EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case No: S/4100651/2017**

Held in Glasgow on 2, 3, 6, 10 and 11 July 2018

Employment Judge: Lucy Wiseman

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Members: Graeme Docherty
Peter O'Donnell

15 **Mrs Maureen Reid** **Claimant**
Represented by:
Ms J Merchant
Solicitor

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Department of Work and Pensions **Respondent**
Represented by:
Dr A Gibson
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided to dismiss the claim.

30 **REASONS**

1. The claimant presented a claim to the Employment Tribunal on the 14 April 2017 alleging she had been unfairly dismissed and discriminated against because of the protected characteristic of disability. The claimant, in particular, argued the respondent had a duty to make reasonable adjustments
35 to allow her to return to work, and had discriminated against her because of something arising in consequence of her disability.

2. The respondent entered a response admitting the claimant had been dismissed for reasons of capability/some other substantial reason, but denying the dismissal was unfair. The respondent asserted it had been prepared to make reasonable adjustments but that the claimant had not been fit to return to work.

3. We heard evidence from the claimant; Ms Lynne Lenaghen, Child Maintenance Specialist Case Worker who was the claimant's line manager; Mr Edmund Cybulski, Wellbeing and Development Leader, who took the decision to dismiss and Mr Kenneth Barnes, Senior Executive Officer with Jobcentre Plus, who heard the appeal.

4. We were also referred to a jointly produced file of documents. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

5. The claimant commenced employment with the respondent on the 4 October 1993 until her dismissal on the 5 December 2016. The claimant was employed as an Administrative Officer within Child Maintenance.

6. The claimant earned £298.04 gross per week, giving a net weekly pay of £246.39. The claimant was also a member of the respondent's pension scheme.

7. The claimant suffers from a range of medical conditions including diabetes, obesity, asthma, cellulitis and arthritis. The respondent conceded the claimant was a disabled person on the basis of the cumulative effect of the various physical impairments.

8. The claimant commenced a period of sickness absence on the 12 August 2016. Ms Lenaghen, the claimant's team leader, was notified by the claimant of her absence (page 53) and that the claimant hoped to return to work on Monday 15 August.

9. The claimant did not return to work on Monday 15 August, but contacted Ms Lenaghen to advise that her GP had diagnosed cellulitis. The claimant was signed off work by her GP for a week, and then a further period of two weeks.

10. Ms Lenaghen had a telephone discussion with the claimant on the 30 August (page 59). Ms Lenaghen was aware, prior to this, that the claimant was going into hospital on the 9 September for surgery on an injured shoulder sustained in a car accident in 2014. The claimant advised Ms Lenaghen the cellulitis had cleared with medication but she was unable to return to work until after the operation because of the pain in her arm/shoulder. It was estimated the recovery time from the operation would be 4 – 6 weeks.

11. Ms Lenaghen discussed referring the claimant for an occupational health report, but the claimant requested that this be done after the operation.

12. Ms Lenaghen sent a "keeping in touch" letter to the claimant on the 14 September (page 61) before writing to the claimant on the 27 September (page 62) to arrange an attendance review meeting.

13. The claimant's sister telephoned Ms Lenaghen in response to that letter, to advise her the claimant had developed blood clots in her lungs, was very short of breath and could not walk. The claimant had been admitted to hospital and was taking medication to disperse the clots.

14. Ms Lenaghen wrote to the claimant on the 3 October (page 64) to say how shocked she had been to hear about the claimant's condition, and asking that the claimant's sister get in touch to let her know how the claimant was getting on.

15. The claimant's sister telephoned Ms Lenaghen on the 10 October to advise the claimant had been released from hospital. An attendance review meeting was arranged for Friday 14 October.

16. Ms Lenaghen attended at the claimant's home on the 14 October to meet with the claimant and her sister. A note of the meeting was produced at page 68. The claimant told Ms Lenaghen the operation on her shoulder had been a success and she was able to fully lift her left arm. The claimant had initially

thought she would be able to return to work early, but over the weekend she had become very breathless and was ultimately admitted to hospital once a large blood clot on each lung had been diagnosed. The claimant was taking medication to disperse the clots and would continue to take this for 6 months.

5 17. The claimant could not give an indication of when she may be fit to return to work and it was agreed she would discuss this with her GP. The claimant was also due to see her surgeon on the 11 November for a report on progress following the shoulder operation.

18. The claimant also agreed to discuss with her trade union representative, 10 consenting to an occupational health referral.

19. Ms Lenaghen concluded the meeting by informing the claimant should would consider making a report for a senior manager regarding whether the respondent could continue supporting the claimant's absence.

20. Ms Lenaghen prepared a return to work plan for the claimant (page 71): 15 however the claimant did not contact her regarding a referral to occupational health, or to update her regarding the visit to the GP and so she decided to prepare a report for Mr Edmund Cybulski. The report, dated 25 October 2016 (page 73) detailed the claimant's absence and the reasons for it. Ms Lenaghen noted she had no information to allow her to plan for a return to 20 work, and she felt the claimant had been quite vague and left her nothing to go on. Ms Lenaghen concluded her report by recommending the claimant be dismissed because there was not a reasonable prospect of her returning to work.

21. Ms Lenaghen wrote to the claimant on the 25 October (page 76) to advise her 25 she had referred the matter to Mr Edmund Cybulski who would decide whether the claimant should be dismissed, demoted or whether her sickness absence could continue to be supported.

22. Ms Lenaghen is the claimant's team leader. She manages a team of approximately 8/10 people. The workplace is busy and the same workload

has to be processed even if a person is absent. This puts pressure on the other members of the team and impacts on morale.

23. The respondent has an Attendance Management Policy (page 176) which is used to support employees on sickness absence. There are also Attendance Management Procedures (page 197) which set out a guide for employees and procedures for managers to follow if an employee is not fit to return to work. The claimant, having been continuously absent for more than 28 days, was regarded as being on long term absence, and the Continuous or Long Term Absence procedure set out at page 240 was followed.

24. Mr Cybulski received a record of the claimant's absence history, copies of fit notes and medical evidence, and copies of any notes of discussions and meetings. Mr Cybulski was satisfied Ms Lenaghen had followed the procedure and so he wrote to the claimant on the 28 October (page 78) to invite her to attend a meeting to discuss her sickness absence. The purpose of the meeting was to discuss whether there is any way to get the person back to work, what assistance may be required and the prospects of them returning to work.

25. Mr Cybulski received a copy of an occupational health report dated 9 November (page 80). The report noted the claimant's breathing had improved (although she still found walking round the home caused breathlessness) and that she had been signed of as unfit for work until the 1st December, by which time it was hoped that her breathing would have improved sufficiently to allow her to return to work.

26. The report noted, in terms of the future, that the claimant continued to take medication to disperse the blood clots, and that it was hoped she would make a full recovery over the next 6 months.

27. Mr Cybulski met with the claimant and Mr Kip Collins, trade union representative on the 14 November. A note of the meeting was produced at page 82. Mr Cybulski was taken aback when the claimant arrived for the meeting because she was very out of breath and purple in the face from

getting to the first floor. He had not appreciated, from the medical evidence, that the claimant's difficulties were so severe.

28. The claimant told Mr Cybulski that whilst she felt much better, her breathing had still not returned to normal and that even walking a short distance was difficult. She tried to be mobile in the house (restricted to the ground floor) but still got quite breathless. The claimant hoped to be fit to return to work on the 1 December, but she did not know if she could return whilst still taking the medication to disperse the clots.

29. Mr Cybulski discussed with the claimant what adjustments would be required for the claimant's return to work. The occupational health report had noted a phased return would be required and Mr Cybulski also referred to re-locating the claimant to the ground floor and nominating a buddy to assist her.

30. Mr Cybulski decided to postpone his decision until there was a clearer picture of the claimant's recovery as at the 1 December.

31. Mr Cybulski met with the claimant and Mr Collins again on the 28 November. The meeting took place at the claimant's home. A note of the meeting was produced at page 88. The claimant told Mr Cybulski she was feeling a bit better although her breathing was still not 100%. Mr Cybulski did not think the claimant was looking any better and he noted that it had taken the claimant 20 minutes to walk from her living room to her driveway. The claimant agreed her breathing was still an issue and she felt the medication should have eased her symptoms more. The claimant confirmed she was seeing her GP again on the Wednesday.

32. Mr Cybulski agreed the claimant would require a number of reasonable adjustments upon her return to work and he asked her to discuss the following with her GP:

- taxi assistance to get to and from the house to work;
- wheelchair;
- seating arrangements at work;
- flexible start and finish times and

- phased return to work.

33. Mr Cybulski agreed to postpone his decision until the claimant had met with her GP on Wednesday and had an opportunity to discuss the proposed adjustments.

34. Mr Cybulski, the claimant and Mr Collins reconvened on the 1st December after the claimant had met with her GP (page 89). The claimant confirmed her GP had given her another fit note confirming she was unfit for work for a further period of 4 weeks, and he had made a referral for her to attend a Respiratory Clinic to see a Consultant. There was no timescale for when she may receive an appointment for this.

35. The claimant confirmed she had spoken to the GP about reasonable adjustments and the GP "had said that all such adjustments would have to be in place before they would consider signing Maureen as fit to return to work". The claimant said she would consider an early return to work if the adjustments were in place, but would have to take her GP's advice.

36. Mr Cybulski wrote to the claimant on the 2nd December (page 91) to inform her of his decision to terminate her employment with effect from the 5th December. Mr Cybulski took the decision to dismiss because although the adjustments which had been discussed were all reasonable and could have been put in place, there was no timeframe for, or prospect of, a return to work. Mr Cybulski considered the claimant had looked worse rather than better at their last meeting, and there was nothing to suggest that if he allowed more time things would change.

37. The adjustments discussed with the claimant were all dependent on her being able to return to work. The final fit note from the claimant's GP indicated the claimant was unfit for work with, or without, those adjustments.

38. Mr Cybulski also had regard to the fact the claimant's continuing absence had an impact on her team. The Civil Service rules mean the claimant's post cannot be "backfilled" until such time as a vacancy has been declared. This

means there is no scope for hiring a temporary/agency worker. Overtime may be offered if there is a business case for it, but this is only usually authorised if there is additional work and not for "business as usual".

39. The claimant appealed against the decision to terminate her employment (page 103). Mr Kenneth Barnes heard the claimant's appeal on the 5 January 2017 and a note of the appeal meeting was produced at page 113. Mr Barnes was provided with copies of all the relevant paperwork prior to the appeal hearing. His role at the appeal is to review the decision of Mr Cybulski.

40. Mr Barnes gave the claimant and Mr Collins an opportunity to address him on each point of the appeal. The main thrust of the appeal was that Mr Cybulski had acted too quickly and should have allowed time for the adjustments to be put in place to enable the claimant to return to work. The claimant felt she could have returned to work regardless of the outstanding appointment with the respiratory clinic and the continuing medication.

41. Mr Barnes, following the conclusion of the appeal meeting, spoke with Ms Lenaghen to satisfy himself that there had been appropriate communication with the claimant and an understanding of the various illnesses. He also spoke with Mr Cybulski regarding what information he had had prior to making his decision. Mr Barnes noted that usually when adjustments are discussed, it will lead to the GP saying the employee is fit to return to work with those adjustments. This was not the case with the claimant: after discussing adjustments, the claimant's GP had signed her as being unfit for all work for a further period of 4 weeks.

42. Mr Barnes also had regard to the last occupational health report where it had stated a return to work within 4 weeks was likely (that is, by 1 December). This date had passed and another fit note for 4 weeks had been produced. Mr Barnes noted the claimant's opinion regarding a return to work, but considered decisions had to be made on the basis of the medical evidence obtained by the respondent. The medical evidence was that the claimant was not fit to return to work at the time the decision was made, and there was nothing to suggest a return to work was imminent.

43. Mr Barnes acknowledged the claimant's argument that the respondent should have waited longer, but Mr Cybulski had given the claimant an opportunity to discuss the reasonable adjustments with her GP. Mr Cybulski understood (and Mr Barnes accepted) the feedback from the GP was to the effect the adjustments would have to be in place once the claimant was fit to return to work.

44. The claimant had, during the appeal, raised a number of alleged breaches of the respondent's attendance procedures. Mr Barnes considered each of these points and was satisfied the procedure had been followed.

45. Mr Barnes wrote to the claimant on the 16 January 2017 (page 116) to confirm his decision not to uphold the appeal.

46. The claimant's employment with the respondent ended on the 5th December 2016. The claimant received 13 weeks pay in lieu of notice. Mr Cybulski recommended a 100% compensatory payment, but the claimant did not receive this payment because she is over the age of 60 and able to access her pension.

47. The claimant continued to be signed off by her GP as unfit for work. She has been in receipt of Employment Support Allowance since 6 March 2017 at the rate of £206.16 per fortnight.

Credibility and notes on the evidence

48. There were no issues of credibility in this case. The witnesses were credible and reliable and all gave their evidence in a straightforward manner. Mr Cybulski and Mr Barnes in particular impressed as witnesses who had given careful and thorough consideration to their decisions, and they were each able to clearly explain the reasoning for their decisions.

49. The claimant impressed as a person who had a complex variety of impairments but who tried to carry on regardless. She was optimistic about her situation. For example, she described the shoulder surgery as being a great success: she could raise her arm above her head the day after the operation and thought she would be back at work the following week

notwithstanding the general recovery period is 4 – 6 weeks. This optimism also impacted on her description of her breathing difficulties. The claimant stated on many occasions that her breathing had improved, but this "improvement" had to be seen in the context of improving against a benchmark of having been admitted to hospital.

50. Mr Cybulski commented on being "taken aback" when he met the claimant on the first occasion. He described her breathing difficulties as "severe" and that she was purple in the face.

51. Ms Merchant questioned the respondent's witnesses regarding whether the operation on the claimant's shoulder should, in terms of the policy, be regarded as exceptional because it followed a car accident. Mr Cybulski rejected that suggestion because the car accident in which the claimant was involved occurred over two years ago. The exceptional circumstances relate to a car accident causing immediate absence. We accepted this explanation. We did not consider this to be a material point in terms of the claimant's case. There was no suggestion that if the absence for the shoulder operation had been discounted there would have been no dismissal.

Respondent's submissions

52. Dr Gibson noted dismissal of the claimant had been conceded, as had the disability status of the claimant because of the combination of physical impairments. Dr Gibson set out the issues to be determined by the tribunal, and also the findings of fact he invited the tribunal to make. One finding in particular was that on the 1 December 2016 the claimant advised Mr Cybulski the GP had signed her off for another 4 weeks until the 28 December. The claimant further advised Mr Cybulski that her GP was of the view that once she was fit to return to work reasonable adjustments would still have to be put in place.

53. Dr Gibson submitted the claimant had been dismissed for a reason best characterised as some other substantial reason, namely continuing sickness absence. Dr Gibson referred to the case of **Wilson v Post Office 2000 IRLR 834** where an employee with a poor absence record due to genuine ill health

was dismissed for failure to satisfy the employer's attendance policy. A tribunal found the reason for dismissal was capability, but the Court of Appeal held the reason was the employee's failure to meet the requirements of the absence policy, which was SOSR. Further, in **Ridge v HM Land Registry 2014 UKEAT/0485/12** the EAT emphasised that the correct characterisation of the reason for dismissal will depend on what was at the forefront of the employer's mind. If it was the employee's "skill, aptitude, health or any other physical or mental quality" then the reason for dismissal will be capability. But where the recurring absences themselves are the reason for dismissal and an attendance policy has been triggered, the better characterisation may be SOSR.

54. Dr Gibson submitted that what was in the forefront of the employer's mind when they dismissed the claimant was that her dismissal was justified because she was failing to satisfy their attendance policy by being continuously absent from work with no prospect of a return within a reasonable timescale.

55. Dr Gibson submitted the respondent acted reasonably in treating the claimant's capability and/or unsatisfactory absence as a sufficient reason for dismissing her. The respondent had had regard to the following factors:

    i. the nature of the claimant's illness. The claimant has a myriad of complex physical impairments, the combination of which made it virtually impossible for her to return to work. At the time of her dismissal she had blood clots on her lungs and serious mobility problems. The claimant's contention that her condition was improving (because she was housebound rather than hospitalised) was, as Mr Cybulski observed, hopeful rather than evident. It was submitted the fact the claimant's condition has not improved adds weight to the views the respondent held at the time. The respondent's view that there was no prospect of a return to work within a reasonable time scale proved to be correct.

ii. The prospects of the employee returning to work and the likelihood of the recurrence of the illness: the prospects of the claimant returning to work to do the kind of work for which she was employed were virtually nil. It was submitted that the idea anything could have been done to facilitate an earlier return to work was misconceived. There were a number of things which could have been done once the claimant was fit to return to work, but not to facilitate an early return when her health simply precluded her from being fit to work.

iii. The need for the employer to have someone do the work: Dr Gibson referred to the evidence regarding the nature of the claimant's job. The department was clearly a very busy one and all administrative officers have a full case load. There was, it was submitted, a constant and ongoing need for the employer to have someone doing the work that the claimant was not doing whilst off sick.

iv. The effect of absences on the rest of the workforce: Ms Lenaghen spoke about the fact the amount of work did not decrease as the number of people doing the work decreased. There was an impact on the morale of the team and an effect on the amount of time the manager had to spend on sickness absence management.

v. The extent to which the employee was made aware of the position: the employee was kept informed at all stages of the process.

vi. The employee's length of service: the claimant did have long service with the respondent and this was taken into account by the decision-makers. This however had to be balanced against the fact she had a long period of absence with no prospect of a return to work.

vii. How long was the respondent expected to keep the claimant's job open: it was submitted the attendance management policy states that continuous absence means an absence of 28 days

and that this was a fair and proportionate minimum amount of time the respondent could be expected to keep the job open. Each case will be different, and in the claimant's case she was off for much longer and Mr Cybulski delayed his decision on two occasions to give the claimant time to return.

56. Dr Gibson referred to **BS v Dundee City Council 2013 CSIH 91** (as applied in ***Monmouthshire County Council v Harris 2015 UKEAT/0010/15***) where four factors had been set out as being relevant to how long an employer may be expected to wait. The first factor related to the availability of temporary cover. Dr Gibson referred to the evidence of Mr Cybulski regarding the difficulties the Civil Service face in "back-filling" roles in the event of long term absence. A role has to first be vacant and internally advertised: this prevents the bringing in of agency staff. The second factor is exhaustion of sick pay and there was no dispute regarding the fact the claimant had not exhausted sick pay. The third factor is the administrative cost of keeping the employee on the books. Dr Gibson submitted there was significant cost in keeping the claimant on the book on full salary. The fourth factor is the size of the organisation: the respondent was of course a large organisation and accepted it had a greater responsibility to employees to look at reasonable adjustments and facilitate a return to work. However the respondent did not have an unlimited budget and must put controls in place regarding sickness absence where there is no prospect of a return to work.

57. Dr Gibson submitted the tribunal was required to carry out a balancing exercise regarding whether in all the circumstances the employer can be expected to wait any longer and if so how much longer. If the tribunal carried out that exercise it would conclude the respondent could not be expected to wait any longer in circumstances where there was no indication of when the claimant may be fit to return to work; there was no appointment to see the respiratory consultant; there were no adjustments which would have facilitated an earlier return to work and where the continuing absence was having an ongoing adverse impact on the business. Dr Gibson invited the tribunal to dismiss this claim.

58. Dr Gibson conceded, with regard to the complaint of discrimination arising from disability, that dismissal of the claimant was unfavourable treatment because of something arising in consequence of the disability. He submitted however that the claimant's dismissal was a proportionate means of achieving a legitimate aim. The legitimate aim of the respondent was to provide the public with an efficient and effective benefits service. In order to achieve that aim the respondent require employees to attend work regularly and carry out their full duties. If an employee is unable to do so, then dismissal in order to free up a post to allow the organisation to hire someone who can is a proportionate means of achieving that legitimate aim.

59. Dr Gibson submitted the dismissal of the claimant was proportionate given the length of her absence and the fact that at the time of her dismissal there was no prospect of a return to work within a reasonable timeframe.

60. Dr Gibson conceded with regard to the complaint of failure to make reasonable adjustments, that the claimant was placed at a substantial disadvantage by the application of the respondent's attendance management process to her, and a duty to make reasonable adjustments did arise. It was submitted, however, that there was no failure on the part of the respondent to make reasonable adjustments to remove the disadvantage of the application of the attendance management procedure. The only adjustment which could have been made to prevent the substantial disadvantage would have been to continue to support the absence indefinitely, and this was not a reasonable step for the respondent to have to take.

61. The adjustments discussed with the claimant were dependent upon her providing an indication that she was fit to return to work. Once that indication had been given, a return to work plan would have been put in place to include the adjustments discussed. The respondent's witnesses all agreed these adjustments would have been reasonable steps to take.

62. Dr Gibson invited the tribunal to reject the claimant's argument that these steps should have been put in place prior to her GP signing her off as fit to return to work. This could not be right because the adjustments were

dependent upon a return to work being identified. The claimant's GP, on the 30 November, could have signed the claimant off as being fit to return to work with adjustments. S/he did not do so. The claimant was signed off as unfit for all work until 28 December (at least). There was no medical evidence that she would be fit to return with adjustments. The claimant was given the opportunity to discuss the adjustments with her GP: the advice she got was that she was not fit to return to work. This was not a case where the reasonable adjustments would have got the claimant back to work.

63. Dr Gibson invited the tribunal to dismiss the claim.

Claimant's submissions

64. Ms Merchant referred to the following authorities regarding unfair dismissal: **Alidair Ltd v Taylor 1978 ICR 445; Spencer v Paragon Wallpapers Ltd 1977 ICR 301; BC v Dundee City Council 2014 SC 254; East Lindsey District Council v Daubney 1977 ICR 566; Crampton v Dacorum Motors Ltd 1975 IRLR 168** and **Luckings v May and Baker Ltd 1974 IRLR 151.**

65. Ms Merchant submitted the respondent had not made out a fair reason for the claimant's dismissal. This submission was based on the fact the respondent had failed to discover the true medical position of the claimant (***East Lindsey District Council v Daubney***). Ms Lenaghen made little/no attempt to ascertain the claimant's true medical position prior to coming to the view the department could no longer sustain the claimant's absence. Ms Lenaghen simply decided to refer the matter to Mr Cybulski when the claimant did not get in contact with her, rather than obtaining an up-to-date position. Ms Merchant submitted Ms Lenaghen appeared to be more concerned with a return to work date rather than understanding the claimant's situation.

66. Mr Cybulski also failed to ascertain the true medical position. The occupational health report dated 9 November indicated the claimant's breathing was improving, it was hoped the claimant would be fit to return to work on 1 December, the shoulder injury should make a full recover within 4 weeks and the blood clots should fully disperse within 6 months. It was submitted Mr Cybulski failed to consider this evidence and placed more

weight on his own opinion of the claimant. Mr Cybulski was critical of the occupational health report which had been based on a telephone interview and sounded much less severe than how he had observed the claimant, and he failed to ask occupational health to review the claimant.

67. Mr Cybulski adopted the same "I know better" approach to the feedback provided by the claimant on the 1 December regarding what her GP had said. There appeared to be scope for interpretation but rather than clarify this with the GP, Mr Cybulski had simply proceeded on his "sense" of what the GP had said/meant. Mr Cybulski decided the claimant was signed unfit for work and therefore reasonable adjustments did not need to be considered, despite the fact the claimant told him that if the adjustments were all in place her GP would consider at that point whether or not she could return to work. It was submitted that in circumstances where a return to work was being prevented because of breathing difficulties and the effect this had on the claimant's ability to move around, the adjustments would have to be in place before she could return to work. If the adjustments were not available then the claimant would have been unlikely to be able to return to work.

68. Ms Merchant submitted that consultation with an employee regarding her medical condition was a requirement of a fair dismissal. The consultation must be meaningful. Mr Cybulski did not do this: he did not establish the true medical position of the claimant and this was critical in a case where there was uncertainty. He could have asked the claimant to submit to a medical examination before making his decision.

69. These errors were not remedied at appeal because Mr Barnes simply continued what Mr Cybulski had started. Mr Barnes placed the onus on the claimant to come forward with any new evidence rather than properly investigating the matter and understanding the true medical position. Mr Barnes, had he looked into the matter, would have learned the GP had noted the claimant's breathing as having "improved" on the 6 January. This was an improvement of which he was unaware. He was also unaware of the difference the adjustments would have made.

70. Mr Barnes concluded there was no written evidence to support what the claimant said her GP had told her. He did not, however, discuss this with the claimant at the appeal hearing. The claimant told the tribunal that if she had been aware there was uncertainty regarding the GP's position, she would have obtained a letter from her GP to clarify the matter.

71. Ms Merchant submitted that even if the respondent show a fair reason for dismissal, no reasonable employer would have dismissed the claimant in the circumstances. The respondent is a large organisation with significant resources. Ms Lenaghen had been questioned regarding the use of temporary staff, overtime and reallocation of work to manage the impact of the claimant's absence on her colleagues. Ms Lenaghen had not discussed these options with her superiors, and in effect had made no attempt to mitigate the impact of the claimant's absence. Mr Cybulski explained why the above solutions could not be put in place, but it was submitted that no real consideration had been given to what could be done to reduce the impact of absence.

72. It was submitted the length of the claimant's absence had been relatively short. There was evidence before the respondent to the effect the claimant's breathing difficulties were likely to resolve in around 6 months. The respondent accordingly had a timeframe and, given the size of the organisation, it was submitted it would have been reasonable for the respondent to wait this length of time.

73. The claimant's absence was caused by a complication following surgery for a shoulder injury sustained in a car accident. Ms Merchant submitted the respondent's attendance policy provides for absence following an accident to be treated as exceptional.

74. The claimant had 23 years' service and no significant absence issues during that time. The claimant would regularly "battle through" her various impairments in order to attend work. Ms Merchant submitted the claimant was likely to return to work as soon as she could and this was based on the way in which she had conducted herself previously (***BS v Dundee City Council***).

75. Ms Mechant, with regard to the complaint of discrimination arising from disability, referred to the case of **Hensman v Ministry of Defence UKEAT/0067/14** where the EAT applied the test of justification described in ***Hardy and Hansons plc v Lax 2005 ICR 1565***. It was held that when assessing proportionality, while a tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

76. In **O'Brien v Bolton St Catherine's Academy 2017 EWCA Civ 145** the tribunal did not find the dismissal to be proportionate in circumstances where there had not been specific evidence as to the effect the employee's absence was having on the school and where, in light of the positive medical evidence, the school ought to have waited a little longer.

77. Ms Merchant submitted there was a link between justification and the duty to make reasonable adjustments. In the case of **Carranza v General Dynamics Information Technology Ltd 2015 IRLR 43** it was stated that an employer who is in breach of a duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct.

78. Ms Merchant also referred to the cases of **Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ 1265** and **Buchanan v Commissioner of Police of the Metropolis 2016 IRLR 918** where it was held that there was a requirement to ask whether the treatment was justified by considering how the policy was applied to the individual in question.

79. Ms Merchant submitted it was unclear how dismissing the claimant was a proportionate means of achieving the legitimate aim of the respondent, particularly when a proper medical investigation was not carried out. Little evidence had been led to explain why the respondent could not sustain the claimant's absence or wait longer before dismissing. It was submitted this was a situation where more could have been done and in those circumstances the law suggested that any justification would not be made out.

80. Ms Merchant referred to the following cases in respect of the complaint of failure to make reasonable adjustments: **Smith v Churchill Stairlifts plc 2006 IRLR 41; Morse v Wiltshire County Council 1998 IRLR 352; Environment Agency v Rowan 2008 ICR 218; Royal Bank of Scotland v Ashton 2011 ICR 632; Archibald v Fife Council 2004 IRLR 651; Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ 1265; Romec v Rudham 2007 All ER 04** and **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**.

81. Ms Merchant noted the respondent had conceded the claimant had been placed at a substantial disadvantage because of the provision criterion or practice applied to her. Ms Merchant submitted the respondent could and should have made the reasonable adjustments discussed. If the respondent had put the adjustments in place, the disadvantage of dismissal would have been removed. The claimant would have been in the position of being able to seek her GP's advice and returning to work with the adjustments in place. There was no evidence to support the respondent's position that even if the adjustments were put in place the claimant would not have been able to return to work within a reasonable time. There was a "chance" that had the adjustments been made, the claimant would have returned to work, and on that basis the adjustments ought to have been made prior to dismissing the claimant.

82. Ms Merchant invited the tribunal to accept the claimant's evidence and arguments. A schedule of loss had been provided regarding compensation.

Decision and Discussion

83. We firstly considered the complaint of unfair dismissal and had regard to the terms of section 98 Employment Rights Act which sets out how a tribunal should approach the question of whether a dismissal is fair. There are two stages: firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2); if the employer is successful at the first stage, the tribunal must then determine whether the dismissal was fair or unfair and this requires the tribunal to

consider whether the employer acted reasonably in dismissing the employee for the reason given.

84. The respondent admitted dismissing the claimant and asserted the reason for dismissal was capability in terms of section 98(2)(a) Employment Rights Act and/or some other substantial reason (SOSR) of a kind such as to justify the dismissal of an employee holding the position which the employee held in terms of section 98(1)(b) Employment Rights Act. Dr Gibson referred to the cases of **Wilson v Post Office** (above) and **Ridge v HM Land Registry** (above) and submitted these authorities supported the proposition that the reason for dismissal was correctly categorised as SOSR in circumstances where the claimant's failure to satisfy the attendance policy was at the forefront of the respondent's mind when dismissing the claimant.

85. We, in considering this matter, had regard to the terms of section 98 which set out the six potentially fair reasons for dismissal, which include a reason related to the capability of the employee for performing work of the kind which s/he was employed by the employer to do. We also noted there was no dispute in this case regarding the fact the claimant was a disabled person in terms of the Equality Act because of the cumulative effect of the various physical impairments she had at the relevant time.

86. There was no dispute the claimant had, at the time of the dismissal, been absent continuously from the 12 August 2016 because of cellulitis, and thereafter surgery on her shoulder and large blood clots on her lungs. The claimant, as at the date of dismissal, had been continuously absent for a period of almost four months, and was signed off as unfit for work for a further period of four weeks until the 28 December.

87. The case of ***Ridge*** to which we were referred noted the correct characterisation of the reason for dismissal will depend on what was at the forefront of the employer's mind: if it was the employee's "skill, aptitude, health or any other physical or mental quality" then the reason for dismissal will be capability under section 98(2). But where the recurring absences themselves

are the reason for dismissal and an attendance policy has been triggered, the better characterisation may be SOSR.

88. We, based on the evidence of the respondent's witnesses, concluded that the issue foremost in their minds was the claimant's health and when she may be able to return to work. We acknowledge the attendance policy had been triggered, but that policy allowed for long term ill health absence: the crucial issues were returning to work and whether continuing support could be given for the absence. We concluded, for these reasons, that the reason for the dismissal of the claimant was capability in terms of section 98(2)(a). We considered we were supported in that conclusion by the fact the authorities to which we were referred concerned short term recurring absence, which was not the issue in this case.

89. Ms Merchant invited the tribunal to find the respondent had not shown the reason for dismissal because they had failed to properly inform themselves of the medical position. We could not accept that argument (for the reasons set out below). We were satisfied, having had regard to all of the points set out below, that the respondent had shown the reason for dismissal was capability, which is a potentially fair reason falling within section 98(2)(a). We must now continue to consider whether dismissal for that reason was fair.

90. We were referred to a number of cases by Ms Merchant which highlight that in a dismissal for reasons of capability the employer should consult the employee, carry out a thorough medical investigation to establish the nature of the illness and its prognosis and consider other options for the employee. The EAT in the case of **East Lindsey District Council v Daubney** (above) stressed these factors and stated:

"*Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. … if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with*

him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employer was unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employer's medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done."

91. In **Taylorplan Catering (Scotland) Ltd v McInally** the EAT added that consultation was also necessary to balance the employer's need for the work to be done against the employee's need for time to recover.

92. We noted that where the employee suffers from a disability, the Equality and Human Rights Commission's Code of Practice – Employment and Occupation provides advice regarding the consultation to be carried out. It states that consultation should include discussions at the start of the illness and periodically throughout its duration and informing the employee if the stage when dismissal may be considered is approaching; personal contact between the employer and employee; consideration of the medical evidence; consideration of the employee's opinion on her condition; consideration of what can be done to get the employee back to work; consideration of offering alternative employment and consideration of an employee's entitlement to enhanced ill health benefits if available.

93. We noted, in terms of consultation with the claimant, Ms Lenaghen followed the respondent's Attendance policy which sets out timescales for keeping in contact and meeting to review absence. Ms Lenaghen knew cellulitis was the reason for the initial absence. She also knew of the planned operation on the claimant's shoulder and was provided with information about the operation and likely recovery time. Ms Lenaghen was advised, by the claimant's sister, about the admission to hospital because of blood clots, and she had an opportunity to meet with the claimant to review her absence on the 14 October.

94. Ms Merchant, in her submissions, invited the tribunal to find Ms Lenaghen had failed to ascertain the true medical position prior to referring the case to Mr Cybulski. We, in considering that submission, had regard to the fact that at the meeting on the 14 October, it was "agreed" the first goal for the claimant was to find out from her GP when she could return to work and to discuss whether the blood clots or the medication would have any impact on a return to work date. The claimant or her sister were to update Ms Lenaghen with the outcome of the discussion with the GP.

95. Ms Lenaghen waited for the claimant or her sister to update her, and when this did not happen, she took the decision to refer the matter to Mr Cybulski. We, in the circumstances, could not accept Ms Merchant's submission. We considered that at the stage of referring the matter to Mr Cybulski, Ms Lenaghen knew the claimant had had surgery on her shoulder which had been a success but that she was to return to see the surgeon on the 11 November. Ms Lenaghen also knew the claimant had developed blood clots on her lungs and was taking medication for this which would continue for six months. Ms Lenaghen did not know if the claimant could return to work with blood clots on her lungs or whilst taking the medication. Ms Lenaghen, accepting what she had been told by the claimant, gave the claimant an opportunity to discuss this with her GP and update her. The claimant failed to do so. We considered that at the stage Ms Lenaghen made her decision to refer the case to Mr Cybulski, she had ascertained the medical position and the focus had moved to identifying when/if the claimant may be fit to return to work.

96. We should state that even if Ms Lenaghen did not ascertain the true medical position before referring the matter to Mr Cybulski, we were entirely satisfied that Mr Cybulski remedied any error of Ms Lenaghen by meeting with the claimant and obtaining further medical information.

97. Mr Cybulski continued the consultation process when he met with the claimant on the 14 November. He had, prior to this meeting, obtained copies of Ms Lenaghen's notes from the various telephone calls and the meeting, the occupational health report and the Fit Notes provided by the claimant's GP.

Ms Merchant was critical in her submission of the fact Mr Cybulski appeared to prefer his own assessment of the claimant at that meeting, rather than the information provided in the occupational health report. There was no dispute regarding the fact Mr Cybulski did take into account the occupational health report had been prepared on the basis of a telephone conversation with the claimant. The report noted the claimant's view that her breathing was improving. Mr Cybulski could not reconcile that with the appearance of the claimant at that meeting. He described being "taken aback" by the fact the claimant was very out of breath and purple in the face from the effort of getting to the meeting room. Mr Cybulski was concerned the claimant had not told him her breathing difficulties were so severe: if he had been in possession of this information he would have made adjustments for meeting the claimant.

98. We could not accept Ms Merchant's criticism of Mr Cybulski: he acknowledged he is not a medical expert and he did not prefer his opinion to that of occupational health. However, his observation of the claimant allowed him to understand an important point in this case, and that is the way in which the claimant viewed her condition. The claimant is a positive person and it was clear she has worked for the respondent for many years whilst coping with various impairments. Her attitude was simply to get on with things where she could. The claimant repeatedly told the respondent that her breathing was improving, however this was against a benchmark of having been admitted to hospital because her breathing was so impaired by the blood clots. The reality was that the claimant was confined to the ground floor of her house and it took her much time and effort to cover short distances. Mr Cybulski observed the claimant was short of breath even whilst sitting, and this was exacerbated when she moved.

99. We acknowledged that an employee's opinion about their condition and a likely return to work should be taken into account. However, we considered that Mr Cybulski could not be criticised for balancing what the claimant told him with his own observations.

100. Mr Cybulski next met with the claimant on the 28 November. This meeting took place at the claimant's home. Mr Cybulski noted the claimant told him she was feeling a bit better, but she still had significant difficulties breathing and moving about her house. There was no dispute regarding the fact Mr Cybulski and the claimant discussed the adjustments the claimant would require upon a return to work. The adjustments included a phased return to work; flexible start and finish times; a taxi to/from work; a wheelchair to move around whilst at work and relocation to the ground floor. Mr Cybulski postponed his decision to allow the claimant time to visit her GP the following day and to discuss the adjustments with him.

101. Mr Cybulski spoke to the claimant the following day via teleconference. The claimant told him the GP had signed her off as unfit for work for a further period of 4 weeks and had said that all adjustments had to be in place before he would consider a return to work. The GP had also referred the claimant to a Respiratory clinic because the claimant's breathing was not improving at the rate hoped for given the medication.

102. Ms Merchant in her submissions invited the tribunal to find Mr Cybulski had not done enough to find out the true medical position of the claimant and had not given due consideration to the fact the claimant's breathing was improving, her shoulder injury was expected to make a full recovery within 4 weeks and the blood clots were expected to disperse fully within 6 months. We could not accept that submission. We considered that Mr Cybulski, prior to making his decision to dismiss, had before him the current medical information regarding the claimant's position, and that was that the claimant was not fit for any work for at least a further period of 4 weeks and that she was being referred to the Respiratory clinic for an appointment which would be some point in the future.

103. This was not a case where it could be said the claimant would return to sufficient fitness to return to work, nor could it be said when she may be fit to return to work. There was some dispute regarding the meaning of the feedback from the claimant's GP. Mr Cybulski understood the GP's position was that once the claimant is fit to return to work, the adjustments discussed

would need to be in place to allow her to return. The claimant sought to argue that the adjustments had to be put in place to allow her to return, because without the adjustments she would never be able to get back to work. We noted this was not a case where the claimant's return to work was being prevented by the lack of adjustments. The key and only factor preventing the claimant's return to work was her lack of fitness for work. The steps to be taken appeared clear: the claimant's GP required to certify the claimant as being fit to return to work; a plan would be put in place for her return to work which would include the adjustments being put in place and then the claimant would return to work. The respondent accepted the need for adjustments to be made, accepted the adjustments discussed were reasonable and were content for those adjustments to be made once the claimant was fit to return to work.

104. The claimant's position on this was confused and unclear. She accepted there was no point in the respondent putting the adjustments in place in the abstract: so, for example, there was no point in the respondent organising a taxi or getting a wheelchair for her when she was not at work. However, she continued to argue the need for adjustments to allow her to return to work, notwithstanding the fact she would not have been able to return to work even if the adjustments had been put in place instead of dismissing her. We noted, above, the respondent did not dispute the need for adjustments to allow her to return to work: the dispute focussed on the timing of those adjustments and when they had to be made.

105. Ms Merchant referred the tribunal to **Romec v Rudham** and **Leeds Teaching Hospital NHS Trust v Foster** as authorities for the proposition that if the adjustments had been made there was an "inkling" or "chance" the claimant would have returned to work. We could not accept that submission because there was no evidence to suggest that if the adjustments were made it would enable the claimant to return to work. The fact the adjustments had not yet been made was not what prevented the claimant from returning to work. The reason why the claimant could not return to work was because she was not fit to do so.

106. We considered it significant in this case that the claimant had an opportunity to discuss the proposed adjustments with her GP at the end of November. The Fit Note completed by the GP gives the option of certifying that the employee is fit to return to work with adjustments. The claimant's GP did not complete that option: instead, he certified the claimant as being unfit for all work for a further four week period.

107. We also considered it significant in this case that there was nothing to suggest the claimant would, upon her next visit to the GP at the end of December, have been fit to return to work at that time. There was evidence suggesting the medication to disperse the blood clots would have to be taken for a period of six months. Ms Merchant extrapolated from this that the claimant would have been fit to return to work by March/April. There was, however, no evidence to suggest that once the medication was finished the claimant would be fit to return to work. Furthermore, this had to be seen in the context of (a) the fact the claimant's breathing was not improving as it should have done with the medication and she had been referred to a Respiratory Clinic and (b) the fact the claimant had a complex number of impairments.

108. The claimant's appeal against dismissal took place on the 5th January 2017. Ms Merchant submitted Mr Barnes ought to have obtained further medical information at this point regarding the prospects of a return to work. We could not accept that submission in circumstances where there was nothing to indicate to Mr Barnes that the position existing as at the date of dismissal had changed. The claimant was, and remained, unfit for work. The claimant, who was represented by an experienced trade union representative, had an opportunity at the appeal hearing to bring forward new evidence if her situation had changed. The claimant could have produced a Fit Note or letter from her GP. We considered it significant the claimant did not do so.

109. The question of how long an employer might be expected to wait before dismissing an employee was considered in the case of **BC v Dundee City Council** (above). A number of factors were identified as being relevant to this issue, including the need to consult the employee and take his views into account; the need to take steps to discover the employee's medical condition

and his likely prognosis; the availability of temporary cover; the fact the employee has exhausted her sick pay; the administrative costs that might be incurred by keeping the employee on the books and the size of the organisation.

5 110. We accepted the evidence of Ms Lenaghen and Mr Cybulski regarding the fact that the workload of the absent employee has to be covered by the remaining members of the team. The department was a busy one and the workload required to be done. We accepted the respondent, perhaps unlike other organisations, cannot use agency or temporary workers unless there is 10 a vacancy which has not been filled through internal advertisement. The claimant was a postholder and accordingly there was no option for Ms Lenaghen to use an agency worker to cover the claimant's work. Ms Lenaghen had to rely on the good will of the other members of the claimant's team to cope with the additional work.

15 111. Mr Cybulski acknowledged that overtime can be available but only for additional pieces of work and not for day to day workload.

112. Ms Merchant challenged the respondent's witnesses regarding the size of the respondent and its budget. Mr Cybulski and Mr Barnes agreed the employer was a large organisation with a significant budget, but their evidence, which 20 we accepted, was to the effect the budget was not limitless and was very tightly controlled.

113. The administrative costs of keeping the claimant on the books were significant in circumstances where the claimant was entitled to sick pay of six months full pay and six months half pay (which she had not yet exhausted). There were 25 also costs linked to management time in managing the absence.

114. We were referred to the case of **Spencer v Paragaon Wallpapers** (above) where it was stated that the basic question to be determined is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer. The circumstances to be balanced include the nature 30 of the illness, the likely length of the continuing absence and the need of the employer to have done the work which the employee was engaged to do.

115. We have set out above our conclusion that the respondent carried out a thorough consultation with the claimant and took her views into account. The respondent also carried out an investigation to establish the nature of the illness and the prognosis. The occupational health report which had indicated a return to work may be possible by the 1st December proved to be wrong in circumstances where the claimant was signed off as unfit for work by her GP for a further period of four weeks. There was, as at the date of dismissal, no indication when the claimant may be fit to return to work. This situation persisted as at the date of the appeal. This was not a situation where the respondent knew the claimant would be fit to return within a certain period but were not prepared to wait. This was a situation where there was nothing to indicate to the respondent when the claimant may be fit to return to work.

116. We decided, having had regard to the above points, and the fact the respondent cannot recruit temporary or agency workers to ease the workload pressures of absence, that the decision of the respondent to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might adopt. The dismissal was fair.

117. We next turned to consider the complaint that the claimant was discriminated against because of something arising in consequence of disability. Section 15 Equality Act provides 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.

118. Dr Gibson conceded the dismissal of the claimant was unfavourable treatment and that the dismissal occurred because of something arising in consequence of her disability. The issue for the tribunal is whether the respondent had a legitimate aim and whether the dismissal of the claimant was a proportionate means of achieving that aim.

119. We had regard to the Equality and Human Rights Commission Employment Code which sets out guidance to the effect the aim pursued should be legal,

should not be discriminatory in itself and must represent a real, objective consideration.

120. The respondent's aim was to have an efficient and effective benefits service and in order to deliver this they required employees to attend work regularly and carry out the duties they were employed to do. We accepted this aim was legal, not discriminatory and represented a real, objective consideration. The respondent had in place an extensive Attendance Policy to provide guidance and support to employees and to allow the respondent to deal with absence effectively.

121. We next asked whether the dismissal of the claimant was a proportionate means of achieving that aim. Ms Merchant challenged the proportionality of the decision to dismiss because, it was submitted, there was a lack of proper medical investigation, there was little evidence to explain why the respondent could not sustain the claimant's absence and wait longer prior to dismissal and the size of the respondent meant the justification test was higher. We have set out above our reasons for not accepting the claimant's submission that there was a lack of proper medical investigation.

122. We also could not accept the suggestion that there was little to explain why the respondent could not wait longer prior to dismissal. The respondent, as at the date of dismissal, knew the claimant had discussed with her GP the proposed adjustments required when she returned to work. The GP, notwithstanding that discussion, signed the claimant off for a further four week period and gave no indication of when the claimant might be fit to return to work. In addition to this the GP referred the claimant to a Respiratory clinic because her breathing was not improving as expected. In addition to this the claimant's work was being done by the rest of the team because overtime and obtaining agency cover are not options available to the respondent.

123. We considered that given the length of the claimant's absence and the fact there was, at the time of dismissal, no prospect of a return to work within a reasonable timescale, that the dismissal of the claimant was a proportionate means of achieving a legitimate aim. Mr Cybulski postponed his decision on

two occasions and allowed the claimant time to discuss the adjustments with her GP. There was nothing to suggest to Mr Cybulski, as at the time of dismissal, that the claimant would return to work within a reasonable timescale. We decided to dismiss this complaint.

124. We next turned to consider the complaint of failure to make reasonable adjustments. Section 20 Equality Act provides that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer has a duty to take such steps as it is reasonable to have to take to avoid that disadvantage.

125. Dr Gibson accepted the claimant was placed at a substantial disadvantage (that is, dismissal) by the application of the attendance management process to her, and that the duty to make reasonable adjustments did arise.

126. Ms Merchant submitted the respondent should have put adjustments in place and, had they done so, the disadvantage of dismissal would have been removed because the claimant would have been in a position to seek her GP's advice and return to work with adjustments in place. Ms Merchant further submitted the respondent had no evidence to support their position that even if the adjustments had been in place the claimant would not have been able to return within a reasonable timescale.

127. We, in considering Ms Merchant's submission, noted this was a case where the respondent was willing to put in place the adjustments which had been discussed and agreed with the claimant. The dispute between the parties focussed on when the adjustments should be put in place.

128. We reminded ourselves that the purpose of making reasonable adjustments is to avoid the employee being put at a substantial disadvantage. In this case, the purpose of making reasonable adjustments was to avoid the claimant being dismissed.

129. Ms Merchant invited the Tribunal to accept that if the adjustments had been put in place, the claimant would have been in a position to seek her GP's

advice and return to work with adjustments in place. We could not accept that submission for three reasons. Firstly, it was not supported by the evidence. The claimant had an opportunity specifically to discuss the adjustments with her GP at the end of November. The GP could have completed the claimant's fit note to say she was fit to return to work with adjustments (if that truly reflected the position). The GP did not do this: instead, he completed the fit note to indicate the claimant was not fit for any work for a further four-week period. Furthermore, it appeared the claimant, her GP and Mr Cybulski all understood the adjustments would need to be in place for the claimant returning to work when she was fit to do so.

130. Secondly, Ms Merchant's submission was premised on the claimant being fit to return to work. The claimant was not fit to return to work either at the date of dismissal or at the date of the appeal. There was reference to having to take the blood clot dispersal medication for six months, and Ms Merchant inferred from this that the claimant would be fit to return to work in March/April. However, that inference was not supported by medical evidence and failed to have regard to the fact that the claimant has a complex range of medical conditions.

131. Thirdly, putting the adjustments in place would not have removed the disadvantage of dismissal in circumstances where the claimant was not fit to return to work. The adjustments would not, and could not, have facilitated a return to work whilst the claimant's breathing difficulties, caused by blood clots on her lungs, rendered her unfit to work. This was not a case where the respondent's failure to make reasonable adjustments prevented the claimant from returning to work. The only factor preventing a return to work was the claimant's health.

132. Ms Merchant submitted the respondent had no evidence to support their position that even if the adjustments had been in place the claimant would not have been able to return to work within a reasonable timescale. We could not accept that submission in circumstances where (a) it was not the lack of adjustments which prevented the claimant's return to work, it was her fitness for work and (b) the claimant was signed off as unfit for work until the 28

December and gave no indication to Mr Barnes, at the subsequent appeal, that her fitness for work had changed in any way.

133. We decided, for these reasons, that there was no failure on the part of the respondent to make reasonable adjustments to remove the substantial disadvantage of dismissal. The respondent was ready, willing and able to make the adjustments which had been discussed with the claimant once she was in a position to return to work. The claimant was not fit to return to work and the making of the adjustments would not have altered that position.

134. We decided to dismiss the claim in its entirety.

Employment Judge: Lucy Wiseman
Date of Judgment: 02 August 2018
Entered in register: 06 August 2018
and copied to parties