EMPLOYMENT TRIBUNALS

Claimant: Miss C Brophy

Respondent: Alverant Ltd (Cartref Residential Care Home)

HELD AT: Liverpool **ON:** 18, 19 and 20 September 2017

BEFORE: Employment Judge Rice-Birchall
Mr M Gelling
Mrs J E Williams

REPRESENTATION:

Claimant: Ms S Ibrahim, Counsel
Respondent: Mr R Crabtree, Consultant

JUDGMENT having been sent to the parties on 21 November 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Tribunal heard evidence from the claimant, Miss Brophy and Mr Kawol who owns and runs Cartref Residential Care Home (Cartref).

2. The Tribunal had the benefit of a bundle of documents to which certain additional documents were added, by agreement, on the morning of the hearing.

3. There was an agreed List of Issues which identified the issues as follows:

Disability discrimination

a. Did the respondent know, or did it ought to know, at the material time or times, that the claimant was disabled? If the respondent is found to have constructive knowledge of the claimant's disability, what is the earliest time they knew of her disability? It should be noted that the respondent

conceded that the claimant was a disabled person within the meaning of the Equality Act 2010 at the time of the Tribunal hearing, as, by that time, the claimant had been diagnosed with cancer.

Discrimination arising from disability

b. The claimant states that she was treated unfavourably because (1) of her absence and (2) that the period of absence was uncertain due to difficulties diagnosing her disability.

c. The respondent accepts that the claimant's dismissal was unfavourable treatment but states that it was a proportionate means of achieving a legitimate aim. Does the need to have a registered manager on site on a permanent basis mean that the dismissal was a proportionate means of achieving a legitimate aim?

d. Was refusing the claimant's appeal on 3 October 2017 unfavourable treatment arising in consequence of her disability? Can the respondent demonstrate that this was a proportionate means of achieving a legitimate aim?

Reasonable adjustments

e. Were the following PCPs applied by the respondent:

    i. a requirement to work full time and be based at Cartref for the entire duration of her working hours;

    ii. a practice of not seeking and/or considering further reports, information or documentation from the claimant's treating clinicians and/or her GP;

    iii. a practice of not waiting for a diagnosis to be obtained prior to dismissal and/or making enquiries with the claimant's treating clinicians as to when a diagnosis could reasonably be expected.

f. Did the PCPs place the claimant at a substantial disadvantage?

g. Did the respondent fail to make the adjustments pleaded by the claimant, namely:

    i. working part time or on reduced hours;

    ii. allowing the claimant to work from home; or

    iii. allowing the claimant to job share with the acting manager until she was able to return to work full time?

h. Were the pleaded adjustments reasonable?

Direct discrimination

i. Was the claimant's dismissal less favourable treatment as a result of her disability? The claimant's suggested comparator is an employee who was absent for non-ill health reasons and for a pre-agreed period of time.

Unfair dismissal

j. Was there a potentially fair reason for dismissal? The respondent argues that the reason is the claimant's capability and/or SOSR. The claimant alleges that she was unfairly dismissed as the decision to dismiss her was made because of her disability and/or because the respondent did not wish to make reasonable adjustments.

k. Was a fair procedure followed?

Failure to pay notice pay and/or holiday pay

l. Did the respondent fail to pay the claimant notice and/or holiday pay.

4. The claims of wrongful dismissal and holiday pay were agreed by consent at the outset, and therefore were matters with which the Tribunal did not need to concern itself, other than to record the sums in the judgment.

Findings of Fact

5. The respondent, Cartref, is a care home run by Mr Kawol and his business partner. The home has 24 beds. The majority of the residents are referred by Halton Borough Council (HBC), though there may be a few private patients or patients referred by other Borough Councils.

6. Care homes generally are very heavily regulated, notably by the Care Quality Commission ("CQC"). According to the CQC, all care homes must have a registered manager

7. The guidance to which the Tribunal was referred sets out the requirements for those registered managers and for the staff they supervise. In particular, the guidance (at page 97 of the bundle) gives an explanation of what will happen when a registered manager is absent from time to time. It is to be noted that the focus of that information is on keeping the CQC informed of arrangements that are being made to provide the service pending the return or the appointment of a registered manager and also providing, for example, dates by when a cover manager will be appointed. The focus is very much on informing the CQC. There is no focus on replacing the registered manager.

8. The claimant was the registered manager of Cartref. As stated above, a care home must have a registered manager who is responsible for the day-to-day running of the home and who is legally responsible and accountable for compliance.

9. The claimant had been employed at the care home since 1991 and had worked her way up to a managerial position over the years. She had an excellent attendance record.

10. The claimant had a contract of employment which appeared in the bundle at page 45.

11. As regards sick pay, the claimant's contract stated that, on completion of 12 months' continuous service, the repsondent would pay her during periods of certificated sickness as follows: six months' full pay followed by six months' half pay in any rolling 12 month period.

12. A disciplinary procedure which applied to the claimant also appears in the bundle. That procedure deals with health issues under the specific heading of "Personal Circumstances/Health Issues" and makes certain statements about how those health issues might be dealt with. For example, it states: "if personal circumstances arise which prevent you from carrying out your normal duties we will normally need to have details of your medical diagnosis and prognosis so that we have the benefit of expert advice". It continues: "when we have obtained as much information as possible regarding your condition and after consultation with you a decision will be made about your future employment with us".

13. According to the evidence from both the respondent and the claimant, absence was not an issue that had been dealt with frequently within the respondent's business. Indeed, where there had been absence issues to be dealt with, those issues involved intermittent absence issues rather than long-term absence.

14. Problems in the home arose in early December 2015 when HBC suspended referrals citing "poor leadership, medication mismanagement, unsafe moving and handling procedures taking place within the care home and low staffing levels that leave vulnerable adults at risk of not receiving the care and support they require" in a letter dated 3 December 2015. The trigger for this, we understand, was that one patient lost a lot of weight causing a safeguarding concern which was then investigated.

15. The suspension was rated "red" which is the highest grade of suspension and means that no patient referrals can be made.

16. The letter of 3 December 2015 was followed up by an inspection by the CQC on 10 December 2015. A report appears at page 187 of the bundle (one of the documents added to the bundle on the first morning of the hearing). The report focuses on staffing levels and specifically requires the respondent to recruit additional staff. The report's summary requires those additional staff members to be recruited in order to work in the laundry and kitchen, for example.

17. Following the report and the restrictions that had been placed on the respondent (which meant that further patients could not be referred to it), action plans were put into place. These action plans appear in the bundle. The respondent specifically asked the claimant, in her role as registered manager, to take certain steps outlined in the action plan. Over a couple of months most of those steps were completed and the action plans, as a result, state "completed" or "resolved" on certain issues. Although Mr Kawol had initially led the Tribunal to believe that Cartref remained under a red restriction, the claimant reminded him that the red restriction (no referrals) had been lifted and was replaced with an amber restriction, which meant that, from then on, the home could be referred one patient per week.

18. Obviously, the period from 3 December, when the red restriction was put in place, was a difficult time for the respondent. Without the beds being full, it's profit was being reduced and Mr Kawol began eating into his financial reserves. The lifting of the red restriction clearly did not mean Cartref was out of trouble, but nonetheless the danger period, the critical period, was over once the red restriction was lifted.

19. Mr Kawol could not give clear evidence as to the numbers of patients resident at Cartref during this period, but the Tribunal finds that the worst period for the respondent must have been just before the red restriction was lifted at the end of March, because from that point in time they could accept referrals again, albeit limited to one per week. Therefore, from the end of March, the home would have been gradually getting back to full capacity. Any financial impact on the respondent would have therefore been reducing from the end of March 2016.

20. During March 2016 the claimant began to feel unwell and visited her GP. She commenced sickness absence around 14 April 2016. At first, she self-certified, stating "tests and investigations" when asked for brief details of her absence. This was followed by a number of sick notes, each for approximately four weeks, all of which stated "severe anaemia under investigation and treatment" and then later just "severe anaemia under investigation".

21. The respondent made a number of attempts to contact the claimant during this period. Although the claimant did not respond, the respondent did receive some, unsatisfactory, responses from her close relatives. It is fair to say that the respondent had no information or contact from the claimant but for the sick notes at this point. Had the claimant been more open and communicative about her position at this stage, the situation as regards the claimant's employment may have been resolved differently. The respondent felt out of the loop. This was felt particularly acutely as the respondent and the claimant had been working very closely together up until the claimant's period of absence in order to resolve the very significant issues that the respondent was facing as regards the restrictions.

22. On 19 July 2016, some three months after the claimant first went off sick, the respondent wrote to the claimant to ask her to come to a meeting to discuss her absence. A meeting followed, attended by Mr Kawol and his two children and the claimant and her sister, Diane Fraser.

23. Mr Kawol was clearly anxious for the claimant to communicate with him about her absence and what was happening. The claimant says that she felt harassed at that meeting and the Tribunal accepts that the claimant will have felt ill, vulnerable and concerned about her future employment, but nonetheless there was no indication, from the minutes of the meeting, which the claimant had confirmed as largely accurate, or from oral evidence, that there was anything to cause concern in terms of how that meeting was handled. To the contrary, the overall tone of that meeting was that the respondent really did want the claimant to get better and get back to work. It was clear to the respondent at that meeting that the claimant was ill as she clearly was pale and tired. The respondent knew that the claimant could hardly get out of bed and was unable to drive. Indeed, the respondent pointed out to the claimant that she " clearly [did]n't look well; you need to go home and get better".

24. By this time, the respondent had put a temporary manager in place. In the initial stages, that temporary manager was Rachel, but she was replaced by Michelle. Neither of those individuals could be registered managers because there can only be one registered manager at any given time, and that was still the claimant.

25. On the same day as the welfare meeting between the claimant and the respondent, there was a meeting between the respondent, represented by Mr Kawol, and his son and daughter, and Halton Borough Council. The purpose of that meeting was to discuss the management arrangements of the home given the claimant's long-term sickness absence.

26. The notes of that meeting indicate that the current restrictions would remain in place whilst the manager was on sick leave. This we found unsurprising given that the leadership had been identified as a concern by HBC and they would be unlikely to lift the restrictions (now amber, rather than red) whilst those concerns remained outstanding. The notes further confirmed that HBC was aware that Michelle had been appointed as acting manager in the claimant's absence, and that they would assist by identifying areas where additional support would be required. This indicates to the Tribunal that HBC had no issue with the claimant's continued absence (other than in relation to the restriction continuing) and was certainly not insisting on the termination of her employment. However, the Tribunal accepts that the respondent would have been concerned that, whilst the claimant was off sick, the amber restriction would stay in place.

27. Following that welfare meeting the claimant gave her permission for the respondent to access her medical records. She was also referred to Occupational Health (OH) who conducted a telephone interview with the claimant on 17 August 2016.

28. The letter requesting the claimant's consent for the respondent to approach Health Assured for an OH report (page 58 of the bundle) is dated 26 July 2016 and specifically states:

> "I trust you understand the reasons behind this letter as we do have sympathy with your situation and I have no wish to worry you at this difficult time. However, we do need to consider the operational needs of the organisation and consider what decisions need to be made. Consequently I feel it is only fair to forewarn you that if the evidence indicates that you are unlikely to return to work in the reasonably near future we may unfortunately have to consider terminating your employment. I do hope this does not turn out to be the case."

29. The Occupational Health report appears at page 61 of the bundle. It confirms that the claimant is still suffering from fatigue and shortness of breath but also informs the respondent that the claimant has now been referred to the gastroenterology consultant and was going to be referred to the gynaecological department. It also revealed that the claimant had been diagnosed with an ulcer, which had been treated, and further indicated that the investigation following the referral to the gynaecological department might in the near and expected future give the hope of diagnosis and an indication of what might be wrong with the claimant.

30. There was some discussion about whether adjustments could be made for the claimant, for example, to work from home. One of the suggestions put forward was that the claimant might be able to work from home for some of the office and desk based duties.

31. Immediately after receiving the report from OH, the respondent wrote to the claimant to ask her to attend a medical capability meeting. The invitation letter appears at page 64 of the bundle, and again reiterates that "if there is little likelihood of a return to work within a reasonable timescale and no reasonable adjustments we need to let you know that the outcome may be termination of your employment".

32. By this time Mr Kawol had sought advice. He then unfortunately simply says that he "followed legal advice" in taking the next steps and so it has been difficult for the Tribunal to ascertain his real reasons and motives for taking the action which followed, in particular the claimant's dismissal and the subsequent failure to uphold the appeal.

33. The medical capability meeting took place on 25 August 2016. No-one from the respondent was present. The meeting was chaired by Carmel Walberg of HR Face-to-Face, a consultant who attended the meeting on the respondent's behalf. She subsequently prepared a detailed report for Mr Kawol.

34. During the meeting, the claimant explained that she was still awaiting a diagnosis and although there was some discussion of potential reasonable adjustments, including working from home, this was largely theoretical, rather than a practical, discussion because the claimant was very unwell and not sure herself of what she would be capable of doing.

35. The report concluded that, given that there was no clear diagnosis and no current treatment which offered any indication of an improvement of the claimant's condition, the claimant's employment should be terminated. Mr Kawol explained that he followed the advice of the report and proceeded to terminate the claimant's employment, seemingly on the basis that there was no indication of a likely return to work in the foreseeable future. There was little, if any, consideration of the possibility of adjustments being made on the basis that, firstly, Mr Kawol believed, rightly or wrongly, that the registered manager did need to be present on the premises for 40 hours a week, particularly given the restrictions that were in place at that moment, but also, secondly, because at that time consideration of any potential adjustments was theoretical only as the claimant still felt too unwell to even consider working from home. The respondent does specifically make a reference in the dismissal letter of the need to find a permanent replacement, and the Tribunal finds that this was very much in the respondent's mind as the reason for terminating the claimant's employment.

36. It should be noted that, at the time of dismissal, the claimant had been absent for some four and a half months which meant that she was still on full pay, and had not had the benefit of the remainder of the contractual sick pay provisions.

37. The claimant appealed against the decision to dismiss her. Her appeal letter appears at page 78 of the bundle. In the appeal letter, the claimant said there had been no reasonable adjustments taken into consideration; that also there had not yet

been a conclusive diagnosis; and that she was still waiting for the gynaecological appointment which had been diarised for 21 September 2016. She also wanted the respondent to take into account her 25 years' length of service and clean sickness record to date.

38. As a result an appeal hearing was held on 22 September 2016. On this occasion, it was chaired by another consultant from HR Face-to-Face, Mr Andrew McCabe. Again, there was a discussion about the possibility of other work. The claimant suggested that she could do some administrative work from home, but at that point the claimant was still awaiting results and there had still been no diagnosis.

39. The claimant's appeal was refused on the basis that there was no evidence of when she could return to work and that the requests that the claimant made for adjustments were unacceptable.

40. On 13 October 2016 the claimant received a diagnosis that she had cancer. Happily, that has been treated successfully by radiotherapy (in February 2017). The Tribunal accepted evidence from the claimant that she would have returned, possibly with some adjustments, by around February/March 2017.

41. Records printed off and drawn to the Tribunal's attention indicate that, at the time of the Tribunal hearing, there was still no replacement registered manager recorded on the system for the repsondent.

The Law

Disability discrimination

Discrimination arising from disability

42. The claimant has brought claims under section 15 of the Equality Act 2010 (the EA) which is the provision which deals with discrimination arising from disability. Section 15 states at subsection (1) that:

> "A person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

43. And section 15(2) states:

> "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."

44. The onus for the justification defence in terms of section 15 is squarely on the respondent.

Direct discrimination

45. There is also a complaint of direct discrimination. Section 13 of the EA provides that:

> "A person (A) discriminates against another person (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others."

46. In this case, the protected characteristic alleged is the claimant's disability.

Failure to make reasonable adjustments

47. The claimant also brings a claim of in respect of the respondent's alleged failure to make reasonable adjustments. The EA, at section 20, provides that:

> "(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 whim 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."

48. Section 21 then provides:

> "(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.

49. We also considered paragraph 6.10 of the Code of Practice on Employment which states that a PCP can include "one off decisions and actions".

50. By paragraph 20 of Part 3 of Schedule 8 of the EA, it is further, relevantly, provided:

> "(1) A is not subject to a duty to make reasonable adjustments if A does not know. and could not reasonably be expected to know-
>
> (b)….that an interested disabled person has a disability and is likely to be placed at the disadvantage."

51. As regards knowledge of disability, the task for the Tribunal is to ascertain whether, at the material times, the respondent knew, or could have been expected to know, that the claimant was disabled.

52. Case law indicates that the Tribunal cannot simply stop at the stage of considering whether the respondent was aware of the claimant's disability, but needs to separately consider what the respondent could reasonably have been expected to know; a failure to carry out that further exercise giving rise to an error of law.

53. According to **Jennings v Barts and the London NHS Trust UKEAT/0056/12** whether or not an employer knows or should have known there was a disability is essentially a question of fact for the Tribunal.

54. The Tribunal must analyse whether or not there was sufficient information available to the respondent at the material times, namely at dismissal and on appeal, such that it could be expected to know that the claimant was suffering from a physical impairment which was of sufficient long-standing and which sufficiently interfered with her day to day activities to amount to a disability within the meaning of the EA. In other words, was there sufficient factual material that the respondent ought to have known the claimant was suffering from a physical impairment which amounted to a disability. Whether or not there was an actual diagnosis of the condition at that time is not relevant, nor is the fact that the claimant was subsequently diagnosed with cancer.

55. The Tribunal was referred by the Respondent to the case of **Peregrine v Amazon UKEAT/0075/13/SM.** The Respondent cited this case as it considered that it had similar facts. However, we also note that there is no need for a claimant to establish a medically diagnosed cause for their impairment. It is the effect of an impairment that must be considered and not its cause.

56. The Tribunal's attention was drawn by the claimant to the Code of Practice on Employment, and in particular, 6.23-6.33 of the code which relates to reasonable adjustments. The Tribunal also took into account 6.19 which states that an employer must do all they reasonably can to find out whether or not an employee is disabled. It goes on to say that what is reasonable will depend on the circumstances.

Unfair dismissal

57. A dismissal will be unfair unless it is for one of the admissible reasons specified in subsection 98(1) of the Employment Rights Act 1998 (ERA). Those reasons include " a reason which relates to the capability ..of the employee for performing work of the kind which he was employed by the employer to do."

58. If dismissal is proved to be for one of the potentially fair reasons then the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 shall be determined in accordance with equity and the substantial merits of the case.

59. In assessing the reasonableness of the employer's conduct an Employment Tribunal must not substitute its own opinion about whether the employee should have been dismissed but must recognise that there will be a range of reasonable responses open to a reasonable employer. A dismissal should not be held to be unfair unless it falls outside that range.

60. There is a good deal of case law around dismissal of employees with long-term illness. Notably, **Spencer v Paragon Wallpapers** [1977] ICR 301 it states:

> "Every case depends on its own circumstances. The basic question which has to be determined in every case is whether in all the circumstances the employer can be expected to wait any longer and if so how much longer. Every case will be different depending upon the circumstances."

61. It is noted in that case that the relevant circumstances might include the nature of the illness, the likely length of the continuing absence, the need of the employer to have the work done which the employee was engaged to do, and so on.

62. In **BS v Dundee City Council 2013 CSIH 91** it is noted that there are three important themes:

a. where an employee has been absent form work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer;

b. there is a need to consult the employee and to take his views into account. It states that, if he is no better and does not know when he can return to work that is a significant factor operating against him;

c. there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.

Conclusions

63. The Tribunal has concluded that the respondent could reasonably have been expected to know that the claimant was a disabled person at the material times, namely at dismissal and on appeal, despite the fact that no diagnosis that the clamant was suffering from cancer was made until after the dismissal and the appeal. The facts which lead the Tribunal to this conclusion are set out below.

64. The claimant was suffering from a physical impairment, namely anaemia. The Tribunal accepts that anaemia is not the conceded disability, but the manifest physical impairments were fatigue and breathlessness. The Tribunal is encouraged by case law not to place too much emphasis on a diagnosis but rather to consider the impairments suffered by the claimant at the material time. Indeed, a later re-labelling of a condition is not diagnosing the physical impairment for the first time using the benefit of hindsight. Rather, it is giving the same physical impairment a different name.

65. Did the respondent know the claimant was suffering from an impairment at the material time? The Tribunal finds that it did. When the respondent did meet with the claimant, some time prior to dismissal, the respondent remarked on how poorly the claimant was. He also had sight of the sick notes the claimant had submitted which made it clear that the claimant was suffering from a physical impairment. It was clear that the claimant was far too poorly to attend work.

66. The next question for the Tribunal is whether the respondent knew, or reasonably ought to have known, that the Claimant's impairment had a substantial adverse effect on her ability to carry out normal day to day activities. The claimant was off sick, despite an excellent attendance record over many years of service with the respondent. As the claimant's physical impairment prevented the claimant from attending work, it is clear that it had a substantial adverse effect on her ability to carry out normal day to day activities. Further, when Mr Kawol met with the claimant, it was clear to him that the claimant was ill. She was pale and tired. Indeed, the respondent pointed out to the claimant that she " clearly [did]n't look well; you need to go home and get better". Taking into account that visual evidence, coupled with the sick notes from the claimant, the Tribunal finds that the respondent knew, or ought reasonably to be expected to know, that the claimant's impairment had a substantial adverse effect on her ability to carry out normal day to day activities.

67. The Tribunal must then determine whether the respondent knew that the effect of the Claimant's impairment on her ability to carry out normal day to day activities had lasted for a period of at least 12 months or was likely to do so or whether the Respondent could reasonably have been expected to know that the effect of the Claimant's impairment on her ability to carry out normal day to day activities had lasted for a period of at least 12 months or was likely to do so.

68. As at the date of dismissal and, subsequently, the appeal, the claimant's symptoms had not been suffered on a long-term basis, namely for 12 months or more. However, at the point of dismissal, and then on appeal, there was still no prognosis and no date for a return to work could be given. Further, the claimant remained ill. The Tribunal is satisfied therefore that the symptoms were likely to last at least 12 months or more. Some five months down the line, after the commencement of the claimant's sick leave, no cause could be identified, no solution was available and the tests, crucially, were ongoing. The respondent was aware that those tests were ongoing and no solution was imminent. The Occupational Health report confirmed that the claimant was still suffering from fatigue and shortness of breath, and also informed the respondent that the claimant had been referred to the gastroenterology consultant and was going to be referred to the gynaecological department. The Tribunal therefore concludes that the respondent ought to have known that the claimant's physical impairment was long term within the definition contained in the EA.

69. Turning to the Occupational Health report, the Tribunal is mindful that that report specifically gives the opinion that the claimant was not a disabled person for the purposes of the EA at that point in time. However, the Tribunal is also mindful of the fact that an employer cannot just take an Occupational Health report at face value but has to draw its own conclusions. In this case we have taken into account also the fact that Mr Kawol, who was dealing with the matter, had some medical knowledge from his training and background as a nurse. Further, the report was prepared after a telephone interview only and did not seek the views of the claimant's treating clinicians.

70. In any event, the Occupational Health report focuses on the effects of the claimant's condition and not, for example, whether the condition was long-term, when determining that it was not a disability. What the report actually says is that the

reason why it finds that the claimant is unlikely to be disabled within the meaning of the EA is because she has normal daily living activities within her present limitations. The respondent knew that the claimant could hardly get out of bed; was unable to drive and certainly couldn't attend work. Consequently, the Tribunal does not accept that this report could be taken by the respondent at face value. It was misleading, at least.

71. The Tribunal has considered the code of employment where it states that an employer must do all they reasonably can be expected to do so to find out whether a worker has a disability. It is clear, and accepted, that the respondent did not know of the claimant's actual diagnosis until after the appeal hearing. That diagnosis could not have been known, therefore, at the material times. However, the Tribunal considers that it would have been reasonable to take steps to seek further information from the claimant's treating clinicians and GP.

Discrimination arising from disability

72. In this case, it is accepted by the respondent that, in dismissing the claimant, the respondent has treated her unfavourably because of something arising in consequence of her disability, namely her absence.

73. The issues, therefore, before the Tribunal, are whether the respondent had a legitimate aim; and, if so, whether dismissal was a proportionate means of achieving that aim.

74. In determining these issues, the Tribunal has conducted a balancing exercise weighing the discriminatory effect of the treatment of the claimant against the employer's reasons for the treatment.

75. The legitimate aim put forward by the respondent is to meet the respondent's requirements to CQC to have a registered manager at the care home. However, the Tribunal is not satisfied that it was a requirement of the CQC, placed upon the respondent, to have a registered manager other than the claimant. Therefore, the respondent is unable to demonstrate that it had a legitimate aim in dismissing the claimant.

76. The Tribunal was not taken to any documentation to support the contention that the CQC required a registered manager at the care home other than the claimant, despite this being the respondent's pleaded legitimate aim. Indeed, the guidance in the bundle from the CQC deals not with the fact that absent managers must be replaced or dismissed, but with supporting an absent manager and what steps to take in the event that a manager is absent. Similarly, during the meeting with HBC which took place after the meeting with the claimant, the Council indicated their support of the acting manager and that they would take steps to assist her.

77. The respondent alleges that, without a registered manager, the respondent would not be able to engage in the provision of care within the home, and that HBC would not refer residents to them. This simply was not the case. The restriction on the respondent had already been lifted from red to amber which meant that residents could be admitted, albeit only at the rate of one per week. Nonetheless, the real

pressure was off the respondent . The contention put forward by the respondent in this regard was simply unsupported by the evidence.

78. The notes of the meeting with HBC do indicate that the restrictions would remain in place whilst the manager was on sick leave. We therefore accept that Mr Kawol believed that the quickest route to lifting the restriction placed upon him was to put a new manager in place. However, CQC were supportive of the acting manager who was appointed during the claimant's absence, and there was no evidence of any discussion with HBC as to whether it was really necessary to terminate the claimant's employment. In any event, Mr Kawol's evidence in this regard was not credible because he was confused about the timings of when the red restriction had been removed and replaced with an amber restriction.

79. The Tribunal also concludes that, even if the requirement to have a registered manager of the care home, as alleged by the respondent, was a legitimate aim, dismissal was not a proportionate means of achieving that aim.

80. In this regard the respondent relies on the fact, first, that the respondent was in financial difficulty. Whilst the Tribunal accepts the home was in financial difficulty at the point at which it only had 17 residents (, Mr Kawol could not give any clear indication of when his financial low point was. As stated above, the Tribunal found that the nadir must have been at the end of March before the restriction was relaxed rather than at the end of September when the dismissal and the appeal took place, by which time the respondent was able to admit residents again and had been doing for some time. There was no evidence before the Tribunal to suggest otherwise.

81. There was no evidence of any discussion with CQC as to whether dismissal would really be necessary.

82. Although we accept that the respondent believed that dismissing the claimant and appointing a new manager might be the quickest way to get the restriction lifted completely, we find that that was not a proportionate step as alleged by the respondent because the restriction was an amber, rather than a red restriction, which meant that referrals were being made and were not suspended completely.

83. Further, the respondent had appointed an acting manager, and meeting minutes clearly indicate that HBC were happy to work with that acting manager.

84. Finally, records printed off and drawn to the Tribunal's attention indicate that even at the time of the Tribunal hearing, and even though the claimant was dismissed some 12 months ago, there was still no replacement registered manager on the system. There was no urgency to replace the claimant as manager as the respondent sought to suggest or it would have been done before the Tribunal hearing.

85. The claimant's claim of discrimination arising from disability succeeds.

Failure to make reasonable adjustments

86. The Tribunal has found that the respondent reasonably ought to have known that the claimant was disabled.

87. The Tribunal also finds that the claimant's disability was liable to disadvantage her substantially, in comparison to others not suffering from the claimant's disability, in particular by virtue of her needing to have time off work, a state of affairs which could, and in this case did, result in the termination of her employment with the respondent. The Tribunal finds that the respondent knew, or ought to have known that the claimant's disability could disadvantage her substantially, as it was considering her dismissal for that very reason.

88. It is alleged that the following PCPs were applied by the respondent:

i. a requirement to work full time and be based at Cartref for the entire duration of her working hours;

ii. a practice of not seeking and/or considering further reports, information or documentation from the claimant's treating clinicians and/or her GP;

iii. a practice of not waiting for a diagnosis to be obtained prior to dismissal and/or making enquiries with the claimant's treating clinicians as to when a diagnosis could reasonably be expected.

89. The Respondent accepted that there was a PCP that the claimant worked her full hours within the care home. However, it was not accepted that (ii) and (iii) were PCPs applied by the respondents.

90. The Tribunal accepted that all three alleged PCPs were, in fact, PCPs applied by the respondent. The Tribunal notes, in particular, that a PCP can include a one off decision or action.

91. The Tribunal further accepted that each PCP would put the claimant at a substantial disadvantage.

92. As regards the first PCP, the nature and extent of that substantial disadvantage in comparison to persons who are not disabled was that a person suffering from the disability from which the claimant suffered would be unable to return to work for a much longer period of time, thus making termination of employment much more likely.

93. As regards the second and third PCPs, the disadvantage suffered by the claimant as a result of the PCPs arises because the termination of her employment has been considered without full and detailed evidence of her condition which may have satisfied the respondent that she would be well enough to return to work at some point in the future. The Tribunal finds that that is a substantial disadvantage as it was more likely that the employment of a person suffering from the same disability as the claimant would be dismissed than a person who was not so suffering.

94. The claimant must then raise the reasonable adjustments that she suggests should have been made with a sufficient degree of specificity so as to enable the respondent to address them evidentially and the Tribunal to consider their reasonableness.

95. The following are the adjustments pleaded by the claimant in respect of the first PCP:

a. working part time or on reduced hours;

b. allowing the claimant to work from home; or

c. allowing the claimant to job share with the acting manager until she was able to return to work full time.

96. The claimant suggested that, by splitting the role into administrative tasks and the physical tasks that a registered manager should do, the respondent could have permitted her to work from home on the administrative tasks. The claimant indicated that this would have been a reasonable adjustment to make both during her illness, and when she was recovering.

97. The claimant also suggested that it may have been a reasonable adjustment to consider a phased return to work on reduced hours.

98. The Tribunal does not consider that the pleaded adjustments were reasonable to make. Whilst the respondent gave little thought to whether such adjustments could, in fact, have been made at the material time, the claimant was still very ill; the respondent was still the subject of the amber restriction; and the role itself was necessarily a hands on role. Although it may have been reasonable to make these adjustments at some point in the future, these were not reasonable adjustments to make at the material time.

99. As regards the second and third PCPs, the claimant submits that seeking further information from the claimant's GP and/or treating clinicians and/or awaiting a diagnosis would have been reasonable adjustments.

100. The Tribunal concludes that it would have been reasonable for the employer to make these adjustments at the material times. The adjustments would have prevented the substantial disadvantage suffered by the claimant, ultimately her dismissal. There was no evidence adduced by the respondent to demonstrate that the claimant could not wait for a diagnosis of her condition. The claimant had an excellent work record for many years and was only part way through her contractual sick pay period. It would have been reasonable to have obtained further information from the claimant’s GP and/or treating clinicians and/or to await a diagnosis. Further, the respondent had an acting manager in place who was supported by HBC, and so there was no urgency to remove the claimant form her post.

101. The claimant’s claim that the respondent failed to make reasonable adjustments succeeds.

Direct discrimination

102. The Tribunal concludes there has been less favourable treatment, namely dismissal.

103. The appropriate comparator should be a person in the same position, and therefore absent from work for a similar period of time as the claimant but without a disability.

104. The claimant was not directly discriminated against because of her disability. The respondent took the steps it took because of its belief that the restrictions it was under would be lifted if they had a manager who was physically present. That that was the reason why is evidenced by the reason set out in the letter of dismissal.

105. The claimant's claim of direct discrimination fails and is dismissed.

Unfair dismissal

106. The decision to dismiss the claimant came about because the claimant was absent from work. The Tribunal is satisfied that, at the time the decision to dismiss was taken, the respondent genuinely believed the claimant was incapable of performing her role and that it dismissed the claimant for that reason.

107. Accordingly, the Tribunal is satisfied that the claimant's dismissal was for a potentially fair reason falling within section 98(2) of the EAR, namely the claimant's capability.

108. The respondent did consult the employee and take her views into account, and did take some steps to discover the claimant's medical condition and her likely prognosis. However, in all the circumstances of the case, the Tribunal considers that it would have been a reasonable response of a reasonable employer in the respondent's position to seek additional medical evidence and to wait for the results of the referrals to become available, taking into account the claimant's length of service; the fact that she was still only five months into her contractual sick pay period of twelve months; the fact that the red restriction had been lifted; and the fact that the referral was imminent.

109. The Tribunal is further not satisfied that, in the circumstances, dismissal was a response falling within the range of reasonable responses open to a reasonable employer. Although Mr Kawol believed that the restrictions it was under would be lifted if they had a manager who was physically present, that belief had not been tested at all. This was an employer in a rush. Mr Kawol wanted to replace the claimant as registered manager as he thought this would solve the restriction problems the home was facing, but he took not steps to ascertain whether that was actually the case with HBC or CQC; the restriction was an amber restriction, rather than red, which meant that the financial implications for the respondent were greatly decreased; the claimant was still on full pay and had not exhausted her contractual entitlement to sick pay, which meant that she had an expectation that she would not be dismissed before she had been absent for twelve months; no consideration was given as to whether the claimant could step down as manager and take another role until she was well enough to return or whether there could be any other alternatives to dismissal; HBC was supportive of the acting manager; and the respondent appeared not to take into account the claimant's long service. The employer could have been expected to wait longer.

110. In all the circumstances of the case (including the size and administrative resources of the employer), the respondent acted unreasonably in treating the claimant's capability as sufficient reason for dismissing her. It follows that the claimant's complaint of unfair dismissal is well founded.

111. The Tribunal went on separately to deal with remedy. Reasons will be provided separately if requested.

Employment Judge Rice-Birchall

Date 13 February 2018

REASONS SENT TO THE PARTIES ON

I March 2018

FOR THE TRIBUNAL OFFICE

[AF]