reasonable adjustments and provides at paragraph 6.2 that :

"The duty to make reasonable adjustments is a cornerstone of the act and ***requires employers to take positive steps to ensure that disabled people can access and progress in employment.*** *This goes beyond simply avoiding treating disabled workers unfavourably and* ***means taking additional steps to which non disabled workers … are not entitled*****"**.

The Code provides guidance on what is meant by 'reasonable steps':

"*the duty to make adjustments requires an employer to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case*".

6.2 4.

"*There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.*"

6.2.5.

"*Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make*".

6.2.8.

- *"The following are some of the factors which might be taken into account when deciding, what is a reasonable step for an employer to have to take.*
- *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 (such as advice to access to work).*
- *The type and size of the employer"*

6.2.9.

"Ultimately the test of the "reasonableness" of any step an employer may have to take is an ***objective one and will depend on the circumstances of the case*****".**

Two examples of reasonable adjustments in practice are given at 6.3.3::

"Allowing a disabled person to take a period of disability leave".

Example: a worker who has cancer needs to undergo treatment and rehabilitation. His employer allows a period of disability leave and permits him to return to his job at the end of this period.

"Allowing the disabled worker to be absent during working or training hours for a rehabilitation assessment or treatment".

Example: an employer allows a person who has become disabled more time off work than would be allowed to non disabled workers to enable him to have rehabilitation training. A similar adjustment may be appropriate if a disability worsens or if a disabled person needs ***occasional treatment anyway****."*

15. In relation to the reasonable adjustments adjustment complaint the Respondent denied that discounting the Claimant's disability related absences would have been a reasonable adjustment. It would not be reasonable for the Respondent to "*continue to compromise clinical services to the ward where the Claimant worked by discounting disability related absences in circumstances where the relevant absence threshold had been doubled to take into account such absences"*. It was also denied that applying a 100% uplift to the long-term target (from 5% to 10%) would have been a reasonable adjustment in the circumstances. Given the historical absence rate an uplift of 10% *would not have been sufficient so as to ensure that the Claimant would have remained within the attendance standards in future*. Furthermore the Claimant was in any event in breach of the adjusted target for the review period March to June 2016. Accordingly *adjusting the long-term absence rate would not have alleviated the disadvantage of dismissal.* That was the position set out in paragraphs 35 and 36 of the ET3 response.

16. We considered the case of **Williams,** which was relied upon by the Respondent to support its contention that, when the Claimant complains about the 'retrospective' application of the attendance target for the review period March to June 2016 she cannot complain as a disabled person of 'insufficiently advantageous treatment' because that is not unfavourable treatment.

17. Mr Williams suffered from a disability which caused him to reduce his working hours to part time hours and then to take ill health retirement at the age of 38. The benefits he was entitled to under the Employer's Pension Scheme were far more advantageous to him than anything which would be available to a non disabled employee, but because an element of them is calculated by a reference to final salary pay, they were less advantageous than those that would be payable to a colleague with a disability of a different kind (such as a form of non fatal heart attack or stroke) which had struck that employee down so suddenly that there was no period of part time working. The appeal in **Williams** dealt with whether in those circumstances

Mr Williams had a valid claim for disability related discrimination under section 15 of the Equality Act 2010 and decided it was not.

18. This was relevant, to number 5.7 in the list of issues which asks the question "did the retrospective application of an increase in the attendance standard amount to unfavourable treatment, or as alleged by the Respondent amount to (insufficiently) advantageous treatment, which was not actionable".

19. The phrase 'insufficiently advantageous' comes from paragraph 29 of the EAT's judgment in Williams which states: "*in my judgement treatment which is advantageous cannot be said to be 'unfavourable' merely because it is thought it could have been more advantageous or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life.* ***Persons may be said to have been treated unfavourably if they are not in a position as good as others generally would be***"

20. The Court of Appeal agreed with the EAT that there was no unfavourable treatment in the circumstances of Mr William's where the treatment conferred advantages on a disabled person, but would have conferred greater advantages had Mr William's disability arisen more suddenly.

21. At paragraph 20 of the judgment in **Williams** the statutory test for section 15 complaints of discrimination arising from disability is set out, and requires a Tribunal to answer three questions:

    1. Had the Claimant been treated unfavourably?

    2. If so, was that because of something arising in consequence of the Claimant's disability?

    3. If so, could the Respondent show that the treatment was a proportionate means of achieving a legitimate aim.

22. The Claimant relies upon four acts of alleged unfavourable treatment:

    1. Putting her through the attendance management process.

    2. Not considering an increase in the attendance management standard or target.

    3. The retrospective application of the increase in the attendance target.

    4. Dismissal.

23. The Respondent relies upon the 'justification' defence provided for by section 15(b) of the Equality Act 2010, for any proven unfavourable treatment. It contends that it can show the treatment is a "proportionate means of achieving a legitimate aim". In that regard we were referred to the case of **Homer** a case of indirect age discrimination where justification was considered in the context of a PCP of a "requirement for employees to have a law degree" to obtain a higher grade and therefore a higher salary linked to that higher grade.

24. The legitimate aim relied upon in **Homer** was "recruitment and retention of staff". What had to be justified was the discriminatory effect of the criterion:

    "*An employer might be reasonably justified in making changes which he genuinely and on proper grounds considers will improve the standard of his*

workforce and these may be capable of justification notwithstanding that with the benefit of hindsight the improvements which you reasonably anticipated were not realised. It is an error to think that concrete evidence is always necessary to establish justification and the ACAS guidance should not be read in that way. ***Justification may be established in an appropriate case by a reasoned and rationed judgment. What is impermissible is a justification based simply on subjective impression or stereotypical assumptions*****"**.

25. In the EHRC Code of Practice, paragraph 5.11 deals with justification for unfavourable treatment and makes reference to the paragraphs dealing with objective justification in indirect discrimination cases, at paragraphs 4.2.5 to 4.3.2 of the Code. At paragraph 5.1.2 the Code states:

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

"What is a legitimate aim?"

4.2.8 of the Code states:

"The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided the risks are clearly specified and supported by evidence."

4.2.9

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

"What is proportionate?"

4.3.

"Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An ET may wish to conduct a proper evaluation of the discriminatory effect of the provision criterion or practice as against the employer's reasons for apply it, taking into account all the relevant facts."

4.3.1

"*EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the PCP is the only possible way of achieving the legitimate aim. It is sufficient that the same aim could be achieved by less discriminatory means*".

4.3.2

"*The greater financial cost of using a less discriminatory approach cannot by itself, provide justification for applying a particular provision, criterion or practice. Costs can only be taken into account as part of the*

employer's justification for the PCP if there are other good reasons for adopting it.

26. For the dismissal, the legitimate aim relied upon is the "**need to maintain an effective clinical service with necessary staffing levels within the budgets imposed by the commissioners of the service and it is proportionate to dismiss the claimant to achieve that aim".**

27. For putting the Claimant through the capability process, the legitimate aim is "**the adoption of a consistent approach to ensure that employees maintain sufficient attendance at work in order to ensure the appropriate levels of delivery of patient care and to facilitate and support employee health and well being in order to reduce the likelihood of sickness absence".**

28. It was denied that not considering an absence target of 10% amounted to unfavourable treatment related to the Claimant's disability because the Respondent avers that it did increase the Claimant's target to 10% during the latest stage 3 review process and the Claimant failed to meet this adjusted target.

29. Finally it was denied that adjusting attendance 'retrospectively' was unfavourable treatment. The treatment was in fact advantageous. Had the Respondent not done so the Claimant would have still been in breach of the lower, 5% attendance standard This was the treatment for which the Respondent advances the argument that this treatment is relied upon as being 'insufficiently advantageous' which is not unfavourable treatment.

30. With those issues and applicable law in mind we set out our findings of fact

Findings of fact

31. The Tribunal heard evidence from the Claimant and for the Respondent from:

    i. Mrs Joanne Reid-Roberts (Ward Manager, Claimant's line manager and investigating officer).

    ii. Mrs Amanda Hodgson (Matron and dismissing officer).

    iii. Mr Steven Ned (Director of Human Resources and appeals officer).

32. The chronology of events and table of absence document prepared by Ms Hashmi was not in dispute and helpfully sets out the dates of absences and the absence targets set for the relevant period. There was one correction made to the table during submissions which was to record that the target imposed in column 8 was 10% for the final period and not "non set" as Ms Hashmi has recorded.

33. We also saw documents from an agreed bundle of documents. Additional documents were produced on the first day of the resumed hearing in December of 2017 (minutes of the sickness hearing meeting of 20 December 2016) during Mrs Hodgson's cross examination, and only disclosed to the claimant at that point.

34. It was agreed this 'new evidence would be dealt with by the Claimant being given time to consider the additional evidence before there was any further cross-examination of Mrs Hodgson.

35. From the evidence we saw and heard the Tribunal made the following findings of fact:

36. The Claimant was employed as a nurse from 7 October 1996 until her dismissal on 20 December 2016, following a Stage 4 hearing under the Respondent's attendance management procedures.

37. Prior to her dismissal she was a Band 6 senior staff nurse working in the children's ward M2, for 31.5 hours per week.

38. She had 20 years continuous service with the Respondent. She was a highly regarded, highly skilled and valued senior nurse with an unblemished 20 year record of service.

39. Band 6 nurses are senior staff nurses bringing with them additional experience and skills and are a valuable asset to the respondent. The Claimant was a 'role model' providing leadership to junior staff, managing the ward in the absence of the Ward Manager and maintaining standards within the clinical governance agenda.

40. The off duty rota for Ward M2 is produced eight weeks in advance by the ward manager, who was Joanne Reid-Roberts (JRR). On a day shift the ward staffing usually consists of six trained nurses and two support workers and on a night shift five trained nurses and one support worker.

41. The Claimant worked 11 shifts of 11.5 hours over a four week period. She did not work night shifts in light of her health problems.

42. When the 'off duty' rota is published, a list is produced of all additional shifts that are required to be covered to ensure adequate staffing levels are maintained. These shifts are then input online to 'NHS professionals', the agency that provides agency staff for cover in order to fill in any gaps, which it was usually possible to do.

43. JRR aimed to roster at least one Band 6 nurse on each shift because the cost implications for regularly rostering two Band 6 nurses on each shift would not be financially beneficial to the Trust. Generally, when a member of staff was unable to attend work due to sickness, which it was accepted, was usually with short notice, on the day of sickness, JRR would look at the staff rota and try to move staff around to cover the absence or get an agency nurse if necessary.

44. It is important for JRR to ensure all shifts are adequately staffed to ensure the correct level of knowledge and skills for the smooth running of the ward. JRR had to ensure a senior Band 6 nurse was on each shift, so that junior staff, were properly and fully supported and so that the patients were able to achieve the best care possible in a safe and caring environment.

45. The Respondent has a "managing attendance policy' which we will refer to as this as "the policy", dated 1 October 2012, at pages 54 to 83 of the bundle. This is the policy which was applied to the Claimant during her absences

46. The policy aim is set out at paragraph 1.3 and is "**not to prohibit sickness absence but to achieve the optimum attendance at work and therefore addressing attendance issues that relate to sickness absence which restrict an employee's ability to fulfil their contract"**.

47. At paragraph 4, the policy refers to the legal position in relation to the Employment Rights Act 1996 and the Equality Act 2010. In relation to the Employment Rights Act 1996 it identifies that a potentially fair reason for dismissal is "ill health" on the grounds of 'capability" or "unacceptable level of absence" on the grounds of 'some other substantial reason'.

48. In relation to the Equality Act 2010 it sets out the section 6 definition of a 'disabled person' and only refers to direct discrimination. It refers to an 'equality impact assessment' having been undertaken and that the aims are to "**design and implement services, policies and measures that meet the diverse needs of services the population and work force ensuring that none are placed at a disadvantage over others"**.

49. The policy states it applies to all irrespective of disability and that **all employees will be treated in a fair and equitable manner**.

50. The policy identifies that line managers are responsible for managing sickness absence within their own departments. They should seek appropriate advice from the Human Resources (HR) department and occupational health in order to support and inform their decision making.

51. The role of HR is "*providing up to date advice in order to ensure the policies applied in a fair and consistent manner across the Trust. To provide training for line managers, to help them understand their role and responsibilities in the process*".

52. The policy provides that Occupational Health Assessments and advice should be sought by line managers if "*an underlying medical condition is suspected*" (paragraph 10.1). In relation to "disability," paragraph 12.4 of the policy provides that "*periods of sickness that relate to disability should be clearly identified on the individual sickness absence tracker <u>in order</u> that management can consider <u>ongoing reasonable adjustments</u> for an individual, but <u>should still form part of the overall sickness absence percentage</u>. Advice on the implications of managing sickness absence where disability is a feature should be sought from the HR department*".

53. The policy identifies two types of sickness absence – short term and persistence absence, and long-term sickness absence. The Claimant was managed for the majority of her absences, prior to her dismissal, under the short-term sickness absence policy.

54. The definitions of short-term and persistence absence which applied to the claimant's absences was "*periods of short-term intermittent absence as a result of an <u>underlying</u> condition".*

55. Section 14.1.2 defines long-term sickness absence as a period of '*prolonged and continuous sickness absence*'. The policy recognises that "***<u>different interventions and approaches are required to support the employer returning to work and attending work on a regular basis".</u>***

56. For short-term sickness absence the respondent applies a 5% trigger. For long-term sickness absence there is no percentage trigger applied at all.

57. The policy does identify that managing short-term and long-term sickness is not mutually exclusive and that absence, which involves a combination of both, "***requires the management of the sickness to be considered in its entirety"***.

58. For short-term absences the policy sets a 5% target to be measured in a rolling 12 month period with four monthly review periods. Paragraph 15.6 of the policy expressly provides that "*at the final review, if the employee has exceeded the 5% target of the previous four months but the employee's rolling 12 month absence target is under 5% then the employee* ***will not be progressed to the next stage of the procedure*****"**.

59. Consistent with that throughout the policy references are made to the 12 month rolling period over which the absence is to be measured and the four monthly review periods.

60. At paragraph 16.7 the policy provides that "*At the final review meeting if the employee has exceeded the 5% target over the previous four month period* ***but the employee's rolling 12 month absence target is under 5% then the employee will not be progressed to the next stage*** *of the procedure*".

61. At paragraph 17.4 the policy provides that "the line manager will set a 5% target and they will explain that the employee's sickness absence will be reviewed **every four months over the 12 month period**. If the employee exceeds the 5% target set at any of the four monthly reviews they will move to the hearing stage (Stage 4) of the procedure where a decision may be made to terminate the contract of employment.

62. There is no reference in the short-term absence policy to the duty to make reasonable adjustments for any disabled employees. In the long-term absence policy, as well as expressly not applying any target for the absences, the policy expressly recognises the duty to make reasonable adjustments. It identifies that *"some individuals with long-term sickness may have a disability as defined by the Equality Act and <u>employers are responsible</u> for considering reasonable adjustments in* ***order to support individuals attending work on a regular basis"***.

63. One of the reasonable adjustments identified in the list of examples is "modifying procedures" (paragraph 23.8). At 23.9 the long-term absence policy provides "it may be necessary for the manager to continue to refer to occupational health in order to gain continuing occupational health advice for appropriate management of a particular case.

64. It was clear from the evidence of JRR that she managed the Claimant under the short-term policy because her absences were "*periods of short-term intermittent absence as a result of an <u>underlying</u> condition"* Despite her knowledge that the claimant had an 'underlying condition' since 2013 no occupational health advice was sought until December 2015. This advice was considered by JRR in January 2016. It was accepted the Claimant had been diagnosed with endometriosis in 1999, neuropathic chronic pelvic pain in 2010 and hormone related migraines in 2007.

65. JRR's statement of case prepared for the dismissal hearing identifies all the absences from March 2013 to August 2016 and it is notable that all but five absences (cold, flu and ENT) are 'disability related'. The 'disability

related' absences were never recorded as such in the absence tracker as the policy requires. As a consequence they were not 'flagged up' for the Claimant to be managed in a different way to a non-disabled employee, which is what the policy intends (*disability should be clearly identified on the individual sickness absence tracker <u>in order</u> that management can consider <u>ongoing reasonable adjustments</u>*)

66. We had no explanation for this omission when the policy clearly and expressly identifies the need to do this for disability so that reasonable adjustments can be considered at an early stage. Even if it is decided that the absence is not to be discounted, the policy requires disability to be taken into account in managing the absence.

67. JRR recognised in her report that throughout the period the Claimant has "a long-standing underlying gynaecological condition for which she receives medication" but did not seek any occupational advice or HR guidance in her management of the Claimant until 2016.

68. Instead she applied the short-term absence procedure and set a target of 5% until 10 May 2016 for each and every absence in the review period for the claimant to be measured against going forward and had not treated the Claimant as a disabled person.

69. It was in fact during JRR's absence from work during maternity leave that Julia Leigh had managed the Claimant, and as Acting Ward Manager, she made an Occupational Health referral. On 20 November 2015 she made the referral in relation to the Claimant's 13 month absence record from September 2014 to October 2015. She identifies in her referral that the Claimant had an "underlying condition of endometriosis and that all of the absences of the Claimant during that 13 month period were related to her condition". She seeks advice specifically on the question of whether or not the condition is a disability and about any reasonable adjustments that should be made in light of that advice.

70. The Occupational Health report provided by Dr A Rimmer in response is dated 11 December 2015 and is at page 146 in the bundle. Dr Rimmer states "**given its duration and effects on her activity of daily living I think it is very likely that Claire's medical condition would be regarded as a disability and I would recommend you put in place appropriate adjustments**". She continues "as you say she had a number of episodes of sickness absence due to an underlying gynaecological problem which **is long-standing and severe**. She is appropriately treated for this condition but unfortunately **from time to time will have episodes attributed to this condition. These episodes are likely to be short. Between episodes of absence she will be fit to carry out the full duties of her role**. **One of the adjustments required under the terms of the Act is to adjust sickness absence targets in recognition of the person's disability. I recommend you consider this requirement"**.

71. The advice could not have been clearer. It was identifying to the line manager that the absences related to underlying condition should be treated as disability related and the Claimant should be treated as a 'disabled employee'. It identified the substantial disadvantage the Claimant faced in that her disability would result from 'time to time' with absences 'attributed to this condition', This knowledge of disability and substantial

disadvantage which triggered the duty to make reasonable adjustments. Dr Rimmer advises, a reasonable adjustment of adjusting sickness absence targets in recognition of the claimant's disability to support her attendance at work.

72. Any previous absence attributable to disability should also have been reviewed retrospectively with the benefit of the 'knowledge' provided to the Respondent as a result of the Dr Rimmer's advice.

73. Unfortunately, that advice (received by JRR in January 2016) was not considered with the Claimant, or actioned by JRR, until a sickness absence review meeting on 10 May 2016.

74. At that meeting on 10 May 2016, JRR apologised to the Claimant for the review meeting not taking place earlier. She reviewed the recent absence record which showed a 4.13% absence over four months and over 12 months in the period March 2015 to February 2016 an absence of 8.99%.

75. Dr Rimmer's report was discussed and the meeting notes record "*OH state one of the adjustments which are required in the terms of the act is to adjust sickness absence targets in recognition of the person's disability.* ***In view of this Claire's target has been set to 10% from March till June 2016".***

76. This was the retrospective target set by JRR as at 10 May 2016 in consequence of Occupational Health advising her that adjusting the sickness absence target was a reasonable adjustment to make.

77. JRR could not explain how or why 10% was the adjusted target, or why the target was set retrospectively from March to 10 May 2016 with only 3 weeks of the 4 month period left to June 2016 before referral to the next stage. She relied on HR advice from Natalie Spokes who had also attended the meeting.

78. There was nothing in the policy about setting retrospective targets or how long they should be set for. The policy only referred to 'targets' being set before the beginning of a 4 month review period presumably so both the manager and employee are aware of it and can do something about it in real time. Deciding to impose it retrospectively was a decision made based on HR advice. No other information was considered at the time. JRR did not consider any information about the impact of the claimant's absences on the ward/staffing/patient safety/clinical risks in the March 2016 to May 2016 when she retrospectively increased the target to 10% for that period. She was able to set an increased adjusted target based only on HR advice.

79. The difficulty the Tribunal had with this is that although the Respondent advanced its case on the basis it was accepted 10% was reasonable at the time, neither JRR, or Mrs Hodgson did in fact consider it was reasonable. In cross examination Mrs Hodgson's view was very clear she always thought only 5% was ever reasonable under any circumstances for any employee irrespective of disability.

80. However in her witness statement she states: "*I felt that the increase of target at stage 3 by 100% to 10% was an adjustment that was both fair and reasonable and Claire had demonstrated she was unable to comply with it*".

81. Unfortunately, the period allowed for the claimant to 'demonstrate' meeting the target before stage 4 and dismissal was only three weeks. It was

suggested to JRR that she gave limited time to the claimant because she was setting her up to fail and there was nothing stopping her from applying a 10% target for 12 months which was the usual monitoring period. Her answer was "I followed hospital policy, it does not stipulate 10% I did not follow OH advice"

82. For the review period March to June 2016 the Claimant's absence was known to be 10.96% so she had already exceeded the 10% target by 0.96%, which equates to 8.3 hours of time. As a consequence of this, on 24 August 2016 another sickness absence monitoring meeting took place.

83. At that meeting the Claimant was represented by her union representative Mary Potter. The rolling 12 month figure by this date was 8.15% but the absence tracker record made no reference to any of the absences under consideration being treated as 'disability related' in light of Dr Rimmer's advice.

84. The Claimant's absences are identified for the period July 2015 to June 2016 and all absences in that 12 month period were disability related. Occupational Health Advice was referred to at this meeting and a further Occupational Health referral was made by JRR. In the interim, a target of 10% was set for the next four month period of July 2016 to October 2016.

85. On 16 September 2016, a second Occupational Health report was received from Dr Rimmer (page 160 of the bundle) where in very clear terms she provides her opinion and advice:

> *"Unfortunately the nature of Claire's condition is that on the first day of her period she has extreme pelvic pain to an incapacitating degree which requires the use of very strong analgesics. As a consequence of this she is not fit for work on those days and this gives rise to her recurring short-term sickness absence. Apart from symptomatic treatment with strong analgesic medication there is no medical treatment available for this.*"
>
> *"This is an unusual and complex situation. The* ***ideal management of this situation would be to schedule Claire's working shifts in such a way that she was not required to work around the first day of her period.*** *At present it is not exactly clear when this would be as her cycle is not completely predictable* ***so I would recommend that you continue to adjust her sickness absence targets recognising that she will require at least one day per month of sickness absence as a consequence of her underlying medical condition. The chronic nature of this condition and its impact on her activities of daily living means that it is prudent to regard as a disability under the terms of current equality legislation and to put in place long-term adjustments to her sickness absence targets to reflect this condition and its impact on her availability for work.*** *It does seem to me that if Claire's sickness absence target was* ***adjusted to accept that she is likely to have 12 or 13 days of short-term absence per year, this would enable her to continue to work***"

86. In answer to the specific question JRR asks "*are there any **adjustments I can consider to support the employer at work to achieve an improvement in their attendance**?* Dr Rimmer's answer is "*as I have indicated above, it may be possible to adjust Claire's shift patterns to accommodate her recurring problems, but it may not be possible to do this until the pattern of her cycle is clear. In the meantime **I would suggest that you continue the adjustments to her sickness absence targets recognising that this is a reasonable adjustment to her ongoing health problems***".

87. In answer to the question "Is there any medical reason why the employee with the suggested adjustments be made should not be able to sustain regular attendance in the future? Dr Rimmer's answer is "***If you put in place appropriate adjustments** to recognise her two chronic health problems ie migraine and chronic pelvic pain, she **should be able to sustain regular attendance with those adjustments.**"*

88. Very clear and unequivocal advice is given by Dr Rimmer to JRR that the adjustments should continue to enable the Claimant to continue work and sustain regular attendance in the future, which was the purpose of making the adjustment. In asking those questions no indication is given to Dr Rimmer advising her that the 10% adjusted figure was not manageable or sustainable for a longer period of time, or what level of regular attendance was required if that was of concern to JRR.

89. Despite the advice given to continue with the adjusted target, the stage 4 meeting took place as planned on 20 December 2016. For that meeting JRR prepared a management report dated 28 November 2016 setting out the history of the Claimant's absences since 2013.

90. She has, when preparing this report, had the benefit of the advice from OH that the claimant should be treated as a disabled person under the Equality Act 2010, and the effects of her disability meant she was likely to have 12/13 days absence. JRR did not convert that information into a % absence figure at the time and, in answer to the tribunal's questions, accepted that 12-13 days equates to 8%. If the 5% absence for non disability related absence was added to that it would give an adjusted figure of 13% figure. She agreed in hindsight that method would have taken into account the information provided by Dr Rimmer about the disability related absences and the possibility of any non disability related absence. She confirmed that she understood Dr Rimmer was advising her as the line manager to 'continue' with the adjustments which she understood to mean 'as long as needed'. If a longer period had been allowed with the adjusted target she agreed the claimant would have been below the 10% adjusted figure and dismissal would not have been recommended.

91. Despite this knowledge of disability and knowledge of the substantial disadvantage JRR did not consider whether it was appropriate, in light of all the information she now had, to review her decision recommending dismissal and allow the Claimant a longer period of time.

92. In her report recommending dismissal JRR reviews the history of absences and recognises that when the Claimant's absence was at 10.96% the Claimant had a non disability related absence for ENT of 23 hours which would have taken her over the 10% target. She was aware that

Occupational Health advice was that 12 or 13 days be allowed to manage the effects of her disability but still enable regular attendance at work. Despite this she made no allowance for any additional percentage for absence to explain the 0.96% excess.

93. In the 'conclusions' section of the report JRR confirms that, from July 2016 to the end of October 2017, the four month percentage figure was 7.55%, which was the most up to date figure that Amanda Hodgson could be provided with in the report. The other figure provided is the 12 month figure from November 2015 to October 2016 showing the percentage absence figure was 7.55% .Both figures were under the 10% target.

94. It would have been apparent to Mrs Hodgson that JRR had not reviewed the absence percentages for the whole period in light of the OH advice which was available. Mrs Hodgson should have questioned why that had not been done and why OH advice was not obtained earlier than it was when an underlying gynaecological condition was the main cause of absences in the absence history from 2013.

95. As the most senior manager involved in the process it is unfortunate she missed the opportunity to reflect and review the absences since 2013 with the benefit of the actual knowledge she had from the OH reports of December 2015 and September 2016. Mrs Hodgson's failure at stage 4 and JRR's earlier failure to manage the Claimant as a disabled person demonstrates a lack of knowledge, awareness and understanding of disability, and the responsibilities and duties an employer has to its disabled employees.

96. It was put to Mrs Hodgson that she had 'predetermined' the outcome was dismissal. It had taken her only 20 minutes to decide the Claimant's future after a 20 year period of service and the meeting in total lasted only 40 to 45 minutes. Mrs Hodgson rejected the suggestion that she had already made her mind up, explaining that she had spent some time in advance of the hearing reading all of the documents, which included reading the Occupational Health advice and the most recent figures of the Claimant's absence. These she accepted showed a 7.55% for the proceeding four months and 7.55% for the 12 month rolling absence figure, which she failed to take into account.

97. The policy provides that there should have been no progression to a stage 4 hearing if the Claimant was meeting the 12 month rolling absence figure. The Claimant was meeting the 10% adjusted figure but was still progressed to stage 4.

98. What was clear from Mrs Hodgson evidence to this Tribunal was that 10% was never reasonable in her view. Only 5 % was reasonable for the Claimant or anyone else. She had already made her mind up to dismiss the Claimant before the Stage 4 hearing. She never properly explored how 10% had been set, why it was not set earlier, whether the period for which the adjusted target was applied was reasonable, whether the Claimant could meet the adjusted target going forward, and if so, whether, in the circumstances, including the OH advice and the recent 7.55% figures, a further period of time should be allowed.

99. Although she said it was not reasonable to have a 10% target because of the impact on patient safety, she accepted there was no evidence before her at the time, or at this hearing, that patient's safety was put at risk as a result of the claimant's absences. She referred to written reporting procedures and records that are available if the ward is running at a 'sub optimal' level.

100. No reports were produced at this hearing, or were considered by her at the time. The best Mrs Hodgson could do in re-examination was to refer (when her attention was drawn to it) to one occasion that JRR refers in her statement on 13 December 2015 when she says that as a result of the Claimant's absence, her shift was not covered and the ward was left short staffed. A nurse from ward 3 helped out as the ward was struggling to cope with reduced staff numbers. That was the only occasion she could identify of 'sub optimal' levels of staff but if that occasion had resulted in a report, no report was produced at this hearing.

101. The consequences of a ward 'struggling' were the same whether the claimant rang in sick on that day or any other employee rang in sick on the day of the sickness absence with short notice. Agency staff would be contacted to see if they were available otherwise the absence had to be managed by the manager.

102. It was clear that at the dismissal hearing Mrs Potter, the Union Representative, had very clearly and simply put the case for the Claimant. The Claimant had not been treated as a disabled person for her absences and she had not been given a long enough period under the adjusted target as a disabled person. The notes Mrs Potter took of that meeting record that JRR's response to that request was that 'they' only had authority to create the target for a 'limited' period before proceeding to stage 3 and referring it for a stage 4 hearing.

103. From the Respondent's notes of the hearing it appears Mrs Hodgson does not question JRR about that answer or pursue it further with Ms Potter. The notes also record that the Claimant was providing a more positive outlook for the future in light of the treatment she was trying at the time. She told Mrs Hodgson that she felt that her condition had been the 'best it had ever been'. She was taking alternative pain relief treatments which were helping and she wanted to continue to work. Mrs Hodgson had the 7.55% absence figure for the rolling 12 month period. The Claimant had provided information consistent with the other evidence she had. This showed improvement and the possibility of the claimant meeting and maintaining the adjusted target in the future.

104. After the 20 minute adjournment Mrs Hodgson informed the Claimant of her dismissal. She told her the 10% target had already been given and the Claimant didn't meet it and she felt therefore it would be unreasonable to extend it for any longer.

105. By a letter dated 23 December 2016, the decision dismissing the Claimant was confirmed in writing. In Mrs Hodgson's letter she refers to the submissions made by Mrs Potter that the claimant was a 'disabled person' her condition was currently better controlled than it had been for some time and she should be given a longer period with the adjusted target. At page 169 the outcome letter states:

"I am satisfied that you have received support from your line manager prior to and during your sickness absence. ***Reasonable adjustments in line with the Equality Act have been made where they have been advised****. Occupational health advice has been sought throughout your absences. I am sympathetic towards your long-term condition and the impact this has upon your life. However,* ***your sickness absence is putting significant pressure on the Department and can no longer be sustained operationally, as it ultimately impacts on patient care.*** *Your target has been increased to 10% previously and you were not able to reduce your sickness absence below this and therefore I have concluded that it would not be reasonable to extend your target again."*

She concludes "*it is therefore with regret that I have no option but to terminate your contract of employment with the Trust as from 20 December 2016*.

103 The Claimant appealed against that decision by letter dated 12 January 2017. In her appeal she specifically states that she has long-term medical conditions for which provisions of the Equality Act 2010 should be applied and states "*in March 2016 occupational health suggested an increase in my attendance target as a reasonable adjustment. My managers did increase my target from 5% to 10% but only for a four month period only.* ***If the target had been extended for longer I would have maintained my absence below 10%****. In the period between July 2016 and the end of October 2016 my percentage figure was 7.55% and my 12 month rolling percentage for the period November 2015 to October 2016 was 7.55% and this shows an improvement in my attendance.*

104 Mrs Potter in her statement for the appeal hearing repeats the same point she has consistently made that *"if the Claimant's target had been set for 10% for 12 months it is very likely Claire would have met her target"*. Mrs Potter refers to the Claimant's consistent improvement to 7.55% and that the Claimant was accessing alternative treatments for her endometriosis and had over the last three months felt her chronic pain was improving. Her periods were less problematic which would also help and improve her attendance. Again the information provided by the Claimant and from Mrs Potter about the future prognosis was positive going forward. There was no challenge to that evidence at the time, or at this hearing.

105 On 7 March 2017, the appeal hearing took place before a panel of three, Sarah Jones (Chair). John Cowling (Non Executive Director) Stephen Ned (HR director). We only heard evidence from Mr Ned.

106 Mr Ned was asked about his knowledge and understanding of the Equality Act 2010, the duty to make reasonable adjustments and the EHRC Code of Practice. He was unaware of the Code but said he was aware of his obligations under the Equality Act not to discriminate because of disability and the duty to make reasonable adjustments. He could not explain why the policy for short term absences with an underlying condition make no reference to disability or the duty to make reasonable adjustments was only identified for long-term sickness absence. Managers' attention was not therefore drawn in the policy to

the need to consider 'disability' for short term absence in the way it is for long term absence

107 Mr Ned as 'HR director' was responsible for reviewing the absence policy and had the opportunity at Appeal to consider how the claimant had been managed as a disabled person under that policy. He did not query whether the policy had been properly understood and applied by JRR or Mrs Hodgson. He did not consider the big hole in the policy for someone like the Claimant to fall thorough because her disability resulted in short term absences. As a consequence the Claimant had not been managed as she should have been. For the history of absences she had been treated in the same way as a 'non disabled person' by the application of the standard 5% absence target.

108 Mr Ned should have been casting his eyes over the whole process with the benefit of the Occupational Health advice that was available, the representations made on behalf of the claimant, and his knowledge and experience as the HR director sitting on the Appeal.

109 Unfortunately in his handling of the appeal, Mr Ned displayed a lack of awareness of disability or disability related issues importantly the duty to make reasonable adjustments

110 At the appeal he had the OH advice and knew the absences pre and post January 2016 were disability related and the history of absences should have been reviewed with that in mind. He should have considered whether the reasonable adjustments recommended had been made when they should have been and for a long enough period? Was there a failure to consider 'disability' earlier than it was and what the consequences of that failure were on the Claimant over that history? If there were adverse consequences how could they be addressed at the Appeal stage? Was there evidence to support Mrs Hodgson's views of the effects a 10% increase would have and had she made the right decision to dismiss in light of all the available information? Mr Ned was in a position to consider all those questions at the appeal stage as part of the panel's review but did not do so.

111 By a letter dated 14 March 2017, the Claimant was informed that her appeal was unsuccessful. The letter repeats the point that Mrs Potter had made during the appeal hearing and records the management case put forward by Mrs Hodgson.

112 The decision of the appeal panel is recorded at page 187 and states "*The discussion that took place at the hearing centred around whether or not management should have set an increased absence target of 10% for you on a long-term basis. Your view was this should have been done as to do so would be a reasonable adjustment under the Equality Act 2010. You also held the view that you would have been able to meet a 10% target over the next 12 months. The view from management was that the* ***10% target set was for a period of four months and was not met.*** *Based on the history of absence and given* ***the clinical risk that arose when you did not attend work it was decided not to extend the increased absence target again.*** *The panel considered whether the 10% target should have been set on a long-term basis, in considering this they* ***reviewed your sickness***

absence history *and* ***the case from management that stated it caused a clinical risk to the ward on the occasions you were absent from work.*** *After reviewing this, the panel* ***cannot find any evidence that supports your view that you would have consistently met a 10% target****. The panel also questioned* ***whether it was reasonable to adjust your absence target to 10%*** *and* ***the impact this would have on your department and colleagues.*** *Although this was recommended through occupational health, it is for management to decide whether it is a reasonable recommendation* ***to take forward balanced against the needs of this service.*** *In light of the above, the panel did not feel the sanction of dismissal was too harsh and the appeal panel upheld the decision to dismiss you from post on 20 December 2016".*

113 We saw no evidence that there was clinical risk to the ward on the occasions when the Claimant was absent from work and any impact going forward could have been considered at the reviews. No evidence was provided at the dismissal/appeal stage, or at this hearing, although we were told reports are kept when staffing levels are 'suboptimal'. The fact that a ward is understaffed of itself does not mean there was a clinical risk to the ward. We have been given no explanation why, if this evidence exists, it has not been provided, even though 'clinical risk' is relied upon for the justification defence.

114 Mr Ned, in answer to questions, accepted that a three week period of time under the revised target going forward was unreasonable. He said that a 10 to 15% increase could be made if it was reasonable to do so in the particular circumstances. He also accepted that if the target is imposed retrospectively, as it was in May 2016 (for the period March-May), without any information about any clinical risks on the days of absence, 'clinical risk' could not have been considered as a factor.

Conclusions

115 Addressing first the reasonable adjustments complaint. From our findings it is clear the Respondent had knowledge of disability from receipt of Dr Rimmer's first report dated 11 December 2015 received by JRR in January 2016. However the Respondent ought to have made enquiries with Occupational Health earlier than it did given the history of absences related to disability since 2013. The policy provides that if an underlying condition is suspected, which was the case here, Occupational Health assessment and advice should be sought. At least by late 2013/early 2014 Occupational Health advice should have been sought about the underlying condition.

116 By the meeting with the Claimant on 10 May 2016, JRR could have reviewed the absence history with the benefit of OH advice and identified each disability related absence in that period. The claimant should have been managed differently in the period prior to January 2016, but the Respondent could not rewrite history. What it could do was manage the Claimant going forward as a disabled employee with the knowledge and understanding that the majority of her absences up to that point were as a consequence of her disability.

117 The Claimant contends a reasonable adjustment would be discounting her disability related absences because those absences placed her at a substantial disadvantage because they put her at risk of disciplinary action. The policy provides that periods of disability related sickness absence should be clearly identified on the absence tracker, in order that management can consider ongoing reasonable adjustments, but should still form part of the overall sickness absence percentage. The policy therefore expects managers to take the disability related absence into account, not discount the absence.

118 The ECHR code does suggest, as an example of a reasonable adjustment, allowing a disabled person a period of disability leave and allowing absence during work for treatment if a disabled person needs occasional treatment. Although the Claimant did not need time off for treatment she did need occasional time off to manage the effects of her disability but that would have enabled her to provide regular attendance at work.

119 It was reasonable for the Respondent to have a policy that provides that proper account should be taken of disability related absences in managing the Claimant employee, rather than discounting the disability related absences completely as the Claimant suggests.

120 The second reasonable adjustment is "the setting of and period of the adjusted target". In terms of setting the target, the 10% figure did not take into account a % figure for non disability related absences and a % for disability related absence. The 10% figure came from HR and we have no further evidence about how or why it was imposed at 10% retrospectively with only 3 weeks allowed, before proceeding to a dismissal meeting. Additionally we found that both JRR and Mrs Hodgson considered 10% unreasonable and that only 5% was reasonable, which influenced their judgement and decision making. It also confirms they were not taking the claimant's disability into account but were treating her in all respects like a non disabled employee.

121 If they had given proper consideration to the target it could, as Mr Ned said, been up to 15% if it was appropriate in the circumstances. JRR accepted an assessment taking disability and non disability absence was 13%. When the claimant is judged as failing to meet the 10% target in the last quarter, she has only exceeded the 10% target by 0.96%, and only because of non disability related absence (ENT). However because the target had been set without any account of that, she was assessed as having 'failed to meet the target'.

122 The lack of time, lack of a reasonable assessment and rush towards dismissal supports our view that reasonable adjustments were not made in either the setting of the adjusted target in May 2016 (for the period March 2016 to June 2016), or the time allowed, which was not long enough for it to be reasonable.

123 Sections 20 and 21 are about affirmative action and if it is reasonable for the employer to have to do so it will be required to take steps to avoid the substantial disadvantage. The ECHR code provides that this means taking additional steps to which non disabled workers are not entitled

which JRR and Mrs Hodgson clearly did not understand or agree was the position.

124 The retrospective application of the target from March to May 2016 was odd because by doing that only 3 weeks were given going forward as part of the period for consideration before stage 4 and dismissal. JRR would have known the absence percentage at that point and that the Claimant's absence would take her over 10% for that retrospective period. If she had allowed a longer period going forward the retrospective application would not have substantially disadvantaged the claimant in the way it did.

125 It was unfavourable treatment if the consequences of that retrospective application are that the normal 4 month review period going forward before the risk of disciplinary sanction, is in fact reduced to 3 weeks and no proper account is taken of all the absences in that period to understand the excess. Additionally evidence showed that thereafter and prior to dismissal the target had been met but that was not considered.

126 We do not accept the submission that this case on its facts is comparable to the case of Williams. Here the claimant was not complaining it was insufficiently advantageous compared to other disabled employees. Her complaint was that in real time her position was not as good as others generally would be because of her disability.

127 All of the Respondent's procedures refer to a 12 month monitoring period and that was the period of time claimant was asking for as a reasonable period of time for the adjusted target of 10%. Although the absence figures did show that she was able to maintain an absence percentage of 7.55% for the 4 and 12 month rolling period before her dismissal, that information was not taken into account in the decision making process. If it was felt 12 months was too long the 4 monthly review period process could have continued long enough for the Respondent to reasonably and properly assess the impact on the Respondent, and on the Claimant, of an adjusted target

128 If in a further reasonable period of time going forward information came to light of 'clinical risk' caused by the claimant's absence, that information could be shared with the claimant identifying the absence and the risk, so that if a longer period was not considered reasonable the claimant could understand the evidence and rationale for that decision.

129 In deciding whether it is a reasonable step for an employer to take we considered the practicability of the step. There is no evidence from JRR or anyone else that it was not practicable to manage the absence with the adjusted target for longer when it had been retrospectively applied without any issues. In fact Mr Ned accepted 3 weeks going forward with an adjusted target was 'unreasonable'.

130 In relation to the financial and other costs there was no evidence presented to us that cost was a factor relevant to the decision. This was a large employer with resources available to manage absence so that

the Claimant could provide sustained regular attendance to continue her employment.

131 The policy aims to ensure "none are placed at a disadvantage over others" and "employees will be treated in a fair and equitable manner". The Claimant's level of absence was greater than a non disabled employee because of disability. It was reasonable for the Respondent to take account of that and allow her a reasonable period of time under a properly adjusted target. The absences prior to dismissal were being sustained at 7.55% under the adjusted target of 10%. In this case, objectively viewed, we considered it was reasonable for the Respondent to have extended the period for the adjusted increased target going forward from May 2016 for longer than three weeks. 12 months is the time frame the policy provides for and that was a reasonable period in our view. By December 2016, 9 months (March –December) had already passed but the evidence about the Claimant's absences in that period was not considered. Objectively viewed 12 months was not an unreasonable period to assess the Claimant under the properly adjusted target.

132 This would have given the Claimant a reasonable opportunity to demonstrate that she could meet and maintain the adjusted target. It would have enabled the Respondent to support the Claimant and take proper account of the effect of the disability absence. It would have enabled the Claimant to continue to work and provide service as a Band 6 nurse for more than 92% of the time. The failure to make those reasonable adjustments was a failure to comply with the duty to make reasonable adjustments pursuant to section 21 'EA 2010' and that failure has resulted in the Claimant's dismissal

133 The dismissal was also an unfair dismissal having regard to section 98(4) of the Employment Rights Act 1996. Primarily because of our finding that the decision by Mrs Hodgson to dismiss the Claimant was pre-determined. Her manner in ignoring any of the evidence presented that supported the Claimant (the absence percentage of 7.55%, which meant her attendance was over 92% for that year, the evidence as to future prognosis and the Claimant's ability to meet and maintain regular attendance against a revised target in the future). The Claimant's 20 years unblemished service, her valuable grade 6 experience knowledge and skills. None of those mitigating factors were considered by Mrs Hodgson. The decision to dismiss was unfair. Unfortunately the appeal process simply rubberstamped that decision and failed to challenge the defects in the earlier process.

134 Dealing then with the complaints of unfavourable treatment. The first allegation is 'putting her through the attendance management process". The policy and process applies to all employees. However managers are then supposed to have regard to disability and manage disabled employees differently. The EHRC code provides that this means taking additional steps to which non disabled workers are not entitled.

135 Applying the process/policy to the Claimant was not of itself unfavourable treatment. Although the Claimant could have put her case that a particular decision made in the application of the policy to her at a

particular time was unfavourable treatment that was not the pleaded complaint.

136 The second complaint of unfavourable treatment is 'not considering an increase in the attendance management standard'. An increase was considered and implemented in May 2016 and we agree with the Respondent that this complaint as pleaded is not unfavourable treatment. The increase of 10% may have been inappropriate because it failed to take into account the possibility of any other non disability related absence but that was not the complaint made.

137 The third complaint is the 'retrospective application of the increase in the attendance target in May 2016'. Based on our findings the effect of this retrospective application was the Claimant was not given a reasonable period of time going forward before referral and recommendation for dismissal. That was unfavourable treatment because the Claimant was not in a position as good as others generally would be. It arises in consequence of disability because the revised target was applied in the way it was because of the Claimant's disability. The Respondent contends it was 'advantageous' treatment of the claimant but it was not, for the reasons we set out in more detail above.

138 Finally, the dismissal was unfavourable treatment arising from disability because dismissal was the consequence of the failure to make reasonable adjustments. In Griffiths, the Court of Appeal (at paragraph 14) state that if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made the dismissal will not be justified.

139 The Respondent contends that dismissal is justified and we deal with that argument here for the sake of completeness. The legitimate aim relied upon is the 'need to maintain an effective clinical service with necessary staffing levels within the budgets imposed by the commissioners of the service' and it "is proportionate to dismiss the claimant to achieve that aim'. We accept the stated aim was legitimate and represents a real objective consideration.

140 Evaluating the discriminatory effect of the aim and whether it is proportionate involves a balancing exercise. Is it appropriate and necessary, can the same aim be achieved by less discriminatory means? Here the claimant was providing regular attendance for over 92% of the time in the 12 months preceding dismissal with an absence percentage of 7.55%. Her absence if measured against an adjusted 10% target was below that figure. The ECHR code provides that the employer must produce evidence to support their assertion dismissal is justified and not rely on 'generalised assertions'. Was there reasoned and rationed judgement or was justification based on subjective impression?

141 We only had the generalised statements made by Mrs Hodgson that 'clinical service' was affected on the days of the Claimant's absences. No evidence was presented at this hearing, even though justification was relied upon. We found Mrs Hodgson had predetermined the dismissal and was disingenuous in presenting the case that 10% was reasonable. She was not taking account of disability related absence,

her view was only 5% was reasonable. Her evidence in other regards was also not convincing. We balanced the fact that with dismissal, no service would be provided at all by a Band 6 nurse, a valued asset, against an alternative of continuing the Claimant's employment for a further reasonable period during which any impact on the Claimant and the Respondent could be assessed and considered. The aim of the policy is not to prohibit sickness absence but to achieve the 'optimum attendance' at work and the policy recognises that with that aim there is a responsibility to disabled employees to make reasonable adjustments to support their attendance at work on a regular basis. Taking into account the knowledge the Respondent had at the time of dismissal of a more positive future prognosis and that the level of attendance had improved and could be maintained, we do not agree it was proportionate in those circumstances for Mrs Hodgson to dismiss the Claimant. The dismissal was therefore not justified and was discrimination arising from disability.

Employment Judge Rogerson

Date: 24 January 2018