EMPLOYMENT TRIBUNALS

Claimant		Respondent
Miss U Lawrence	v	Birmingham City Council

EMPLOYMENT TRIBUNALS

Held at: Birmingham **On:** 26, 27 & 28 February 2018

EMPLOYMENT JUDGE Lloyd **MEMBER** Mr P Zealander

Representation

For the Claimant: In person
For the Respondent: Ms E Hodgetts, Counsel

JUDGMENT

The tribunal, having further heard the claimant's claim according to the remittal directions by the EAT, it adjudges that it shall reverse its judgment for the claimant; and decides that;

1) The claimant's unfair dismissal is dismissed
2) The claimant's claim under s.15 EqA is found unproven and is dismissed
3) The claimant's claim under ss.20 & 21 EqA, of the respondent's failure to make reasonable adjustments, is unproven and is dismissed.

REASONS

The Remittal

1.1 In the Employment Appeal Tribunal before Her Honour Judge Eady ("Judge Eady"), the appellant's (respondent's) appeal was allowed in part. For clarity of reference, we will in this judgment adopt, consistently with our first instance

judgment, the terms “claimant” (for Miss Lawrence) and “respondent” (for Birmingham City Council).

1.2 Judge Eady concluded that, when considering the claimant’s complaint under section 15 Equality Act 2010 the employment tribunal had failed to clearly explain its findings as to the reason for the treatment complained of and whether that was connected to her disability (***Pnaiser v NHS England and Another [2016] IRLR 170 EAT***).

1.3 Reading this tribunal’s judgement as a whole, Judge Eady found assistance in the tribunal’s earlier findings; in particular in respect of direct discrimination (s.13 EqA). A similar reading of the employment tribunal’s consideration of justification for the purposes of section 15 (1) (b) EqA was however not possible. The tribunal’s reasoning, she found did not demonstrate the requisite objective balance between the discriminatory effect and the reasonable needs of the employer; and some of the findings were inconsistent.

1.4 Accordingly, Judge Eady allowed the appeal on the question of justification for the purposes of section 15 EqA. As for the tribunal’s judgment on the claimant’s reasonable adjustments claim, it’s reasoning she said, was not to be read as including a finding that the respondent had failed to make a reasonable adjustment by failing to carry out further investigation or enquiry (insufficient to found a breach of section 20 EqA) – (***Tarbuck v Sainsbury’s Supermarkets Ltd UKEAT/0136/06***). The tribunal’s decision came down to a finding that the respondent had failed in its duty to make reasonable adjustments in not deferring dismissal until the claimant had completed her therapy or drawn a provisional conclusion from it. It was not apparent, however, that the tribunal had properly assessed the question of reasonableness in this regard. That was an exercise requiring an objective assessment, including asking what difference the adjustment would have made – (***Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 CA***). It was not necessary that the adjustment would inevitably have removed the disadvantage – (***Noor v Foreign and Commonwealth Office [2011] ICR 695***). Accordingly, the appeal was allowed in that respect.

1.5 Although required to apply a differently worded test on the unfair dismissal claim, similar considerations arose to those relevant to the justification defence under section 15 EqA – (***O’Brien v Bolton St Catherine’s Academy [2017] EWCA Civ 145***). In the present case, the employment Tribunal’s conclusion on unfair dismissal was flawed by its apparent failure to have regard to the relevant factors relating to the impact of the claimant’s continued absence on the respondent; and not dissimilar failure to that identified in respect of the EqA claims. The appeal would also be allowed in this respect.

Evidence to this remittal hearing

2.1 This hearing has taken further detailed evidence from Mrs Tracy Holsey. The opportunity of further examination of Mrs Holsey has we feel been very valuable to the process which has been remitted to us by Judge Eady. A

detailed further witness statement by Mrs Holsey was adduced in evidence. Her cross examination by the claimant was extensive. A good deal of valuable evidence emerged.

2.2 Mrs Holsey holds the post of Head of Income Collection for the respondents rent service. Her department is located organisationally within the Customer Services Division and in turn is part of the Strategic Services Division. Mrs Holsey is charged with the duty of developing and implementing the income collection strategy and business management systems in order to meet financial objectives set in the business plan for the Housing Revenue Account (HRA). Her role is also charged with the protection of rental income in the context of Welfare reform.

2.3 At the time of the claimant's dismissal, Mrs Holsey managed approximately 134 full-time equivalent staff (FTE's). Those staff members were responsible for generating rental income from Council properties. Rental income is the major source of income to the HRA.

2.4 The claimant was employed as a grade 2 income services negotiator within the rent service. Her job was to deal with incoming calls from council tenants in order to take rent payments or set up payment arrangements including direct debits. At that time there were approximately 24 full time equivalent employees (FTEs) carrying out the same role as the claimant. At the time, income service negotiators had been expected to answer eight calls per hour. The claimant worked 30 hours per week, and in that time would have been expected to answer 240 calls. The function of the duties was to increase revenue by taking rent payments or setting up payment arrangements. Mrs Holsey said that her service area was the major source of income into the HRA. The non-collection or underperformance of her department impacted upon the following housing areas: namely, repairs, new builds, local housing costs, staffing costs and tenancy estate management roles.

2.5 Mrs Holsey referred to the Chancellor of the Exchequer's budget in 2015. That announced a new national rent policy of minus 1% over the coming four years between 2016/2017 and 2090/2020. As a result, Mrs Holsey had an obligation to generate an additional £1.2 million in rental income into the HRA over the following three years.

2.6 Mrs Holsey had acted as the chair of the claimant's FCH and presented the management case at the claimant's appeal hearing. The FCH was convened to consider the claimant's level and nature of absence in accordance with the respondent's MAP procedure. The purpose of the hearing was to consider (a) what further assistance and actions could assist the claimant (b) whether there was a need for any further medical information to assist the respondent in considering the claimant's case, (c) whether medical redeployment had been sought, with advice from occupational health (d) whether ill-health retirement had been considered by occupational health, and (e) whether the claimant's employment cease by reason of medical capability.

2.7 An invitation letter was sent to the claimant on 27 November 2014 (see page 330 – 331). She was given an option of two dates for the hearing, 17 December 2014 and 18 December 2014. The letter was plain; if the claimant did not indicate her preferred date for the hearing by 5 December 2014, then the hearing would proceed on 17 December 2014. The letter also advised the claimant of her right to be accompanied at the meeting or to submit any documentation for the panel to consider: if she did not wish to attend the hearing in person. The letter expressly stated the hearing could potentially result in the termination of her contract of employment.

2.8 The statement of case and paperwork which was to be referred to as part of the management case was sent to the claimant by recorded delivery on 27 November 2014. The claimant did not receive direct delivery nor did she collect it from the post office. Arrangements were made for the bundle to be hand-delivered to her: and she received the documents on 11 December 2014 (page 394).

2.9 As this tribunal recorded in its earlier judgement, that the claimant did not attend the hearing. No explanation was provided by the claimant for her non-attendance. Nor had there been any request to postpone or re-schedule the hearing. No documentary evidence had been submitted by her for consideration by the panel. The hearing duly took place on 17 December 2014. Mrs Holsey was joined on the panel by Loretta Crow, of the respondent's human resources division. Ms Crow acted as a technical advisor. Jayne Horne presented the management case. Nikki Whitmore was also present as notetaker. No witnesses were called.

2.10 During the hearing the panel heard evidence from Jayne Horne. She dealt with the claimant's sickness absence record and the nature of the support she had received from her line manager upon return to work. The panel was told that ill-health retirement was not an option, since occupational health had not concluded that the claimant was permanently unfit to return to work. Medical redeployment was also not explored with occupational health; the claimant had not agreed to these questions being asked on the referral. Moreover, the claimant had stated she was happy with her current role. The location was a problem. Medical redeployment was therefore not an option.

2.11 At the conclusion of the hearing, the panel decided to defer the making the decision so as to consider all the evidence. Mrs Holsey wrote the claimant on 19 December 2014 to explain that decision (page 349).

2.12 An email from the claimant on 24 December 2014 acknowledged that the bundle had been hand-delivered to her on 11 December 2014. She contended that because of that she had not had sufficient time to supply paperwork or secure representation for the hearing (page 351). Mrs Holsey replied on 5 January 2015 (page 350). The original delivery was well in advance of the hearing by recorded delivery. Moreover, that the claimant had failed to notify anybody about any difficulties she may have had in attending the hearing or requesting a postponement. The panel were due to meet the following day – 6 January 2015 – to reach a final decision. The claimant was

to send Mrs Holsey a statement before 11am the following morning if she wished anything to be taken into consideration with regard to her sickness absence. The claimant replied to Mrs Holsey's email on the same date (page 350). She confirmed that she had not had her mid-December appointment with occupational health and that she had not started her therapy. The claimant had been due to start her therapy on 19 November 2014. In their report of October 2014, occupational health stated that the claimant's therapy was due to commence" next month" (page 283). The claimant provided no further information about the start of the treatment nor any information with regards to a possible return to work.

2.13 On 6 January 2015, the panel reconvened. It considered the emails which had been received from the claimant. The panel made a decision that the claimant should be dismissed from her employment under the MAP procedure. The dismissal would take effect from 6 January 2015. Mrs Holsey acknowledged in her evidence to this hearing that the decision and the reasons were set out to the claimant in a letter dated 19 January 2015 (pages 357 – 360).

2.14 The claimant was notified of her right to appeal in the letter of 19 January 2015 (page 360). She was allowed 15 working days following receipt of the letter to do so.

2.15 The appeal was at pages 425 – 427 of the bundle. Mrs Holsey presented the Management Case and the Statement of Case, which is at pages 382 – 390. Jayne Horne was called as a witness. The members of the panel were Councillors Seabright, Hughes and Sambrook. The appeal hearing was convened on 22nd of September 2015. The full notes of the appeal meeting were at pages 766a – 766p. The claimant was asked if she was fit to attend work. She said she was not.

The claimant's case at the remittal.

3.1 The claimant contends that the dismissal and the application of the Management of Absence Procedure (MAP), cannot be justified as a "proportionate means of achieving a legitimate aim". She concedes that, whilst managing absence is likely to be a legitimate aim, breaching its own procedure was not a proportionate means of achieving that aim or breast practice.

3.2 The claimant has argued that despite the respondent's size and its ability to access in-house medical expertise it failed to ascertain from its occupational health services the latest position as regards the claimant's medical condition as it related to her employment. They failed to clarify this for the purposes of the FCH that it had convened.

3.3 Specifically, Jayne Horne had failed to ensure (as required by MAP) that the chair of the panel was provided with the most up-to-date medical evidence relating to the claimant. The claimant asserts that it was Tracy Holsey's responsibility as the chair to ensure that management had provided her with the most up-to-date medical information from OCH; so that her final decision

was based on the latest medical evidence. If this information was not available then it was the Chair's responsibility to gather that information for the hearings from management. The medical evidence was five months out of date; namely, September 2014. An up-to-date medical assessment could have been commissioned and obtained by the respondent's management in less than two weeks. The claimant asserted that it was evident that the FCH was deferred to review the evidence already in Mrs Holsey's possession. In the claimant's submission that was more than enough time to instruct the presenting officer for the management, namely Jayne Horne, to obtain further medical evidence. That would have been consistent with the procedural requirements of the MAP.

3.4 Occupational health were expecting to review the claimant's medical position in "two months-mid December 2014", which, in the claimant's submission was the same period of time as the FCH was in session. The review did not take place. In the claimant's submission. The claimant says it was evident that both management and the chair of the FCH wilfully chose to ignore the advice of its occupational health advisers.

3.5 The respondent failed to obtain the most up-to-date medical evidence as required by the MAP and to ask its own medical experts all those questions necessary fully to understand the treatment to be undertaken by the claimant, the likely date of return, if reasonable adjustment can be put in place alongside her work.

3.6 The claimant further submitted that the respondent had failed to justify its business case underlying the decision to dismiss her. Moreover, the respondent systematically continued with that approach; failing even to inform the occupational health medical staff of its intention to dismiss the claimant. The respondent it is argued further left unexplored the level of absence in her last period of sickness; and its sustainability or otherwise due to budget-cutting and the cost of running the service.

3.7 The claimant argues that had the respondent applied the MAP correctly, the fair decision based on the circumstances on 5 January 2015, according to MAP would have been to refer the claimant back to OCH to determine the matter fairly according to an up-to-date statement of the medical evidence.

3.8 The respondent has failed to justify its decision to dismiss the claimant having regard to s.15. Claimant's absence arose in consequence of her condition of PTSD. The claimant submits that the condition was itself triggered or aggravated by the respondent. It merited further medical evidence and investigation. The respondent dismissed the claimant without embarking on any such investigation; or at least adequate investigation and all the circumstances.

3.9 The claimant argued that there were several outcomes available at the FCH. In particular there would have been the option of the adjournment of the FCH proceedings, in order to permit the commencement of therapy. The respondent failed to deploy its resources correctly and fairly in relation to the

claimant's case. It failed to put to OCH the correct questions about the potential treatment in relation to the claimant's job role. Tracy Holsey failed on 6 January 2015 to justify the dismissal decision. No minutes were produced to record the proceedings on that date. The respondent has failed to justify the dismissal; such failure is the more stark given that there are no minutes of that hearing. Further medical evidence was required to make an accurate and fair decision.

3.10 The respondent, conflated a pre-conceived management view of the claimant's capability, and its perception of the claimant as a "difficult employee", with medical evidence which was inadequate for the purposes of the MAP procedure. The respondent demonstrated a lack of skill and understanding in administering its own MAP procedure.

3.11 The MAP procedure placed the claimant at a substantial disadvantage. The respondent had imputed knowledge of the PTSD condition, before, during and after the period of sickness absence that led to her dismissal. The respondent still failed to discuss the claimant's condition of PTSD and agree or implement any reasonable adjustments or even inform OCH of any perceived difficulties it was facing; particularly given their lack of expertise in dealing with mental health issues as they related to the claimant's job role. In evidence, the respondent stated that "all reasonable adjustments had been put in place". However, the claimant submits that the real question for the tribunal was that of what reasonable adjustments OCH recommended? And, what reasonable adjustments were put in place by the respondent? The answer, submits the claimant, was that no reasonable adjustments were put in place.

3.12 Had the respondent referred the claimant's case back to OCH, clarification would have been provided to the respondent in relation to the claimant's current condition, and the nature and likely impact of the proposed therapy. That would have been the latest contemporary medical evidence. The claimant was waiting for a community psychiatric nurse to be appointed while she remained on the waiting list to begin CBT treatment as an outpatient. There was no evidence to suggest that any attempts were made after 24 October 2014 to seek medical expert advice about those matters; which, the respondent submits, any reasonable employer would have done.

3.13 The claimant made three requests for a transfer to continue her employment. The respondent failed to respond to any of those requests. The claimant had worked as a grade 2 employee in various HRA departments across the city. To be relocated to another location as a grade 2, whether permanently or temporarily, would have facilitated and allowed the claimant to return to work she claims. It was evident she says, that the trust and confidence in the respondent's managers had been lost; and compounded by the thought of returning to a hostile atmosphere involving her poor treatment by members of management. There was a patent ignorance and lack of skills on the part of the respondent in dealing with an employee, like herself, having mental health issues. That led the respondent to assess the claimant as being a difficult employee to manage. Those issues and the poor management practice would have been a barrier not only for her improving her condition but for her

returning to the same location and management, where this ill-treatment had taken place. It would likely have aggravated the claimant's PTSD even further. The respondent rejected the transfer requests on the grounds that the claimant "had no issues with the job, it was the location". The claimant contends that for an employer, like the respondent, with multiple locations and over 15,000 employees across Birmingham, such a refusal by the respondent was outside a range of reasonable responses.

3.14 Further, the respondent had used the welfare meetings to aggravate and provoke the claimant in respect of the incorrect "borer" debits (77 hours) and work issues. That was, again, outside the MAP procedure.

3.15 The respondent failed in its duty, more especially as a public body, to apply reasonable adjustments for the claimant. That place the claimant had a substantial disadvantage as compared to a non-disabled person. There was a general lack of will on the respondent's part to assist the claimant to return to work.

3.16 In relation to the unfair dismissal claim, the claimant says this. Had the claimant considered with sufficient care, the effects of the claimant's mental illness, it would have been much more accommodating in its management of the claimant's case. The claimant argues that there were procedures in place to prevent further illness or long-term absence; notably the Attendance Improvement Plan (AIP). The claimant had exceeded her target in 2013 as her attendance at improved. There had been no medical issues since her return to work in December 2013. That was not reviewed at the FCH held in December 2014.

3.17 The claimant argues that the respondent failed to follow its own internal standards by not applying the requisite procedural fairness and the basic principles of the ACAS Code of Practice. The decision to dismiss the claimant was outside range of reasonable responses. A reasonable employer would have extended the period available to determine the claimant's future employment.

3.18 The claimant argues that the decision to dismiss was driven by the respondents ignorance in relation to her mental health. She says that the range of reasonable responses test applies not only to the question of whether the sanction of dismissal was permissible but also to whether the employer's procedures leading to dismissal were adequate. In this case, the claimant submits those procedures were not adequate. The respondent failed to justify the claimant's dismissal by reference to its own procedural standards.

Analysis & Application of the relevant Law

4.1 The ambit of this remittal hearing is set out in the EAT judgment of Judge Eady. In this tribunal's earlier judgment, we acknowledge that we fell into error in focusing inadequately on the objective balancing exercise to be done for the purpose of Sections 15, & 20 EqA and Section 98 ERA.

4.2 Firstly, we reprise the relevant statutory provisions:

Section 15 EqA: Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Section 20 EqA: Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage….

…….

(13)…….

Section 21: Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Section 98(4): Employment Rights Act 1998

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b)shall be determined in accordance with equity and the substantial merits of the case.

4.3 There are three live issues; justification, reasonableness and fairness.

4.4 The task for the tribunal in considering whether the failure to allow the claimant to complete her therapy was a failure to make a reasonable adjustment is to assess whether the proposed adjustment was such a step as it was reasonable to have to take to avoid the identified disadvantage - s. 20 (2) Equality Act 2010. The question whether the proposed steps were reasonable is a matter for the employment tribunal and has to be determined

objectively - ***Griffiths v Secretary of State for Work and Pensions [2017] ICR 170, CA***.

4.5 Section 18B Disability Discrimination Act 1995 provided the factors that might be taken into account in determining whether it was reasonable to have to take steps. While the express provision for these factors was not re-enacted. In the 2010 Act, they were substantially reproduced at chapter 6 of the Equality and Human Rights Commission ("EHRC") Code of Practice on Employment 2011 (particularly at paragraphs 6.28 - 6.29).

4.6 The first factor listed at paragraph 6.28 of the Code is whether taking the step would be effective. The second and third factors listed at paragraph 6.28 of the Code are:-the practicability of the step, and the financial and other costs of making the adjustment and the extent of any disruption caused.

4.7 While the Code does not impose legal obligations, and is not an authoritative statement of the law, an employment tribunal must take into account any part of the Code that appears to it relevant to any questions arising in proceedings-paragraph 1. 13 of the Code. Further, it is wise for tribunal to consider the factors identified in the Code although, it is acknowledged, they are under no duty to address every factor contained in it: see ***Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2014] ICR 341***, EAT at paragraph 58. However, the question whether and to what extent the step would be effective to avoid the disadvantage will always be an important one.

4.8 If there was no prospect of the proposed steps succeeding in returning the claimant to work, it could not be reasonable to have to take it; if there was a prospect, even if considerably less than 50%, it could be -see ***Romec Limited v Rudham EAT/0069/07*** at paragraphs 40-42.

4.9 The uncertainty of a prospect of success is one factor to weigh in the balance when considering reasonableness-see ***Griffiths***.

4.10 Counsel for the respondent has argued that there was no evidence available to the respondent and, equally, there is no evidence available to the tribunal, that a deferral of dismissal would have had any prospect that the claimant would return to work. It followed, Ms Hodgetts submitted that deferral of dismissal would not have been a reasonable adjustment to make.

4.11 There are also business factors which it was legitimate to consider as part of the evidential mix. Those business factors were set out in the FCH minutes, in the dismissal letter and also in the management case for appeal and the appeal hearing itself. Mrs Holsey gave supporting evidence on this issue in her witness statement and under cross examination before the tribunal at this remittal hearing.

4.12 Ms Hodgetts argued that it was not open to the tribunal to conclude that the respondent *could have* retained the claimant for longer simply because it is a large publicly funded body. The evidence in Mrs Holsey's evidence to this

tribunal was clear. The respondent Counsel has specific budgets, funded by the taxpayer and those budgets are aimed at providing specific functions and have been subject to some significant cuts. It is not the case that the absence of one member of staff over a lengthy period of time in this sort of organisation is of little or no consequence-on the basis that it will cause no financial harm to the respondent. Employees having the claimant's function are committed to the recovery of revenue vital to the respondent's continued provision of services. The absence of one "revenue earner" impacts upon the financial targets which that department is expected to attain.

4.13 It was further argued by counsel for the respondent that, on the evidence, it was clear that on 6 January 2015 it would not have been reasonable to have deferred dismissal-having regard to this tribunal's earlier findings, and the evidence that:

(a) treatment would not have brought the claimant back to work either at all or for any sustained period.

(b) as of 5 January 2015, after five months' absence, the claimant had not commenced therapy, and this was at odds with the previous assertion that she would started in November. By 5 January 2015 there was no start date for therapy.

(c) the claimant should have commenced therapy the previous year and failed to do so.

(d) the claimant had said that she would not return to work until therapy had commenced.

(e) by 5 January 2015 there was no indication of a realistic return to work.

(f) the prospect of success of the transfer was too remote a possibility to consider.

(g) it was not reasonably probable that the claimant would have altered her position if offered a transfer (paragraph 17. 6). The prospect of the claimant's cooperating with the transfer was remote (paragraph 17. 6); and

(h) the impact on the respondent of the claimant's continuing absence as is set out in the FCH minutes, the dismissal letter, the Management Case for Appeal and the Appeal hearing.

4.14 To rely on the 'objective justification' defence, the respondent must show that its treatment of the disabled person was a 'proportionate means of achieving a legitimate aim'**.**

4.15 The Supreme Court in ***Akerman-Livingstone v Aster Communities Ltd [2015] UKSC 15***, laid down a four-stage structured approach for this[1]:

1. Is the objective sufficiently important to justify limiting a fundamental right? Elsewhere it has been said the aim must represent a 'real, objective consideration' which is not itself discriminatory (Statutory EqA Employment Code), and the employer etc must have a 'real need' (*Allonby* and *Elias* cases).

2. Is the measure rationally connected to the objective?

3. Are the means chosen no more than is necessary to accomplish the objective? Could *alternative measures* have met the legitimate aim, without such a discriminatory effect? If proportionate alternative steps could have been taken, the unfavourable treatment is unlikely to be justified. One consequence of this is that if reasonable adjustments could have been made instead, it will normally be difficult to show justification.

4. The disadvantage caused to the claimant must not be disproportionate to the aims pursued. So, it is not enough that there is a legitimate aim and the means used are necessary to achieve it. There are situations in which the the ends, however meritorious, cannot justify the only means which is capable of achieving them. It seems from the *Akerman* judgments that on a s.15 claim one looks at the disadvantage caused to the particular claimant. (On a claim for indirect discrimination it may be a group test, ie. one looks at the disadvantage to people with that disability.)

4.16 There is a *balancing exercise*. Was the aim sufficiently important? Could the aim have been achieved by less discriminatory means? Does the legitimate aim outweigh the discriminatory effects of the unfavourable treatment?

4.17 In her submissions, Ms Hodgetts referred to the objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. She has referred us to the decisions of ***Land Registry v Houghton UKAEA T/0149/14*** at paragraphs 8 – 9 and ***Hensman v Ministry of Defence UKAEA T/00067/14***, at paragraphs 41 – 42 and 44. Those paragraphs expressly adopt for the purpose of the test of justification the explanation of "justifiable" in ***Hampson v EDS [1989] ICR 179,*** CA and ***Bilka-Kaufhaus GmbH v Weber von Hart [1987] ICR 110***; and the statements of principle in relation to the balancing exercises in ***Hardy and Hansons plc v Lax [2005] ICR 1565*** and ***Homer v Chief Constable of West Yorkshire Police [2012] ICR 704.***

4.18 Ms Hodgetts invited the tribunal to undertake an analysis of the working practices and business considerations involved and to have regard to the business needs of the employer. The severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness

[1] The tribunal considered that this authority was helpful during its deliberations. It is not at odds with the legal analysis that Ms Hodgetts has advanced. Although we did not raise the authority with her at the hearing we do not think it is prejudicial to either party for us to cite it now.

absence must be a significant element in the balance that determines the point at which their dismissal becomes justified.

4.19 Whether there was objective justification is a matter for the tribunal. The tribunal is not limited to considering whether a reasonable employer might have considered it justified.

4.20 The burden is on the employer to show that the unfavourable treatment was objectively justified.

4.21 The tribunal must reach its own decision on whether the action was objectively justified. It is *not* limited to deciding whether the view taken by the employer, falls within the range of what is reasonable.

4.22 The tribunal must undertake an analysis of the working practices and business considerations involved and have regard to the business needs of the employer. The severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified.

4.23 The impact on the respondent of the claimant's continuing absence must be assessed. Including an evaluation of the business factors relevant to the decision.

4.24 In an unfair dismissal claim, the law acknowledges that different employers may reasonably take a different view on whether the person should have been dismissed. In an unfair dismissal claim, the tribunal considers whether the dismissal was within the band of reasonable responses. That is not the approach under the EqA.

4.25 Ms Hodgetts invited the tribunal to remind itself that the range of reasonable responses test applies to capability dismissals – ***O'Brien v Bolton St Catherine's Academy [2017]***, at paragraphs 53 – 55. The decision to dismiss is a managerial one not a medical one: ***D B Schenker Rail (UK) Ltd v Mr John Doolan UKEATS/0053/09*** at paragraph 33. Whilst medical or other expert reports may assist in employer to make an informed decision on the issue of capability, the decision to allow someone to return to work or to dismiss for reasons relating to capability is, ultimately, one which the employer has to make.

4.26 A finding that the dismissal of an employee disabled by long-term sickness was disproportionate for the purposes of section 15 Equality Act 2010 would mean also that the dismissal was not reasonable for the purposes of section 98 (4) ERA 1996 – see ***O'Brien*** per Underhill LJ at paragraph 53. The language in which the two tests was expressed was different, and the burdens of proof were different, but there was no reason to judge the dismissal by one standard for the purposes of unfair dismissal, and by different standard for the purpose of discrimination law. Ms Hodgetts invited us to the view that the converse equally applies.

The remittal to this tribunal

Prologue

5.1 Thus, for the purposes of the matters referred to it on remittal this tribunal must perform a balancing exercise of (a) the likelihood of a return to work; and (b) the business factors influencing the dismissing officer's decision – as set out in (i) the management statement of case, (ii) the dismissal letter, (iii) the management case for appeal, (iv) the appeal hearing and (v) Mrs Holsey's witness statement.

5.2 It has to be said that the further evidence given to this remittal hearing by Mrs Holsey has been wholly informative and helpful in our applying the tests which are now put before us.

5.3 Our consideration of the likelihood of a return to work requires consideration of the position manifest some 10 weeks after the occupational health report. That was, to the effect that the claimant was unfit to return to work and she had not started therapy and indeed she would not return until therapy had started. There was no start date for therapy, and following the respondent's attempt to consult with the claimant through the mechanism of the FCH, and its attempt to seek further information from her following the FCH, there was no evidence of any prospect that she would return to work within a reasonable time.

Analysis and Overview

Section 15 EqA:

5.4 It is clear that, in respect of the s.15 EqA claim, Judge Eady agreed with the respondent's argument that the reasoning of this tribunal failed to demonstrate any structured approach. Judge Eady did concede, however, that the answers to the initial questions under s.15 could be found in the tribunal's findings on the s.13 EqA claim; namely direct discrimination.

5.5 The tribunal made a finding that the claimant was dismissed because she had been absent from work since 31 July 2014; and there was no realistic date for her to return to work. Further, the tribunal accepted the claimant's absence was because of genuine PTSD symptoms, which had been triggered by stress, including work stress.

5.6 At this hearing, counsel for the respondent has emphasised the importance of keeping in mind that, it is not for this remittal hearing to go back and make fresh findings of fact which have remained undisturbed on appeal. To adopt Ms Hodgetts turn of phrase there are findings of fact that the respondent frankly is "stuck with" and there are also findings of fact that the claimant is equally "stuck with". Neither side can now persuade this tribunal to change its mind about those findings.

5.7 The learned Judge also accepted that the tribunal did not ignore the respondent's case as to the precise causal connection; and its potential ambiguity. Ultimately, the most relevant connection was with the claimant's disability. The learned Judge was prepared to accept that sufficient could be gleaned from the judgment taken as a whole, to answer the questions identified in ***Pnaiser*.**

5.8 The assessment to be carried out in relation to the question of objective justification is one for the tribunal. The EAT acknowledged that it is not for the appellate tribunal to interfere unless the tribunal has misapplied the evidence or has not fairly assessed the question of justification. The learned judge was unable to discern from the previous judgement, a critical scrutiny of the working practices, business considerations and particular needs of the employer. The tribunal's conclusion on section 15 was rendered unsafe because it had failed to demonstrate that it had properly engaged with the question of justification.

5.9 In relation to the reasonable adjustments claim, the tribunal found a lack of enquiry or investigation which amounted to a failure to make reasonable adjustments for the purposes of section 20 Equality Act 2010.

5.10 Judge Eady concluded that the tribunal was in error in making such a finding. She concluded that the claimant's case was not put on the basis that the respondent was required to undertake an enquiry or investigation as a reasonable adjustment. It was apparent that the tribunal considered that more should have been done. Specifically, further reasonable adjustments might have been made to the procedure in terms of allowing the claimant more time to go to therapy, engaging in dialogue with her and not jumping to any conclusion that dismissal was the only feasible expedient.

5.11 The tribunal's criticism of the respondent for failing proactively to investigate matters, was really an observation as to the manner it adopted; which might have caused it to fail to make reasonable adjustments. It was not, of itself, a finding of a failure to make reasonable adjustments. But, the respondent's appeal in that respect was dismissed.

5.12 However, Judge Eady could not accept that this tribunal had approached its task in an objective manner. The tribunal had failed to ask itself what difference the adjustments would have made and to factor such answers into its assessment of reasonableness relating to sections 20 & 21. The tribunal's reasoning amounted, in the view of the EAT to a finding that the respondent failed to comply with its section 20 obligations in not deferring dismissal until the claimant had completed her therapy; or at least drawn a provisional conclusion from it. This tribunal's reasoning has been found to be solely focused on the position from the claimant's perspective.

s. 98(4) ERA:

5.13 In relation to the unfair dismissal claim, the learned judge acknowledged that the statutory tests are different for 98 (4) ERA to those under sections 15, 20 and 21 of the Equality Act 2010. However, having found that the tribunal failed to carry out the requisite objective balancing exercise required under section 15 or assess reasonableness in the way required for the purposes of section 20, judge Eady considered that it would be unsafe to uphold the tribunal's conclusion under 98 (4). In her conclusion, although the tribunal listed certain of the matters relied on by the respondent in seeking to show that its decision fell within a range of reasonable responses, there was in her view no indication that the tribunal took into account the business needs of the respondent; especially the pressure on the team and on the service arising from the claimant's continued absence. She could not see that the tribunal had put relevant factors into the balance.

Findings and Conclusions

The Effectiveness of the Reasonable Adjustment:

6.1 At paragraph 39 of the EAT judgment at F, the tribunal's reasoning is said to amount to a finding that the respondent failed to comply with its s.20 obligation in "not deferring dismissal until the claimant had completed her therapy or at least drawn a provisional conclusion from it". Of course, in her submissions, the respondent's counsel suggested a wider interpretation of this; namely that the dismissal is deferred until the claimant had completed therapy or at least started therapy, so that some conclusion could be drawn. In this remittal judgement, the tribunal has adopted this broader interpretation.

6.2 The questions which we were to address were therefore; whether awaiting the therapy, either to start or for it to be concluded, would have led to the claimant returning to work and whether there was at least some likelihood of that. That in turn is set in the context of the occupational health service advice available at the final case hearing (FCH); which advice was contained in the report dated 24 October 2014. The advice was that the claimant was waiting for cognitive behavioural therapy so as to assist her in the treatment of her PTSD condition. The therapy had been scheduled to start in November 2014 and was to last for 3 to 6 months. On that basis the occupational health service would review the position accordingly in or about mid December 2014.

6.3 The therapy did not in fact commence in November and indeed had not started at the date of the FCH. We made that finding in the first judgment. The claimant did not provide any information about the likelihood of the therapy commencing when she presented to the FCH. The purpose of the December date for the occupational health service to review the claimant's situation, was to take account of anything arising from the commencement of the therapy. Because the therapy had not commenced there was nothing that could be ascertained.

6.4 The tribunal, moreover reviewed the OHS Report and the email communications from the claimant to Mrs Holsey of 5 January 2015 (page 350). We have also referenced the file note of Jane Horne of 25 November 2014, at page 316. We are satisfied that the OHS report of 24 October 2014 was the most recent live and relevant clinical report available to the FCH.

6.5 As a principle part of this dismissal hearing, this tribunal has also now considered whether the deferral of the dismissal would have been an effective and reasonable adjustment.

6.6 We found at paragraph 19.1 of our original judgement that the treatment would not have brought her back to work, either at all, or if so for a sustained period. We made this observation as a comment in the "Postscript" section of our judgment. In the context of this remittal hearing, it has been necessary for us now further to examine the matter of the effectiveness of deferring the

dismissal to allow the therapy to commence. That on any analysis is a different question to whether the therapy would be successful.

6.7 As a starting point, there is of course the likelihood that any clinical treatment will be successful; otherwise it would not be recommended or indeed provided. This was the presumption of the 24 October 2014 OHS report. The tribunal, however, was concerned that the therapy might not be successful in achieving a sustained return to work by the claimant. Our concern arose, foremost, because the treatment due to start in November 2015 did not do so. As we found, from pages 355 and 388 of the bundle, the therapy did not start as it had been rearranged, in February 2015. In the event, the therapy did not commence until July 2015.

6.8 The claimant had said that she would not return to work until the therapy had commenced.

6.9 Irrespective of the commencement and the successful outcome of the therapy, there were other issues in the relationship between the claimant and the respondent that the claimant believed were not resolved; and which would impact on her likelihood of return.

6.10 The claimant had argued in her submissions to us that the respondent ought to have done more to investigate and understand the nature of the disability, namely PTSD and to have commissioned further medical reports. She did not, however, at the time of the FCH suggest that.

6.11 We conclude, therefore, that deferring the decision to dismiss until the therapy had concluded or begun would not have been effective in achieving the claimant's return to work.

The Reasonableness of the Adjustment

6.12 Mrs Holsey stated in answer to the tribunal in her evidence to this hearing that there was no practical reason why the decision could not be deferred or that a further OHS report be sought. We accept her evidence.

6.13 However, that is a different matter to whether the decision not to make the adjustment can be justified in all the circumstances.

Justification; the business needs of the respondent

6.14 In her evidence to this tribunal remittal hearing, Mrs Holsey repeated the information provided to respondent appeals panel; that the Chancellor of the Exchequer's budget of 2015 announced a new national rent policy of -1% over four years which would result in the council needing to make an additional £1.2 million in rental income. Such additional income was needed to cover the reduction brought about by the new policy. We noted that the Chancellor's announcement would have taken place in 2015, after the FCH had met and had decided to dismiss the claimant. Therefore, that precise information was not before the respondent at the relevant time.

6.15 We take judicial notice of the very difficult position of local authorities during the last decade. Public sector bodies generally have been under increased financial pressures; and every department of the respondent was required to meet financial budgets and expend resources prudently.

6.16 We do not accept the claimant's argument that the housing revenue account, as an income generating department, was afforded greater flexibility; or more especially were not under the same pressure to generate more income. Had the financial impact of making an adjustment been small, we would expect a large local authority department to absorb the cost. However, when the adjustment has an impact on the ability of the Department to perform effectively it is a much different matter to be assessed.

6.17 Mrs Holsey's evidence to the previous hearing in January 2016 gave only limited information about the impact on business resources. At paragraph 26 she stated "… As an organisation we cannot continue to employ people with these levels of absence given the reducing budget of the service and the Council overall…"

6.18 We have found the further evidence of Mrs Holsey to this remittal hearing of great assistance to our deliberations; and in addressing the direction given to us by Judge Eady.

6.19 There was also very relevant evidence provided in the management case prepared for the FCH. At page 342 of the bundle, the position was set out as follows by Jayne Horne

"in relation to the financial element of UL's sickness absence, this has cost the rent service £3,179.23 for her current period of sickness prior to any deductions. In addition to the impacts already mentioned above I would ask the panel to consider the effects the current absences had on customers. In UL's role there is a target to answer eight calls per hour. [During]The current absence of 85 days UL would have been expected to answer 4560 calls aimed at increasing revenue to the city and assisting with homeless prevention. Regrettably a number of these calls will have been abandoned and others will have been answered by UL's colleagues adding to their already pressured role…. UL's absence *has also affected management ability to release new starters to undertake their required Institute of Customer Service training during telephone operation periods and asking staff to either undertake this training prior or after the telephone service."*

6.20 We have also noted Mrs Holsey's witness statement dated 5 February 2018 at paragraphs 26 and 27, which dealt with this matter. Her evidence there, essentially repeated that information. Moreover, paragraph 7 of her present statement was to the effect that the claimant was one of 24 full-time equivalent roles in the Department jointly tasked with income generation. See the management case to the appeal hearing (paragraph 4.2). Pages 386 and 387 also set this out, with further information explaining the impact in terms of delivery of services, specifically in relation to, for example, business performance objectives, strain on work colleagues having to support the claimant's absence. Also, the additional costs incurred in the associated

management of the claimant's case, such as managerial costs, referrals to occupational health and the hearing is held and personal support.

6.21 Due to the claimant's sickness absences, Mrs Horne sent 15 emails, 10 letters, made three telephone calls and attended three welfare meetings. Moreover, due to the antagonistic towards Mrs Horne by the claimant at a meeting on 8 November 2014, a senior manager escorted Mrs Horne to the next welfare visit organised with the claimant.

6.22 The dismissal letter made clear to the claimant the time that the respondent had taken and the impact of her absence on business performance. At paragraph 13 on page 359, Mrs Holsey wrote:

"I further noted that the impact of your sickness absence on the service delivery was causing a strain in terms of loss of productivity for the service and the impact on business performance objectives. This in turn has led to additional strain put upon your manager and the team which is untenable".

6.23 The tribunal has concluded that the impact of the claimant's absence was by no means insubstantial and, moreover, had a significant impact on the ability of the housing department to perform its functions and that the management of her absence added to the strain.

6.24 The decision not to make an adjustment can be justified in all the circumstances.

The Date of Termination

7.1 In the tribunal's earlier judgement, we found as a matter of fact (paragraph 12.20.12) that the claimant was dismissed under the MAP procedure with effect from 6 January 2015. We also found (paragraph 12. 20. 13) that the decision letter sent to the claimant was dated 19 January 2015. Ms Hodgetts, has drawn our attention to this point; namely that allowing for delivery of the letter in the mail, the date that the dismissal was notified to the claimant was therefore 20 or 21 January 2015. We have considered how material that matter is. We have noted, firstly, that the decision to dismiss was made in the FCH. Further, when Mrs Holsey communicated the matter on 19 January, she had specifically dated the dismissal letter for 6 January 2015. She reiterated that in her witness statement to the tribunal at this hearing (see paragraph 25 of the witness statement).

7.2 We are confident therefore, that it is fair to assess the decision to dismiss, both for the purposes of the EqA and the ERA on the basis of the information before the respondent at the earlier date, namely 6 January 2015. We conclude, therefore, that the effective date of termination of the claimant's employment was at 6 January 2015. We do not intend to reinvestigate the EDT as part of this remittal hearing. Moreover, we do not consider that there are grounds for us to review or reconsider the date of dismissal we have previously found.

Summary

8.1 For this remittal hearing, the tribunal sat as a panel comprising Employment Judge and one member. This was with the full and unqualified consent of both parties. The second member on the last occasion, Mr J L Gordon, has in the meantime retired from the tribunal's service; and was not available for this hearing.

8.2 This tribunal as now constituted have now viewed this case through the prism of Judge Eady's conclusions on appeal and her directions for the remittal back.

8.3 Having carried out the processes identified by Judge Eady, we conclude that there was no prospect of any return to work on the claimant's part. Further, there were justifiable business reasons why the respondent should not continue to shoulder the costs and the impact of the claimant's absence.

8.4 We conclude that on the evidence before us the dismissal was justified and fair.

8.5 Accordingly, our decision on this remittal is to reverse our original decision and to conclude that:

1) the claimant's claim of unfair dismissal fails and is dismissed.

2) the claimant's claim of discrimination arising from her disability, under section 15 EQA is unproven.

3) the claimant's claim under sections 20 and 21 EQA, of the respondent's failure to make reasonable adjustments is unproven and is dismissed.

Employment Judge Lloyd
19 March 2018