Case Number: 2300007/2017

JB

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr J Hulm		**Sussex Oakleaf Housing Association Limited**

Held at London South **On 25 – 28 September 2018**

BEFORE: Employment Judge J Nash

MEMBERS: Ms L Grayson
Ms C Edwards

Representation

For the Claimant: **In person**

For the Respondent: **Ms L Hatch, Counsel**

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

REASONS

The Hearing

1. The Claimant presented his application to the Tribunal on 3 January 2017. The response was submitted on 7 February 2017. There was a preliminary hearing on 28 February 2018 which identified the claims and the issues.

2. At this full merits hearing the Tribunal heard from the Claimant and from Dr Jane, his GP. From the Respondent it heard from Mr Casper Murphy at the material times its Director of Operations who managed the Claimant's sickness

absence, from Ms Elizabeth Saunders at the material time its Finance Manager who made the decision to dismiss, and Mr Neil Curtis its CEO at the material time, who made the decision on appeal.

3. The Tribunal had sight of an agreed Bundle and all references are to this Bundle unless otherwise stated.

The Claims

4. The Claimant brought three claims:-

   a. for unfair dismissal under Section 98 of the Employment Rights Act 1998

   b. under Section 15 of the Equality Act 2010 for discrimination arising from disability

   c. under Section 20 and 21 of the Equality Act 2010 for a failure to make reasonable adjustments.

The Issues

5. The issues were identified at the preliminary hearing and confirmed before the Tribunal as follows.

   Unfair dismissal

6. The Respondent relied as a potentially fair reason on capability, being the Claimant's ill health.

7. Sanction - did the decision to dismiss come within a reasonable range available to the employer in the circumstances?

8. Was the dismissal procedurally fair?

9. If the dismissal was not procedurally unfair, should there be a so called Polkey deduction, that is, would and could the employer have dismissed fairly in the circumstances?

   Disability

10. In respect of disability, it was accepted that the Claimant was a disabled person for the purposes of the Equality Act.

    S15 Equality Act – discrimination arising from disability

11. The respondent took the Claimant's disability related absences into account when making the decision to dismiss. It was agreed that this was a matter which arose out of the Claimant's disability.

12. In doing did the Respondent have a legitimate aim, (it relied on the provision of service to its users)?

13. Was the taking into account of the disability related absences a proportionate means of achieving any such legitimate aim?

S21 and 22 Equality Act - reasonable adjustments

14. The Claimant relied on as his provision criterion or practice, a requirement to work full time as opposed to part time.

15. Did such a provision put the Claimant at a substantial disadvantage because he was not able to work full time compared to people who were not disabled?

16. If the duty to make reasonable adjustments was thus triggered, the Claimant contended that the reasonable adjustment was permitting him to work part time - an 18-hour week.

17. Was this an effective and reasonable adjustment?

The Facts

The employment

18. The employer employs about 120 people. One of primary activities is the provision of advice and support in the community to people who have mental health conditions.

19. The Claimant started work on 1 July 2009. The Respondent knew the Claimant had previously been a user of mental health services.

20. The Claimant was employed latterly as a Community Recovery Worker. He provided support in the community to adult users of mental health services. He was employed full time, 37½ hours a week and on average serviced about 10 to 20 clients. He worked in a small team of 3 people. The service users expected to see the same advisor on a consistent basis. However, the service was provided on a fixed term contract and therefore there was at least the potential for considerable disruption every few years in any event.

21. The Respondent did not have a disability policy. It did operate a sickness absence policy. This policy did not set a specific number of days after which any particular steps of the policy was triggered. The sickness policy also made provision for a phased return from sickness of four weeks and usually no longer.

The Claimant's sickness record

22. By March 2014 (just over four and a half years of service), the Claimant had taken in excess of 100 days sickness for a number of different reasons, including anxiety. During a sickness absence for anxiety, the Respondent

commissioned an Occupational Health Report in respect of the Claimant. This was provided on 19 May 2014 and was based on a report from the Claimant's GP of 12 May 2014. According to the report, the Claimant should make a full recovery, he was disabled, and he might need reasonable adjustments. He was fit to return following his anxiety. There was a reference to him having a long-term mental health condition.

23. The Occupational Health Advisor at no time met with the Claimant but based his opinions on reports from the Claimant's GP and on the information provided by the Respondent.

24. Following his bout of ill health, the Claimant returned to work on 1 June 2014. The Respondent provided, by agreement, a phased return over four weeks, which was successful.

25. Following this, the Claimant continued to have sickness absences, the reasons were a mixture of his mental health condition and other various causes. As a result, on 24 November 2014, the Respondent invited the Claimant to a first sickness absence meeting under its sickness procedure. At this meeting the Claimant was warned there could be consequences to his employment if his sickness record did not improve.

26. The Claimant then went on a long-term sickness absence of 125 days from January to July 2015. The cause on his sickness notes was described as anxiety and sometimes depression. It is now known that the Claimant was in fact suffering from an undiagnosed psychosis.

27. The Respondent obtained a further Occupational Health Report on 15 June 2015, based on a GP Report of 26 May 2015. According to the GP, the Claimant had unfortunately suffered a marked deterioration in his condition, he was unable to return in the foreseeable future, even on a phased basis. The GP stated that the Claimant nevertheless very much wanted to return to work.

28. The Respondent invited the Claimant to its second absence meeting under its procedure on 1 July 2015 to discuss, amongst other things, the sickness and the second Occupational Health Report. However, it was not made clear to the Claimant in advance that this meeting was - in fact - the second absence meeting under the absence procedure, and hence a significant step. At this meeting, the Claimant said that his mental health had considerably improved, and he was receiving support. Reasonable adjustments were discussed.

29. The parties agreed that the Claimant would return on a phased return lasting 8 weeks. (Human Resources had suggested a 3-month phased return, but financial implications influenced the Claimant to choose an 8-week phased return.)

<u>The Claimant's 2015 phased return to work</u>

30. The Claimant duly returned to work on a phased return on 20 July 2015. The respondent provided the Claimant with a schedule for the phased return on the

first day. This was agreed. He started working 7½ hours a week and was to build up to full time working by week 9. After a week or so, some of the start times were altered.

31. The parties agreed that all went well for the first 2 weeks and the Claimant successfully built up to his scheduled working week of 11½ hours. However, on 4 August 2015 the Claimant went absent sick. This was at week 3 of the phased return when he was scheduled to work 15 hours a week. The Claimant believed this sickness was caused by his changing both his medications. In effect he took weeks 3, 4, 5 and 6 off sick. At this point Human Resources of the Respondent told the Occupational Health Doctor that they were worried that the Claimant could not fulfil his role and they made a further referral.

32. On 1 September 2015, the Claimant returned to work in effect at week 7 of the original schedule. He provided a fit note on 4 September 2015, stating that he might be fit for work at 3½ days a week initially. The return to work plan was revised. The weeks were rescheduled (at page 230), giving the Claimant until 5 October 2015 to build up to working full time. Essentially, the Claimant started again at week 3.

33. However, this was amended again (and for the final time) giving the Claimant until 30 October 2015 to build up to full time working. The Claimant started working 11.25 hours a week.

34. The Claimant complied with this final schedule, steadily building up his hours. On 1 September 2015, he worked 12 hours a week. For the week starting 7 September he worked 12.25 hours a week. For the week starting 14 September, he worked 15 hours a week. For the week starting 21 September, he worked 18 hours a week. For the week starting 28 September, he worked 17.25 hours, having one day off for sickness. For the week starting 5 October 2015, he worked 25½ hours. For the week starting 12 October 2015, he worked 27.75 hours.

35. The Claimant stated that there were difficulties during the phased return. For instance, he was not provided with a computer and had to use a laptop which did not work properly. Accordingly, deadlines were missed, and this was escalated. He found training difficult. More seriously, he missed one of his fortnightly supervision meetings with his manager because his manager was sick. At this time, he was having difficulties with his colleague and had asked for support. There was a visit from a senior manager who was not able to get involved in personnel matters, which would have to wait for the return of the line manager.

The Claimant's 2015-2016 sickness absence

36. For the week starting 19 October 2015, he was scheduled to work 30 hours. However, he only worked 16.75 hours and he went off sick after 21 October 2015. The Claimant never returned to work and was absent sick from 22 October 2015 until the effective date of termination.

37. On 19 October 2015, the Claimant provided a sick note which stated that he should have a further extension to his phased return and his altered hours should continue until 20 November 2015. In effect, the Claimant was asking for the phased return to work to be slowed down and extended. The Respondent refused this on 22 October on the grounds that the phased return had been revised on more than one occasion and there was no evidence that a further revision would be effective.

38. Occupational Health provided a third report on 22 October 2015, based on an updated report from the GP of 13 October 2015. The GP stated that the Claimant was at work and went on to express uncertainty about the Claimant's long-term prognosis. However, the Occupational Health Report of 22 October stated that the Claimant was not working, that reasonable adjustments were not working, and termination might be necessary.

39. This Occupational Health report can only have been produced between 13 October and 22 October when the Claimant was at work and had only one day off. Accordingly, either the Respondent provided the Occupational Health doctor with incorrect information, or the Occupational Health doctor made a mistake.

40. Whilst the Claimant was off sick from 22 October, he raised a grievance concerning the failure of the Respondent to agree a further extension of his phased return and, to a lesser extent, about the failure to provide the supervision. This grievance was rejected by the Respondent on 18 November 2015.

41. The Claimant and Respondent met on 17 November 2015 and discussed the Occupational Health Reports. The Claimant asked for a phased return to work. He told the Respondent that his current sickness was caused by the Respondent's refusal to slow down the phased return. The Respondent in turn told the Claimant it needed a further Occupational Health Report. It made a further referral on 14 December.

42. The Claimant appealed against the rejection of his grievance on 24 November 2015. He had a grievance appeal meeting on 18 December 2015 with Mr Curtis the CEO. Mr Curtis refused the Claimant's appeal on 29 December 2015.

43. On 9 February 2016, the Respondent wrote to the Claimant stating that the GP report was ready. They were only waiting on him seeing the doctor to consent to the report. The report needed to be provided by 15 February.

44. On 10 February 2016, the Occupational Health Physician informed the Respondent that, in his view, the Claimant was "playing for time" and continued, "you will never get a straight answer from his medical practitioners".

45. The Claimant raised a further grievance on 12 February 2016, which was rejected on the grounds that it was in effect a repeat of the matters contained in the previous grievance.

46. By this time, there had been very considerable delay in obtaining medical reports, in part because of delays by the Claimant's psychiatrist. The psychiatrist finally said that he was retiring and was unable to provide a report. The Respondent then decided following advice from Occupational Health not to obtain a psychiatric report; it would cost them money and because it would be from a new psychiatrist, it would not add anything helpful.

47. The GP received on 17 March 2016, a letter from the psychiatrist referring to an assessment on 28 February 2016 that the Claimant "remains well and asymptomatic".

48. The GP sent the Respondent a further report on 21 April 2016. This report referred to a diagnosis under ICD10 - a personality disorder. It referred to the Claimant's difficulty with medications. Without any qualification it repeated the psychiatrist's comment that the Claimant was well and asymptomatic. It stated that the Claimant was now less likely to return to work; he needed a less mentally challenging role and needed to return on a gradual and part time basis; he was vulnerable to relapse.

49. The Occupational Health Physician prepared a report on 4 May, which effectively paraphrased the GP's report and added that he could not see that any reasonable adjustments would assist.

50. The Claimant told the Respondent that the GP report of 21 April 2016 was erroneous and that it had gone out without his permission. The Respondent nevertheless pressed on with a meeting, warning that dismissal was a possible consequence. This meeting occurred on

51. At the meeting on 31 May 2016 the Claimant told the Respondent that he had an accurate GP Report, but it was not yet available. He made a formal request to the Respondent for a reasonable adjustment, that he return on a permanent basis working part time 18 hours a week, at the end of his current fit note on or around 6 June 2016. The Respondent in effect told the Claimant that the only way for him to effectively make a reasonable adjustment request would to be complete a flexible working form for them to consider; this would be emailed to him.

52. The Respondent obtained the amended GP report, dated 23 May 2016. This was similar to the 21 April report. The material differences were that the Claimant was stated as being "much more on an even keel" and there was no mention of his needing a less challenging role. However, the report's language was uncertain. The GP stated he did not know, and "I would like to think he can return…it remains to be seen if he can return". There was emphasis on the Claimant's optimism about the success of return. The GP stated that there would need to be a very gradual return, possibly to permanently reduced hours. The GP summed it up, "time will tell".

53. On 8 June 2016, the Occupational Health doctor reported back, essentially stating that the 23 May GP report did not alter his opinion.

54. Mr Murphy wrote to the Claimant on 6 July 2016, copied to Ms Saunders, saying that the Claimant would not be given a flexible working request form until he had provided a fit note stating that he was fit to return on part time hours. Mr Murphy in evidence before the Tribunal gave a further different account as to how the Claimant had to make a request for part time working – he could only do so once he had returned to work full time. No witness was able to say that this was incorrect, even if they did not necessarily think this was a good idea.

Dismissal - 2016

55. The Respondent proceeded to an absence dismissal meeting on 12 July 2016. The letter of invitation did not refer in terms to the sickness absence procedure, but it did warn the Claimant that dismissal was an option.

56. The Claimant was accompanied by his union at the meeting. He told the meeting that his phased returns had not be handled properly. He criticised Occupational Health for not having met him in person. He provided a fit note dated 7 July stating that he might be fit to return on phased return and altered hours. He stated his anxiety was under better control. He again stated that he wished to return part time permanently at 18 hours, although he had been unable to make a formal request because the Respondent had refused to send him the paperwork. He provided a fit note to this end.

57. Ms Saunders's account in her witness statement of this meeting was unsatisfactory, in that she stated that she was struck that she had to draw the part time working reasonable adjustment request out of the Claimant. However, she accepted that she had been in possession of the Respondent's minutes of the meeting of 31 May, which in whatever form, stated in terms that the Claimant had made his reasonable adjustment request for 18 hours and was told that he needed to complete the form. Further, Ms Saunders had been copied into Mr Murphy's email to the Claimant stating that in fact he would not be provided with the form until he provided the fit note.

58. Following the meeting, Ms Saunders went back to the Occupational Health Physician concerning the part time proposal. The Occupational Health Physician spoke to her on the telephone and gave a very emphatic reply, there was no change in his view. He stated that the Claimant was not, "fit to be employed".

59. The Claimant provided a further fit note on 4 August, which specified he could possibly return on 18 hours part time.

60. On 10 August 2016, there was a second and final absence meeting. The Claimant again asked for a phased return building up to an 18-hour permanent week, now backed up by a fit note which stated 18 hours. Ms Saunders told the Claimant about the Occupational Health Doctor's opinion, which at that stage was not in writing.

61. According to the minutes of this meeting, the Claimant said that his support on his previous return to work was acceptable and appropriate. The Claimant denied having said this. The Tribunal accepted the Claimant's account for the following reasons. The Claimant had been raising concerns about his phased return for some time. The Respondent had altered other minutes after the fact, casting doubt on their accuracy.

62. However, it was not in dispute that the Claimant said that in part his phased return failed because he had agreed to reduce the timeframe from 3 months to 8 weeks.

63. Ms Saunders, following the meeting, made a decision to dismiss the Claimant. He was informed by a letter of 10 August 2016. She stated the reason for dismissal was he was unlikely to be able to return reliably on an 18-hour week. The reasons for this opinion were his sick record, the Occupational Health opinion, and his record on the previous phased return. She also referred to the needs of the organisation.

Appeal

64. The Claimant appealed on 10 October 2016 and there were a number of amendments to his grounds of appeal. Mr Curtis heard his appeal on 30 October 2016. Again, the Claimant stated that he did have issues with the support provided to him on his previous phased return. Mr Curtis rejected the appeal on essentially the same grounds as the dismissal.

65. The Claimant remained signed off sick after the dismissal and after the appeal and he remained so at the date of the full merits hearing.

The Applicable Law

66. The applicable law in respect of unfair dismissal is found at Section 98 of the Employment Rights Act 1996

98General.

(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

…

(3)In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case.

67. The applicable law in respect of disability discrimination is found at Sections, 15, 20 and 21 of the Equality Act 2010 as follows

15Discrimination arising from disability

(1)A person (A) discriminates against a disabled person (B) if—

(a)A treats B unfavourably because of something arising in consequence of B's disability, and

(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20Duty to make adjustments

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

(2)The duty comprises the following three requirements.

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

…

(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

…

(13)The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21Failure to comply with duty

(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Submissions

68. The Respondent provided written submissions and spoke briefly to these. The Claimant read out his own relatively brief written submissions.

Applying the Law to the Facts

Unfair Dismissal

69. The Tribunal found that the reason for dismissal was incapacity by reason of sickness, a potentially fair reason for dismissal. The reasons for this are as follows. There was no challenge from the Claimant that this was the reason in the Respondent's mind when making the decision to dismiss. The Claimant had been off sick for a very considerable time. He was on his own case unable to return full time due to his medical condition. The Claimant was dismissed using the Respondent's sickness procedure.

70. Accordingly, the Tribunal went on to consider the reasonableness of the dismissal.

71. The Tribunal firstly considered whether the dismissal was procedurally fair. The test for the Tribunal is whether the procedure adopted by an employer comes within a range of procedures available to a reasonable employer in the circumstances. This is commonly referred to as the no substitution principle, that is, a Tribunal may not substitute its view of what constitutes a reasonable procedure for that of the employer.

72. The Tribunal noted that the letters of invitation to the meetings were not always correctly labelled. This was confusing, and was particularly unhelpful to a Claimant who, as the Respondent was aware, was suffering from anxiety. The Respondent operates a sickness procedure, and it would be well advised in future to ensure that steps in this procedure are made very clear to those undergoing the procedure, particularly those who are vulnerable. Nevertheless, the Claimant was represented by his union at the material meetings, and his evidence was that he did understand what was happening at the meetings. Accordingly, the mis-labelling of the letters was not sufficient to render the procedure unfair.

73. The Tribunal next considered the Respondent's conduct in respect of medical evidence. This was not without its failings. The respondent did not give the Claimant advance notice of the latest medical evidence from Occupational Health upon which it relied at the dismissal meeting. Again, this put the Claimant who suffers from anxiety at a disadvantage. Nevertheless, the Occupational Health input in question was brief. Further, the disadvantage to the Claimant was cured by the delay between the first and second meetings which gave the Claimant time to consider Occupational Health's latest input. Finally, the reason that the Occupational Health doctor's opinion was obtained late was he was responding to the Claimant's lateness in providing the fit note.

74. This takes us the reason why the Claimant provided a fit note so late in July 2016. The Respondent had told the Claimant to make a flexible working request for an 18-hour week on 31 May 2016 and he was told he would be provided with a form. However, he was not. Then in early July, over a month later, he was told something entirely different by Mr Murphy. He was told that he needed to provide a fit note backing up the 18-hour plan before the request form would be provided; in effect this was the only way to obtain the reasonable adjustment he sought.

75. Before the Tribunal Mr Murphy gave a third account. In order to make a request for a reasonable adjustment the Claimant needed to return to work on unadjusted terms and then apply whilst working full time – which, according to the medical evidence he was unable to do. This in effect rendered the Claimant unable to make a request for reasonable adjustments. Although both Respondent's other witnesses did not think this was the right way to proceed, they did not deny when it was put to them that this was how the Respondent appeared to have operated in this case. In effect the Respondent was making it almost impossible for the Claimant to make a reasonable adjustment request. To put the Respondent's conduct at its highest, it appeared entirely confused about how to deal with reasonable adjustment requests.

76. Only when the Claimant was attending his dismissal hearing and his job was on the line, was he able to make a request that the Respondent would consider. Ms Saunders said she was struck by the lateness of this request. This was surprising because she knew that he had made the original request on 31 May, and had been refused on 6 July,

77. The Tribunal therefore considered whether a failure to permit a disabled employee (who suffers from anxiety) to make a reasonable adjustment request and have it considered effectively before a sickness dismissal meeting renders the dismissal procedurally unfair.

78. In this case, the Claimant was provided with a second dismissal meeting, as a result of the Respondent agreeing - late in the day - that he was allowed to make a reasonable adjustment request. The Tribunal also took into account that this Claimant was requesting a very considerable change to his contractual position; the change was such that, in effect, he was not attempting to save the job that he had been employed to do, although he would be working on the same duties.

79. The respondent's procedure was very poor in respect of its approach to a request for reasonable adjustments. However, this failing was cured by Ms Saunders delaying her decision on termination from July to August and taking further Occupational Health advice. In the circumstances, the Respondent's failings concerning the request for adjustments were not enough to take the procedure outside the reasonable range. A finding that this was an unfair procedure would mean that we had committed the inadmissible sin of substituting our view for that of the Respondent.

80. Accordingly, the Tribunal found that the dismissal was procedurally unfair and went on to consider sanction. Again, the test for the Tribunal is whether the decision of the employer to dismiss comes within a range of decisions available to a reasonable employer in the circumstances. This is the no substitution principle, that is, a Tribunal may not substitute its view of what constitutes a reasonable decision for that of the employer.

81. In determining the fairness of a long-term sickness dismissal, the case law tells us that often the most important question is how long an employer is expected to wait for the employee to return. In this case the Claimant was never going to come back full time, he was only able to work, on his case, 18 hours. The Tribunal was not provided with much, if any, evidence by the Respondent as to how the Claimant returning part time would be operationally difficult. For the reasons we set out below in the disability complaint, we found no reason why it would not be possible for him to return part time, from an organisational point of view.

82. The Tribunal considered the Respondent's approach to medical evidence.

83. It declined to get a psychiatric report because it would cost money and the treating psychiatrist had retired. In the view of the Tribunal it is strongly arguable that it would have been advisable to get a psychiatric report, particularly where there had been issues with the Occupational Health advice. (The Occupational Health advice in 2015 was not entirely reliable. The doctor had either made a mistake or had been given incorrect information when he said the Claimant was not working. Although he was reluctant to rely on the treating physicians, he did not meet with the Claimant.) Nevertheless, this employer had an Occupational Health doctor from whom it obtained several reports, and it commissioned a number of GP reports. All Occupational Health advice was shared with the Claimant, albeit it late in the day.

84. The Claimant argued that the Respondent should not have taken into account the 21 April GP report and should have only considered the 23 May report. The Tribunal found that this was not relevant. We accepted the Respondent's submission that it would have dismissed only on the May GP report, because the Occupational Health doctor was clear that he would have advised dismissal in any event.

85. The Tribunal considered how much the decision to dismiss was tainted by Ms Saunders's incorrect assertion that the Claimant had only made his request for a reasonable adjustment at the very last minute. Ms Saunders appeared to see the Claimant's application for part time working as not well thought through.

86. The Claimant made his request on 31 May 2016, 6 weeks earlier. At that time, he had been off sick since 22 October, over 7 months. When viewed in the long-term time frame, the Tribunal found that he had made this request late in the day. He had not, for instance, made his request after what appeared to be a positive assessment from his psychiatrist early in 2016. He only made his request on 31 May when all other ways of saving his job had failed.

87. Accordingly, in these circumstances the Tribunal did not find that this enough to take the decision outside of a reasonable range of decisions available to an employer in the circumstances. There were too many other factors. The Claimant had a poor sickness absence record. The Respondent had waited a very considerable time for the Claimant to return. There was Occupational Health and GP medical evidence in abundance. There was no medical evidence to suggest that the prospects that the Claimant would be able to stay at work in 2016, were better than they had been in 2015. There had been a previous attempt at a phased return in 2016 which had failed, started again and then finally failed.

88. Therefore, the Tribunal found that the Claimant was fairly dismissed.

Section 15 Equality Act - discrimination arising from disability.

89. The Respondent accepted that the decision to dismiss arose out of the Claimant's disability. His disability made him unable to work in the Respondent's view, and he was dismissed as a result of this. The issue was whether the decision to dismiss was a proportionate means of carrying out a legitimate aim.

90. According to *O'Brien v Bolton St Catherine's Academy [2017] ICR 737 CA* a Tribunal should expect evidence from the Respondent as to the impact of the Claimant's absence, in order for the Respondent to establish its legitimate aim and whether or not this is a proportionate means.

91. As a legitimate aim, the Respondent relied on the continued provision of a contract for community wellbeing service to vulnerable individuals by a small team. The Tribunal agreed that this was a legitimate aim. There was little if any challenge to this from the Claimant.

92. The crux of the section 15 claim was, therefore, proportionality - was the Respondent's taking the Claimant's disability-related absences into account on dismissal a proportionate means of achieving this legitimate aim. The Tribunal in effect had to carry out a balancing exercise.

93. Procedural failings on dismissals carried out under attendance management policies, while relevant to unfair dismissal, are not relevant to the balancing exercise required in assessing proportionality for the purposes of Section 15.

94. The Tribunal considered what factors were relevant in the assessment of proportionality.

95. Firstly, did the Respondent provide support and help for the disabled person? The Respondent had provided support. The Respondent had provided a phased return which it had extended more than once. The un-extended phased return was longer than its standard 4 weeks. It was only after a number of changes that the Respondent refused any further extensions. However, it had in effect not permitted the Claimant to request his final reasonable adjustment (permanent part time working) until his dismissal meeting.

96. Secondly, the Claimant's case was that one reason for the length of his absence in 2015 to 2016, was the Respondent's conduct – its failure to support during the phased return and to extend the return, the way they had dealt with his grievance when he was off sick and the way they had chased him for medical evidence in February 2016. The Tribunal accepted that, if the Respondent's conduct had without justification exacerbated his condition and lengthened the Claimant's absence, this would be a relevant factor.

97. The Tribunal took into account that this argument was not clearly stated in the ET1, and even less so in the witness statement. The Claimant had not asserted this argument throughout his case and this indicated that it was not the most significant factor in his mind. The Tribunal reminded itself that the Claimant was unrepresented, nevertheless this was a point that the Claimant was able to make before the Tribunal and there was no very obvious reason why it could not have been made consistently through his case, if he felt very strongly about this.

98. Further, there was no medical evidence that the Respondent's conduct had exacerbated the Claimant's condition. Although the Tribunal accepted the Claimant's comments about the difficulties of getting doctors to give an opinion on causation, nevertheless, there was no medical evidence on this point.

99. Taking the allegation that the Respondent was unsupportive during the phased return, the Tribunal did not find that the Respondent had behaved unacceptably. It had, as stated above, extended the return and made a number of adjustments to assist the Claimant. It had attempted to help when the supervisor was absent sick.

100. The respondent responded to the grievances in a reasonably timeous and proper manner. He was provided with an appeal against rejection.

101. As to the Respondent requesting medical evidence in February 2016, the Respondent was required to obtain medical evidence and was entitled to ask the Claimant to assist. At that time, the Claimant had been dealing with the Respondent on a number of occasions about the grievance, so there was no reason for the Respondent to think he could not deal with correspondence.

102. The Tribunal accepted that with anxiety there is not necessarily an obvious link between the severity of the cause and the severity of any resulting anxiety. However, there was insufficient evidence that any conduct of the Respondent caused the length of the Claimant's absence to be extended.

103. The third factor that the Tribunal found relevant was that this was a very small team. This made it was more difficult to cope with sickness absences. Further, the team serviced very vulnerable users which meant that any disruption caused by sickness could have a particularly serious impact. The Respondent needed to be able to plan provision of its services.

104. Fourthly, the Claimant's absence was long term. The Respondent had attempted a phased return which had unfortunately not succeeded. He had in addition a previous poor sickness record before this final long absence.

105. Putting all of these matters into the balance, the Tribunal found that that taking the Claimant's disability-related absences into account was a proportionate means of achieving the Respondent's legitimate aim. Accordingly, the Respondent had not breached Section 15 Equality Act.

S20 and 21 Equality Act - reasonable adjustments

106. The duty to make a reasonable adjustment is essentially a requirement to avoid the substantial disadvantage to a Claimant where a provision, criterion or practice (a PCP) applied by the employer puts that disabled person at a substantial disadvantage compared to those who are not disabled.

107. Paragraph 6.10 of the Equality and Human Rights Commission Code (the Code) tells us, "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions…".

108. The Respondent did not permit the Claimant to work part time. The Tribunal had no hesitation in finding that a requirement to work full time is a provision, criterion or practice. Further, the Tribunal found that it was applied by the Respondent; there was no dispute that the Respondent rejected the request by the Claimant.

109. The next issue was whether this PCP put the Claimant at a substantial disadvantage compared to non-disabled people. As accepted by the Respondent during submissions, the correct comparative exercise is not between a Claimant who is unfit to work due to disability and another employee who is unable to work in the same way, but due to a non-disabled reason. This is made clear at paragraph 6.16 of the Code as follows:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

110. This is also made clear in the case of *Smith v Churchill Stairlift plc [2006] ICR 524 CA*, *Fareham College Corporation v Walters [2009] IRLR 991 EAT* and was confirmed by the Court of Appeal in *Griffiths v The Secretary of State for Work and Pensions [2017] ICR 160 CA*.

111. The Claimant was not fit to work full time, on his case. The Respondent did not dispute this. The Tribunal therefore found that the PCP put the Claimant at a substantial disadvantage, or to put it another way, the duty to make reasonable adjustments was triggered.

112. When deciding on whether or not an employer has breached its duty to make reasonable adjustments, this is an objective test for the Tribunal. This is again made clear in *Churchill Stairlifts*. Unlike in the unfair dismissal case, a Tribunal *may* substitute its view for that of the Respondent. The Tribunal has to decide, whether part time working was a reasonable step for the employer to take and, in effect, would it have been an effective step.

113. Paragraph 6.28 of the Code suggests that some factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:-

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer.

114. The Tribunal found that the reasonable adjustment sought by the Claimant would have been practicable. This was a small team and after the Claimant was dismissed the Respondent recruited a part time employee into the team. Taking the Claimant back part time would be no more disruptive for the Respondent than undertaking a recruitment, and there was no reason to believe that it would take any disproportionate amount of resources. The Claimant, on his evidence, was prepared to be flexible and work a three-day week or a two-and-a-half-day week, or whatever would suit the Respondent. The Tribunal accepted his evidence because it found that he was highly motivated to return to work and save his job. The Respondent employed staff on a part time basis in the Claimant's team.

115. The Respondent accepted in its submissions that its case was based primarily on the effectiveness of the adjustment in preventing the substantial disadvantage. The Tribunal agreed that this was the crux of the reasonable adjustments case. Would adjusting the Claimant's working hours permanently to 18 hours have been effective, i.e. would the Claimant have been able to work reliably an 18-hour week?

116. As has been set out above, the request was poorly dealt with by the Respondent. Also, there were concerns about the reliability of the medical evidence. Nevertheless, this is an objective test for the Tribunal – in the opinion

of the Tribunal, based on the evidence, would the adjustment have been effective?

117. The Tribunal found that the following factors relevant when deciding whether the Claimant would be able to work on a reliable basis 18 hours a week.

118. Firstly, medical evidence. The Tribunal had sight from the Occupational Health and the GP. The medical evidence was not entirely consistent. The Claimant was, according to his GPs who saw him reasonably regularly from October 2015 to early June 2016, unfit for work even at 18 hours a week. However, his psychiatrist stated that he, "remains well and asymptomatic" in early 2016 reported in March 2016. This was quoted - without any qualification - by the GPs in April and May, whilst those same GPs signed him off as not fit for work at all until early June. There was no medical explanation before the Tribunal as to how these inconsistencies might be reconciled, including from the only medical practitioner before us, one of the Claimant's GPs.

119. The Tribunal concluded that the GPs saw the Claimant regularly and were best placed to advise whether he was fit for work or not. They did not think he was fit for work at all until at least June 2016. The final GP report was notably non-committal, even after the Claimant had re-visited his GP to seek to persuade him that he was fit to return.

120. The next factor was the previous experience of working 18 hours on a phased return. This had not succeeded, despite there being amendments and extensions to this. The Tribunal reminded itself that this previous experience was 9 months old and medical conditions change. However, there did not appear to be any medical event or factor which accounted for the failure of the 2015 return to work which would not be relevant in the middle of 2016. For instance, there was not a psychosis episode. The Claimant had changed his medications in July 2015, but he did not rely on this as the material reason for the failure of his phased return.

121. While there was lengthy evidence about how many amendments to the phased return the Respondent had offered, the overall picture was that the Respondent had offered a 3 months phased return and the Claimant wanted 8 weeks - for understandable financial reasons. This agreement was delayed by him falling sick and it was extended. When he requested a further extension, refusal precipitated his going on lengthy sick leave which was terminated by his dismissal.

122. The Tribunal noted that the Claimant worked four weeks at nearly 18 or more hours a week from 21 September to 19 October. However, when the Claimant went back up to 18 plus hours, issues arose. He said that he had experienced difficulties in the last few weeks at work. There were many moving parts to this and at this time his supervisor also went off sick, but the record does show that the problems arose when the Claimant started to work at least 18 hours. After four weeks having built up to over 18 hours, he simply could not continue.

123. The Claimant said that he had not been supported on the phased return, and if he was properly supported next time this would be successful. He emphasised before the Tribunal that he was left 28 days without formal supervision at a difficult time. This, in his opinion, was the major factor. Although the manager had visited to offer some support, this was not the same as supervision.

124. The Claimant's difficulties related to a disagreement between him and a colleague with whom he had worked for some time. He was coming back after a long absence and the Tribunal accepted that habits and work arrangements might have changed and therefore there might need to be some readjustment all around. The Tribunal did not doubt that this workplace issue genuinely caused the Claimant anxiety and exacerbated his condition. However, it was the type of personnel issue which - and in this the Tribunal relies particularly on the experience of its industrial members - is extremely common in workplaces, particularly in small ones. There is every chance that something like this would reoccur when the Claimant tried to return to work again.

125. The next relevant factor for the Tribunal was the Claimant's sick record. The Tribunal did not accept that the employer was the cause of the exacerbation of the Claimant's sick record. The Claimant, simply put, had a poor sick record. The GP in May 2016 stated in terms that the Claimant continued to be vulnerable to relapse.

126. The next issue was the Claimant's own account and views. His evidence was that he was able to work and return on an 18-hour week. The Tribunal accepted the Claimant was committed to return; he wanted to work, he wanted to contribute. He is a highly motivated and hardworking employee. However, this is an opinion, albeit confidently expressed, and it must be compared to the GP's letter of May 2016 which is notably non-committal.

127. The next factor was the amount of support available to the Claimant on return. The Tribunal proceeded on the basis that the Respondent would comply with its statutory duties and provide reasonable support. The Tribunal noted that in a workplace, employees will come up against each other, there is what may be termed "jostling" i.e. the need to manage conflicts and personality issues. The Claimant had experienced difficulties before and the Respondent's support was less than ideal, but these things are likely to reoccur. The Respondent would provide support, but this is unlikely to avoid the normal conflicts, however, small scale, of the workplace.

128. The final factor was what had actually happened after August 2016. The Claimant had remained not fit for work. However, a psychiatric report which post-dated termination, stated that the Claimant had been made anxious by the dismissal, then by the appeal and then by the Employment Tribunal case. The Tribunal accordingly found that this was a neutral factor. What happened to the Claimant's health after the dismissal and the rejection of his appeal and during Employment Tribunal proceedings was not a sufficiently reliable guide as to what might have happened had he gone back to work part time.

129. Taking all of these factors into account, the Tribunal found on the balance of probabilities that offering the Claimant an 18-hour working week would not effectively have removed or significantly mitigated the disadvantage. Accordingly, in failing to offer this reasonable adjustment the Respondent was not in breach of its duties.

Coda

130. The Tribunal would like to record its considerable concern about the lack of understanding, as evidenced by the facts in this case, on the part of the Respondent of its duties to its disabled employees. This is of particular concern as it states that it seeks out disabled employees. Further, the Respondent provides services to disabled people. The duty to make reasonable adjustments applies to the Respondent as a service provider as well as an employer.

131. On its own evidence it made it difficult if not impossible for a disabled employee to make a request for reasonable adjustments until his dismissal meeting. The type of adjustments sought by the Claimant was not unusual and is referred to in the Code. The Tribunal accepts that the Respondent had made a number of reasonable adjustments for this employee in the past but its procedure on the final request for a reasonable adjustment was poor.

132. In these circumstances, the Tribunal expresses the hope that the Respondent will without delay revisit its understanding of its duties to its employees and service users and ensure that making a request for reasonable adjustments is straightforward.

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Employment Judge Nash
Date: 9 December 2018