EMPLOYMENT TRIBUNALS

Claimant: Ms J D Norton

Respondent: Boots Management Services Limited

HELD AT: Manchester **ON:** 16 and 17 October 2018

BEFORE: Employment Judge Rice-Birchall

REPRESENTATION:

Claimant: Mr T Clare, TU Representative
Respondent: Miss L Quigley, Counsel

JUDGMENT

The judgment of the Tribunal is that:

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

2. The claimant was not indirectly discriminated against by the respondent in relation to the claimant's age contrary to section 19 of the Equality Act 2010.

REASONS

Background

1. The claimant's application to amend her claim to add the claim of unlawful age discrimination, in the form of indirect age discrimination, contrary to section 19 of the Equality Act 2010 (EA 2010) was granted at a Preliminary Hearing which took place on 21 June 2018. However, the Claimant's claim was listed to be heard by a Judge sitting alone. Accordingly, I gave the parties the opportunity to await a fully constituted Tribunal (which I indicated could have been possible by lunch time) or to proceed in accordance with section 4(3)(e) of the Employment Tribunals Act 1996.

2. Both parties agreed to me sitting alone and accordingly signed a document to indicate their consent as required by section 4(3)(e) as referred to above, a copy of which was retained on the file.

The Issues

3. At the outset of the hearing, I spent some time with the parties in order to agree the issues as follows:

Indirect Age Discrimination

(1) Did the respondent apply a PCP to the claimant and also to persons who do not share the protected characteristic in question, namely age? In this case it is accepted that the application of the absence policy/procedure was a PCP which was applied to the claimant and to persons who do not share the protected characteristic of age.

(2) Does the PCP put those who share the protected characteristic (of age) to particular disadvantage when compared with persons who do not share the characteristic in question? The claimant defined those at a particular disadvantage as older people, namely workers over 50.

(3) What, if any, is the nature of that particular disadvantage?

(4) Did the PCP put the claimant at that particular disadvantage?

(5) Can the respondent justify the application of the absence management procedure as a proportionate means of achieving a legitimate aim?

Unfair dismissal

(6) What was the reason for dismissal?

(7) Was the reason for the dismissal potentially fair within the meaning of Section 98(1) Employment Rights Act 1996 (ERA)? The respondent submits that the claimant was dismissed due to capability.

(8) Was the claimant's dismissal fair having regard to the principles set out in Section 98(4) ERA?

(9) If not, should an order for re-instatement be made pursuant to Section 113 ERA or, what, if any, compensation should be awarded to the claimant having regard to those factors set out in Section 123 ERA?

(10) In the event that the dismissal was unfair due to procedural grounds, would following a different procedure have made any difference to the outcome? If not, how much should any compensation award be reduced to reflect this.

Evidence

4. The Tribunal had the benefit of a bundle of documents. The Tribunal explained to the parties that it would only read documents to which it was referred in the statements or in evidence. It was confirmed that some of the content of the bundle was historic and may not therefore be necessary to be read in advance.

5. The Tribunal heard evidence from Jill Reece, Store Manager and Mark Duncan, Area Manager for East Manchester on behalf of the respondent and from the claimant herself.

The Facts

6. The claimant was employed as a Customer Assistant by the respondent in its Trafford Centre store from 15 March 2004 until her dismissal on 21 January 2018.

7. The respondent manages absence according to an absence policy (pages 32 to 35 of the bundle). The policy is non-contractual. The policy sets out that, "if a colleague is frequently and persistently absent, it can have a negative impact on the delivery of a store's/department objective and on the remaining colleagues who must carry the burden of extra work. This policy is designed to ensure a balance is struck by ensuring adequate support for colleagues who are absent and our ability to fulfil business obligations".

8. The respondent's absence procedure consists of five stages, the first two of which are informal. Stages three to five are a formal absence review; a capability review meeting; and an appeal respectively.

9. The policy states under the heading "short term absence process – one to fourteen calendar days" that "if a colleague's level of absence reaches an unacceptable level e.g. after three separate short absences in the last twelve months, we will follow the absence review procedure". This heading is rather unhelpful, as, in practice, any absence counts as an absence under the process, and could trigger the next stage of the process, even if the absence is longer than fourteen days.

10. The five stages of the process are as follows:

    a. Stage one - first absence review. This is triggered by an employee being absent on three separate occasions and is an informal review following which absence levels will be reviewed over a period of six months. Any further absence in that period will lead to stage two.
    b. Stage two – second absence review. This is an informal review triggered by any further absence in the six month review period of the first absence review as a result of which absence levels will be reviewed over a period of nine months.
    c. Stage three – formal absence review. An employee will be invited to a formal meeting with 48 hours' notice if there is a further absence in the nine month period. The employee will have the right to representation

and a right of appeal. A formal absence warning, live for a period of twelve months, may be issued as an outcome of this meeting.

d. Stage four – capability meeting. An employee will be invited to this formal meeting with 48 hours' notice if there is a further absence in the twelve month period and will have the right to representation and a right of appeal. A possible outcome of this meeting is dismissal with notice.
e. Stage five – appeal. An employee may appeal the outcome of the formal absence review or capability review.

11. There is a separate process which deals with long term absence (categorised as absences longer than fourteen calendar days).

12. The claimant, during the period 2004 – 2013, had previously been subject to the absence process and accepted that the policy had been explained to her on more than one occasion previously.

Return to work interviews

13. After every absence, employees attend a return to work meeting in which the employee who has been absent goes through a set form with his or her manager. The return to work interview records: the reason for absence; whether the absence is work related; if the employee is waiting for any assessments/treatments or investigations; whether the employee is able to do their normal job or what they are able to do; and whether or not they feel that they need any other immediate support to perform their work. The employee is also asked to read through and sign to confirm his or her agreement with the notes.

The claimant's absences

14. The claimant was absent from work on 6 January 2015 because of flu/cough and cold, and attended a return to work interview on 7 January 2015.

15. The claimant was absent for two weeks in April 2015 because of viral labyrinthitis. At the return to work interview, held on 15 April 2015, the claimant was asked if she needed any support and stated that she would have liked a chair.

16. The claimant was absent for nine weeks during June, July and August 2015 due to shoulder pain. The notes of the return to work interview, held on 5 August 2015, indicate that the claimant thought her pain could, at least in some way, have been aggravated by work. The claimant's fit to work note stated that she was fit to return on amended duties, as a result of which the respondent moved the claimant to work on the self-serve tills and light duties so she wouldn't have to lift heavy baskets and could avoid repetitive movements. When asked if she needed any other immediate support the claimant said, "not for now".

17. It is worthy of note that the adjustments referred to above, which were made to the claimant's role as a result of shoulder pain, remained in place up to the date of the claimant's dismissal. Although the claimant indicated that she believed that work caused her shoulder injury, there was no medical evidence to support that

proposition and, in any event, the claimant's further absences did not arise from a recurrence of the claimant's shoulder issue. Further, there was no evidence before the Tribunal, from a medical professional or otherwise, to suggest that this injury was age related. As this was the claimant's third period of absence in a rolling twelve-month period, this absence triggered the first stage of the absence procedure.

18. The claimant was absent again for one day in October 2015. The reason given was groin and hip pain. There is no doctor's note, due to the length of absence, but the claimant expressed the opinion during her return to work interview that the groin and hip pain could be caused by arthritis and may be due to long hours spent standing. The claimant indicated that, "if the pain flares up" she may need to sit down during shifts. However, there is no evidence that her hip and groin pain did flare up again at any stage prior to her dismissal. As regards other immediate support, the claimant indicated that she didn't feel any was necessary.

19. As this absence occurred within six months of the first informal review, it triggered the second informal absence review which would be live for a period of nine months. The note of the return to work interview states that the second informal absence review would mean that if any absence occurred within the next twelve months this would lead to a formal absence review.

20. The claimant's next absence occurred in December 2015 and was caused by dizziness and nausea. There was no suggestion that the claimant's absence was work related. However, although the respondent could, at this stage, have moved on to a formal process, the respondent actually decided to go back two stages and to re-issue a first informal warning. It was not clear from the documentation on what basis that decision was taken.

21. From March 2016, the claimant was absent for six weeks by reason of stress at work. The claimant explained that a customer had complained about her conduct, as a result of which there was a potential misconduct matter which was investigated. The claimant felt that she didn't do anything wrong and felt it unfair that she was treated in the way she was by the respondent, hence a significant period of absence from work. As the absence was within six months of the first informal absence review, it resulted in a second informal review for the claimant on 20 April 2016. The claimant returned to work and did not request any further support.

22. In September 2016, the claimant was off work for two weeks for headaches (which she said were possibly caused by medication). Again, the claimant did not request any support (she stated that she didn't think she would get any anyway and that she couldn't talk to anyone). The result of this absence was a formal absence meeting invite was issued in accordance with stage three of the absence process.

23. Accordingly, on 5 October 2016, the claimant was issued with a formal absence warning which was stated to be live for twelve months. It was made clear that the process would be escalated if there was any further absence during that 12 month period. A letter to the claimant dated 5 October 2016, carefully explains that: "the formal absence warning will remain live for twelve months from the date of this letter. In the meeting we have agreed the improvements that need to be made to your absence levels, I need to see an immediate and sustained improvement in your

absence levels to prevent further action under this process. The next stage of this process may result in you being invited to a Capability Review Meeting where a possible outcome is your dismissal from Boots with notice". The claimant was given the right of appeal against this decision but did not do so.

24. In November 2016 the claimant commenced a five-week period of absence for domestic reasons. The absence was within the warning period and could have resulted in the claimant being invited to a capability review meeting. However, in the circumstances, the respondent did not do so and took no further action. Nonetheless, the claimant was reminded in the return to work interview that a formal absence review had been issued on 5 October 2016 and would be live until 5 October 2017. It was explained to the claimant that any absences within that time would result in her being invited to a capability review which could result in the termination of her employment.

25. In January 2017 the claimant was absent for part of a day due to severe indigestion. Again, the respondent chose not to escalate the process and, again, it was explained to the claimant that the warning was still live and further absence could result in a capability meeting which could result in the termination of her employment.

26. In May 2017 the claimant was absent for sickness and diarrhoea and was invited to a capability review meeting with Jane Eastwood, Store Manager. At that capability review meeting Ms Eastwood and the claimant went through the claimant's absences and the reasons for them. The claimant was requested by the respondent to indicate what she thought the respondent could do to help her but the claimant made no suggestions. It was made very clear to the claimant that her absence history had been terrible. The claimant said, at the end of the meeting, "I feel I am incapable to carry on working without being off again".

27. Ms Eastwood did not dismiss the claimant, which was a possible outcome in accordance with the absence policy, but made three recommendations: that the claimant be referred to Colleague Health; that the claimant should contact Life Works; and that the claimant should take action to improve her general health and wellbeing. The claimant was given a right of appeal but did not appeal. The respondent made it clear that the re-issued formal absence warning would remain live on the claimant's file for twelve months from 9 June 2017and that if the claimant was absent within this time she may be invited to a further capability review meeting which could lead to her dismissal.

28. As a result of the recommendations made, the claimant was referred to Occupational Health. The claimant confirmed that the symptoms of her psychological health issues had now resolved and that this was not an issue and the occupational health feedback was that the claimant was fit for work. The claimant chose not to follow up the recommendation to contact Life Works. A recommendation for a stress risk assessment was also followed up by the respondent, but the claimant terminated the process and did not wish to continue with it.

29. The claimant was absent again from 27-30 September 2017 because she had a swollen foot. Although the claimant had been suffering from issues with her foot

for some time prior to being absent, and although she was aware f the consequences of a further absence from work, she did not consult with the respondent on possible ways to avoid her absence.

30. The claimant was invited to a capability review meeting by way of a letter which made it clear that, if the respondent concluded it was not likely that the claimant would be able to maintain a sustainable level of attendance, a potential outcome of the meeting was her dismissal with notice on the grounds of capability.

31. Following a capability review meeting, Ms Reece took the decision to dismiss the claimant. Prior to dismissing the claimant, Ms Reece first satisfied herself that the absence policy had been adhered to and followed correctly and that the formal absence warnings were issued appropriately. She took into account that there had been at least two occasions on which the claimant could have been dismissed under the absence policy but on which the claimant was shown leniency and given further opportunity to improve. Ms Reece considered that she could not envisage the claimant's attendance levels improving as she had been warned throughout the process that if her attendance did not improve it could lead to her dismissal, however the absences continued. As all of the absences were due to different reasons, Ms Reece considered that there was nothing specific that the respondent could do to help prevent the claimant's absences.

32. The claimant appealed against her dismissal. Mr Duncan heard the appeal. Mr Duncan's decision to uphold the claimant's dismissal was confirmed by letter dated 24 January 2018. He took into account the fact that the claimant could have engaged in dialogue with the respondent to avoid issues, for example with regards to the swollen foot which she had been suffering for a number of weeks prior to being absent. He took into account: the fact that the respondent had shown leniency in respect of some absences; that, during the absence process and return to work interviews, the claimant had confirmed there was nothing for the respondent to do to support her; and that the respondent had correctly applied its absence policy.

The Law

Indirect Discrimination

33. Section 19 of the EA 2010 reads as follows: -

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B.
>
> (2) For the purposes of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) It puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

34. Paragraph 4.18 of the EHCH Code of Practice on Employment (2011) states: "In general the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively".

35. The Tribunal was referred to the case of **Grundy v British Airways Plc 2008 IRLR 724** which states that "the pool must be one which suitably tests the particular discrimination complained of: but this is not the same thing as the proposition that there is a single suitable pool for every case."

36. Section 23 of the EA 2010 applies to section 19 and provides: "On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case."

37. As to the meaning of "particular" in this context, the Tribunal was referred to **Chez Razpredelenie Bulgaria AD -v- Komisia za zashtita at diskriminatsia 2015 IRLR 746 ECJ**. The ECJ held that particular disadvantage does not refer to the serious, obvious or particularly significant case of inequality but instead denotes that it is particularly persons of a given racial or ethnic origin who are at a disadvantage because of the practice at issue.

38. The Tribunal was also referred to **Constable of Avon and Somerset Constabulary -v- Chew [2001] EAT 503/00 (**and **Ministry of Defence -v- Debiqque).** Whilst it is not necessary to rely on statistics, the ECHR code at paragraph 4.12 states that "statistics can provide an insight into the link between the provision, criterion or practice and the disadvantage that it causes".

39. As regards justification, the Tribunal was referred to **MacCulloch -v- ICI [2008] IRLR 846** in which the EAT set out four legal principles since approved by the Court of Appeal in **Lockwood -v- DWP 2013 EWCA Civ 1195**: -

(1) The burden of proof is on the respondent to establish justification: see **Starma -v- British Airways 2005 IRLR 862** at 31;

(2) The classic test was set out in **Bilka – Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317** in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end". This involves the application of the proportionality principle, which is the language used in regulation 3 itself. It has subsequently been emphasised

that the reference to necessary means reasonably necessary (**Rainey -v- Greater Glasgow Health Board (HL) [1987] IRLR 26**).

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys and Hansons Plc -v- Lax 2005 IRLR 726**.

(4) It is for the Employment Tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: **Hardys and Hansons Plc -v- Lax 2005 IRLR 726**.

Unfair Dismissal

Reason for dismissal

40. The respondent accepts the claimant was dismissed. It is thus for the respondent to show one of the five potentially fair reasons for dismissal (section 98 (1) and (2) of the Employment Rights Act 1996 ("the 1996 Act").

41. The task of identifying the real reason for dismissal rests with the Tribunal (notwithstanding that the burden rests on the employer to prove that it was one of the five potentially fair reasons).

42. In this case, the respondent asserts that the reason the claimant was dismissed falls within the category of capability defined by section 98(3)(a) of the 1996 Act as "assessed by reference to skill, aptitude, or any other physical or mental quality".

43. Capability is one of the five potentially fair reasons for dismissal set out in section 98 of the 1996 Act. This is significant because the Tribunal can only properly consider the question of fairness in the context of the reason found for the dismissal.

44. In **Wilson -v- The Post Office 2000 EWCA Civ 3036**, an employee with a poor attendance record was dismissed for failure to satisfy the employer's attendance policy. A tribunal found that the reason for dismissal was capability but the Court of Appeal held that the reason was the employee's failure to meet the requirements of the policy, which was some other substantial reason.

Fairness

45. If a potentially fair reason is shown by the employer, the Tribunal needs to have regard to section 98(4) of the 1996 Act which provides that: *"the determination of the question whether dismissal is fair or unfair (having regard to the reasons 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".

46. The test in section 98(4) of the 1996 Act was further clarified by the Employment Appeal Tribunal in **Iceland Frozen Foods Limited -v- Jones 1982 IRLR 439**, which states that:

a. the starting point should always be the words of section 98(4) themselves;
b. in applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair;
c. in judging the reasonableness of the employer's conduct, an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
d. in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
e. the function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair".

47. The claimant referred the Tribunal to a number of cases including:

a. **Scott -v- Secretary of State for Scotland EAT 196, 1988** as authority for the proposition that a significant improvement should be taken into account;
b. **Post Office -v- Stones EAT 390 1980** as authority for the proposition that specific difficulties e.g. marital difficulties which cause absence can be “put behind” once they are over;
c. **RBS -v- McAdie 2008 ICR 2087** as authority for the proposition that, in the case of work-related ill health, the Respondent should go the extra mile and put up with a greater level of absence; and
d. **BS -v- Dundee City Council 2014 IRLR 131.** In that case the Court of Session held, in the context of a long-term sickness absence, that the Tribunal had failed to address the question of whether, in all the circumstances of the case, any reasonable employer would have waited longer before dismissing the claimant.

48. In **Lynock -v- Cereal Packaging Limited [1988] IRLR 510** the EAT described the appropriate response of an employer faced with a series of intermittent absences as follows:-

> “The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment – sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has

> to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching in what must inevitably have been a difficult decision, include perhaps some of the following - the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy, the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These we emphasise are not cases for disciplinary approaches, these are for approaches of understanding".

Remedy

49. If dismissal is found to be unfair but a Tribunal is of the opinion that there is a chance that the claimant would have been dismissed in any event, then a deduction can be made from any compensatory award as a result of the principle in **Polkey -v- A E Dayton Services Limited 1988 ICR 142**.

50. An award of compensation may also be adjusted to take into account contributory fault under section 122(2) and section 123 (6) of the 1996 Act.

Conclusions

Indirect Discrimination

51. The claimant argued that the Tribunal should accept that older people have more absence generally (and more musculo-skeletal absence in particular) and submitted that this was borne out by statistics from the Office for National Statistics (ONS) and was a matter of common knowledge. It follows, according to the claimant, that the respondent should allow older people a higher level of absence, and a that a failure to do so constitutes indirect age discrimination. I have applied the law to the claimant's argument as set out below.

PCP

52. In this case it is accepted that the application of the short-term absence procedure (triggered by number of absences as opposed to duration) was a PCP which was applied to the claimant and to persons who do not share the protected characteristic of age. The claimant argued that the respondent should allow older people a higher level of absence.

Particular Disadvantage

53. Does the PCP put those who share the protected characteristic (of age) to particular disadvantage when compared with persons who do not share the

characteristic in question? The claimant defined those at a particular disadvantage as older people, namely workers over 50.

54. It seems to me that, as the Respondent suggests, the obvious pool for comparison is all workers to whom the respondent's absence policy applies. No alternative pool was suggested by the claimant.

55. The particular disadvantage is a greater likelihood of being subjected to the absence procedure and/or dismissal.

56. I do not consider that the claimant can establish that those who share the protected characteristic of age (workers over 50) are placed at a particular disadvantage, by reference to the absence management policy, when compared with persons who do not share the characteristic of age (in this case workers under 50). I do not consider that I had sufficient evidence before me to be able to conclude that older workers were placed at a particular disadvantage in comparison to all workers to whom the absence management policy applies.

57. The claimant relied on ONS statistics which were produced in the bundle. Those statistics indicate that:

a. for the age group 50 to 64, the absence percentage is 2.7%;
b. for the age group 35 to 49, the absence percentage is 1.7%;
c. for the age group 16 to 34, the absence percentage is 1.5%.

58. However, the statistics relate to "sickness absence rate" i.e. total hours lost as a proportion of total hours worked by reference to the national working population. The statistics appear to relate to duration, rather than rate, over number of instances of absence and will, therefore, presumably include long term absences. Accordingly, these statistics tell the Tribunal that workers over 50 have a marginally higher sickness rate than younger workers. They do not necessarily support the contention that older workers are more likely to have more instances of sickness absence.

59. Under the respondent's absence policy, the trigger is the number of absences as opposed to the duration of absences. True long-term sickness absence is dealt with under a separate policy. I therefore agree with the respondent's submission that the fact that older people are more likely to have more occasions of absence is not a truth which can simply be accepted. I have no evidence before me to suggest that an older person is more likely to have more occasions of absence. Nor can I accept that a staged process over a twelve month rolling period placed older workers at a particular disadvantage in comparison to younger workers.

60. Accordingly, there is no valid basis which "particular disadvantage" by reference to the actual PCP and older workers can be established.

61. In any event, there is no evidence upon which the Tribunal can rely to find that the claimant was placed at the disadvantage alleged by reason of her age: there is no medical evidence whatsoever to explain why the particular absences occurred, nor can it be inferred that the claimant's age was a relevant factor from the nature or circumstances of the illnesses/absences.

62. For the avoidance of doubt, I find that in weighing the reasonable needs of the undertaking against the potential discriminatory effect of the employer's measure, the respondent's absence policy is a proportionate means of achieving a legitimate aim. I do not accept the claimant's contention that the respondent made "patently spurious" claims about the operational financial impact of absence on it".

63. The policy itself makes clear what its aims and objectives are, and it is clearly essential for a business employing a significant number of employees, each of whom perform a valuable role, to have measures in place to deal with disruption of short term absence. This is a legitimate aim.

64. In assessing proportionality, the Tribunal must evaluate the potentially discriminatory effect of the PCP. I am satisfied that the respondent can justify the application of the absence management procedure as a proportionate means of achieving a legitimate aim, as there are a series of warnings and discussions with the employee in a policy which spans two informal and two formal stages prior to dismissal. Moreover, the respondent has demonstrated that it does not apply the policy rigidly.

65. The claimant was not indirectly discriminated against in relation to the protected characteristic of age contrary to section 19 EA 2010.

Unfair Dismissal

Reason for dismissal

66. The respondent relies on capability as a potentially fair reason for dismissal. The decision was based on the Claimant's short-term absenteeism. It was accepted by the Claimant that this was the reason for dismissal, and, in fact, the Claimant was dismissed in accordance with the Respondent's absence policy.

67. The Tribunal accepts that capability was the potentially fair reason for dismissal in these circumstances. In the alternative, the potentially fair reason could have been some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

Fairness

68. The respondent followed its clearly set out absence policy. The policy becomes onerous at its later stages with long periods of review and no scope for any absence of any duration before the next stage is triggered, though the respondent can, and will, exercise its discretion in this regard from time to time. The respondent clearly sets out its business reasons for such a policy, as referred to above.

69. The absence policy itself is slightly misleading in that it appears to describe the short-term absence process as applying only to absences of between one and fourteen days when, in fact, every absence counts be it an absence for one day or nine weeks. However, the claimant never raised this as an issue and the respondent's treatment of each absence, regardless of duration, was consistent throughout the process which resulted in the termination of the claimant's

employment. The claimant could not have been in any doubt as to how the policy was being applied.

70. Although I had considerable sympathy for the claimant, I considered that the respondent's decision to dismiss her was fair and fell within the range of reasonable responses open to a reasonable employer in all the circumstances of the case for the reasons set out below:

a. The policy, though strict, is clear and there is good reason for its existence. A business such as that run by the respondent depends on its staff and is entitled to adopt a low tolerance approach to absence. The claimant's submission that the respondent made patently spurious claims about operational and financial imperative to dismiss is not accepted. A reasonable employer is entitled to set limits on the amount of absence that can be tolerated and there are good sound business reasons to do so.
b. The policy, even if slightly misleading in one regard, was spelt out sufficiently clearly to the claimant on numerous occasions, such that she could be under no misapprehension as to the stage of the process she was at or what the ultimate result of her continued absences would be. It was very clear to the claimant, by the application of the policy to her, that the policy worked by reference to each occasion of absence, regardless of its duration. Accordingly, the claimant's nine-week absence from work for shoulder tendonitis was treated in the same way as her one-day absence for sickness and diarrhoea.
c. The respondent did not just apply the policy blindly but applied it in a compassionate way. It discounted the absence resulting from the claimant's personal situation; in December 2015 it downgraded the claimant to the first informal stage even though the claimant hit the trigger for a warning; it overlooked the January 2017 absence despite it being a trigger for a capability meeting; and it re-issued the formal warning rather than dismiss following the claimant's penultimate absence.
d. The respondent did support the claimant when appropriate. The respondent made adjustments which remained in place until the termination of her employment. Although the claimant indicated at one stage that she would have liked a chair, her request was not made in the context of a specific ongoing medical condition and, the reason for absence in respect of which the claimant had requested the chair did not recur. Accordingly, the respondent acted reasonably in not acceding to the claimant's request on that occasion.
e. That the claimant was genuinely ill or unable to attend work on any occasion was never in dispute. However, the respondent dismissed the claimant because of the claimant's high level of absence following the application of a policy designed to deal with employees with a high level of absence.
f. The Respondent sought occupational health's input prior to dismissing the claimant.
g. The claimant suggested that certain absences were "work related" (shoulder tendonitis, arthritis in hips, stress at work, headaches and

swollen foot) and, as such, the respondent should be more sympathetic in relation to those absences (**RBS v McAdie** above). However, no medical evidence was presented to the Tribunal which indicated that any of these absences were "work related", it was just that the claimant herself believed them to be so related.

h. The claimant argued that it would have been clear to the respondent that the claimant was suffering from mental health issues. Although there were some mental health issues, they were self-contained and related to a period in 2006. The claimant herself confirmed to OH that they were resolved. There was no suggestion of any underlying condition, and indeed, there is no claim of disability discrimination before this Tribunal.

i. In terms of the process followed, at all stages the claimant was invited to meetings to fully discuss the reasons for her absence and to review where support was required. Support was given where appropriate.

j. It was reasonable for the respondent to conclude, when faced with dismissing the claimant, that there was a likelihood of further absence even if the claimant's attendance had improved. It was the response of a reasonable employer to follow the policy in the way the respondent did, given that, as stated above, the policy was not applied rigidly and compassion was shown.

71. In all the circumstances of the case, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer.

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Employment Judge Rice-Birchall

Date 13 January 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

.14 January 2019

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FOR THE TRIBUNAL OFFICE