EMPLOYMENT TRIBUNALS

Claimant: Mrs T Collins

Respondent: B&Q Plc

HELD AT: Sheffield **ON:** 23, 24 and 25 January 2018

BEFORE: Employment Judge Little
Mrs E M Burgess
Mrs S Robinson

REPRESENTATION:

Claimant: Miss B Clayton of Counsel (instructed by USDAW)
Respondent: Mr A MacPhail of Counsel (instructed by Mr B Shepherd Solicitor)

JUDGMENT having been sent to the parties on 1 February 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These reasons are given at the request of the respondent made in it's solicitor's email of 2 February 2018.
2. **The complaints**

   In her claim presented to the Tribunal on 7 June 2016 Mrs Collins brought these complaints:-

   - Failure to make reasonable adjustments.
   - Discrimination arising from disability.
   - Unfair dismissal.
3. **The relevant issues**

It was agreed at the beginning of this hearing that the following were the issues for the Tribunal to determine:-

Reasonable adjustments

3.1. Did the respondent have a provision criterion or practice of requiring the claimant to work her contracted hours in her substantive role?

3.2. Did the respondent have a provision criterion or practice for "consistent attendance at work"?

(A matter of discussion before us at the beginning of the hearing was that the further and better particulars which the claimant had been ordered to provide in respect of other aspects of her claim had led to her, in effect, seeking to add a further PCP as at 3.2 above - the requirement for consistent attendance at work. No formal application to amend had been made when those particulars were presented on 13 September 2017. When the respondent replied to those particulars in it's solicitor's letter of 6 October 2017, confirmation was sought by them from the Tribunal that the respondent was only required to submit a response in relation to the PCP as identified at the preliminary hearing. It appears that no action was taken about that request and the matter was not chased up or it seems commented upon by either party subsequently, until that is, the first day of our hearing. Miss Clayton said that if need be an amendment application was being made although she considered that it was only a question of re-labelling. We agreed with the parties that we would deal with this matter once we had undertaken our reading. However when the hearing re-started Mr MacPhail confirmed that the respondent would not be taking any further point. That of course was without prejudice to the respondent's contention that neither PCP was operated)

3.3. In either case, if there was such a PCP, did it put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

3.4. If so, was the respondent in breach of it's duty to make reasonable adjustments?

The claimant suggests that the respondent could have adjusted the absence policy triggers so allowing a longer period before the attendance procedure commenced.

The claimant was, at the beginning of our hearing, also suggesting that reasonable adjustments would have been to offer her reduced hours on her return to work or offering her revised duties on her return to work. However we were told during the course of Miss Clayton's closing submissions that the claimant was no longer contending for these adjustments.

Discrimination arising from disability

3.5. Did the unfavourable treatment of being dismissed arise in consequence of the claimant's disability related absences?

3.6. If so, can the respondent show that dismissal was a proportionate means of achieving a legitimate aim?

Unfair dismissal

3.7. Can the respondent show a potentially fair reason for dismissal? (the respondent seeks to show the reason of capability).

3.8. If so was that actually fair having regard to the test in the Employment Rights Act 1996 section 98(4)?

3.9. If the claimant was unfairly dismissed, would the respondent have been able to dismiss her fairly thereafter? If so, how would that affect remedy?

4. **Jurisdictional issue**

This was a new matter raised by Mr McPhail at the beginning of the hearing. Had the claimant complied with the Employment Tribunals Act 1996 section 18A – did she have an ACAS early conciliation certificate prior to presenting her claim?

In order to deal with this issue we considered the Tribunal's file from which we noted that the claim had initially been rejected because no certificate number was given. However, the claimant had then successfully sought a reconsideration of the rejection once she had rectified that omission by supplying the certificate number.

It was further noted that Regional Employment Judge Robertson made the decision that having granted the reconsideration the claim should be regarded as being presented on 15 June 2017, that being the date when the omission was rectified. It appeared to us that this part of the decision had not been notified to the parties and so could have caused confusion.

Mr McPhail accepted the explanation we were able to give and agreed that the Tribunal did have jurisdiction. Moreover no time issue arose in circumstances where the claim was being treated as having been presented on 15 June rather than the original presentation date of 7 June.

5. **Evidence**

The claimant has given evidence but called no other witnesses. The respondent's 'live' evidence has been given by Mr Paul Nettleship, trading manager and also the dismissing officer and by Mrs S Wilbor, unit manager of the respondent's Scunthorpe store and the appeal officer. We have also considered a witness statement from a Mr Richard I'Anson, another trading manager at Doncaster, although Mr I'Anson has not been present at the hearing. He explains in his witness statement that he was on planned leave at the time of the hearing. No application to postpone has been made to facilitate Mr I'Anson's attendance .

6. **Documents**

We have had before us a bundle running to 244 pages.

7. **The claimant's comparator**

In relation to her unfair dismissal complaint, the claimant has contended that one of the reasons for unfairness was that the respondent treated another employee in similar circumstances more favourably than the claimant was treated with the result that there was inconsistency. We have referred to that other employee within this Judgment as 'Mrs D' in order to protect her confidentiality bearing in mind that details of Mrs D's medical history have been aired in our hearing.

8. **The Tribunal's findings of fact**

8.1. The claimant began her employment with the respondent on 25 March 1988. At the material time she was employed as a customer advisor in the seasonal (gardening) department of the respondent's store at Doncaster.

8.2. In July 2016 the claimant commenced a period of sick leave which, in the event, would continue until her dismissal in February 2017.

8.3. During that period of absence there were numerous referrals to the respondent's occupational health provider and the claimant continued to be signed off work. There were also numerous informal absence review meetings conducted by the claimant's line manager Mr I'Anson.

8.4. The respondent has an absence policy and a copy of the relevant policy at the material time is in the bundle at pages 132 to 158.

8.5. On 18 January 2017 an occupational health report was prepared by Dr I Robinson, a consultant occupational physician. That was the first report prepared after there had been a face to face meeting. The previous interviews with different occupational health professionals had been by telephone. Dr Robinson's report is at pages 72 to 74 in the bundle. He confirmed that the claimant had been diagnosed with fibromyalgia in 2009. It was this condition which latterly had been referred to in the fit notes which the claimant was submitting. In the first period of her absence those notes referred to stress. Dr Robinson noted that the claimant continued to experience severe, though variable, levels of fatigue and also severe, though variable, levels of widespread body pain, particularly affecting her back, her arms and her legs in association with headaches. His opinion was that the claimant was suffering from her symptoms to a profound degree. Although she had been off work for approximately six months there seemed to be little likelihood of her being able to return to work in the near or foreseeable future. The doctor could not foresee any adjustments which the respondent could consider implementing at that time to facilitate the claimant's return to work in the near future. He had given the claimant advice as to alternative medication and treatments and there was implicit criticism that the claimant's GP had not done enough in that regard. However the doctor's opinion was that it would take some time for the claimant to be directed towards what was described as "optimal treatment" and for that to have any benefit. It was in those circumstances that it was not possible for the doctor to advise on the likely timescale for return, save that it would extend over many weeks and potentially a number of months.

8.6. On 2 February 2017 Mr Nettleship conducted a long-term absence review meeting with the claimant, although that was described as an informal meeting. This represented the start of what the respondent's absence policy describes as the Long-Term Incapacity Route, details of which are given at pages 148 to 149 in the bundle. That "route" provides that if an employee's absence has lasted for three months

then managers may (so there is a discretion) consider commencing the long-term incapacity route. That would involve a long-term absence incapacity review meeting to discuss medical evidence, alternative roles, reasonable adjustments and such matters as possible eligibility for ill health early retirement. It was that type of meeting which Mr Nettleship was conducting with the claimant on 2 February 2017.

8.7. The typed version of Mr Nettleship's notes of the 2 February meeting are at page 83 in the bundle. The claimant confirmed her agreement with the comments made by Dr Robinson in his report. Mr Nettleship asked the claimant when she thought she would be back at work and she explained that she was having a foot operation (as we understand it unconnected with the fibromyalgia condition) and so she was thinking of returning in March if she could get the pain relief sorted out. She would want to return to her department but reduce her hours to 24 per week.

8.8. The claimant was then invited to a further meeting and that information was in the letter of 4 February 2017 which is at page 84. The claimant was informed that if it was not possible to agree a return to work at that meeting or to facilitate adjustments to enable a return, the meeting might result in the termination of the employment.

8.9. That meeting took place on 16 February 2017 and again was conducted by Mr Nettleship. On this occasion the claimant was accompanied by her union representative, Mr Aidan McCarthy of USDAW. Typed notes of that meeting are at page 94. The claimant was asked when she thought she could return to work and she replied:

> "End of March, 16 March for new medication".

Mr Nettleship referred the claimant to various comments in Dr Robinson's report which suggested otherwise. Following an adjournment, Mr Nettleship announced his decision to dismiss the claimant. The dismissal was confirmed in Mr Nettleship's letter of 17 February 2017 which is at page 95.

8.10. Although it was not seen by Mr Nettleship prior to the decision to dismiss, there had been a further report from an occupational health doctor. On this occasion it was a Dr Boakye. That doctor had not seen the claimant and the purpose of his report was to summarise and comment on a report which had been obtained from the claimant's GP. Dr Boakye's report is at pages 87 to 88 in the bundle. He reported that it was unlikely that the claimant would return to work in the foreseeable future, that is within the next three months.

8.11. The claimant appealed against her dismissal and the grounds of appeal were set out in her email of 20 February 2017. She felt that insufficient time had been given for her to carry out the recommendations of Dr Robinson in terms of new medication, which she believed would have enabled her to return to work by the end of March 2017. The claimant also complained that another member of staff (Mrs D) had been off work on more occasions and for longer periods than herself but adjustments had been made.

8.12. The appeal hearing was conducted by Mrs Wilbor on 29 March 2017 and the notes are at pages 113 to 115. The claimant expressed the view that Dr Robinson had contradicted himself. The claimant reported that she had had her medication changed five days previously and already felt a lot better. She had not been given time to put the doctor's recommendations in place before being dismissed. The claimant again raised the issue of Mrs D. She stated that Mrs D had been absent for longer and more frequently than the claimant and the claimant herself had been dismissed after seven months absence.

8.13. Mrs Wilbor's response to that was that she had not got any evidence about an end of March return and so it seems that no response was made about the Mrs D issue. The claimant also raised an issue about a Rachel Coult (the unit manager – that is the manager of the Doncaster store) who she alleged had told her at one of the formal meetings that she might be better off on benefits.

8.14. Mrs Wilbor did not reach a decision at the hearing because she felt it was necessary to carry out further investigation. That included asking Rachel Coult about the alleged benefits comment. Mrs Wilbor also chose to ask Ms Coult about Mrs D issue. Notes of Mrs Wilbor's interview with Rachel Coult are at page 118AA (typed version). They show that Mrs Coult's response to the Mrs D question was in very general terms. She simply said that everyone was treated the same. Mrs Wilbor carried out no further enquiries about Mrs D and her absences or how she had been treated.

8.15. The other step taken by Mrs Wilbor post the appeal hearing was to seek a further occupational health report. The referral, made on 30 March 2017, is at pages 118A to C. In that document Mrs Wilbor explained that the claimant had told her that the advice given by Dr Robinson previously about pain management had had a positive impact which the claimant felt would permit her return to work. The referral went on to pose the question as to whether the claimant would be able to return to work as soon as Monday 3 April 2017 with reasonable adjustments.

8.16. In response to that referral Dr Robinson provided a further report and that is dated 26 April 2017 (pages 119 to 120). He noted that following attendance at a pain management clinic and with additional medication there had been some improvement in the claimant's condition. She was on a waiting list to commence cognitive behavioural therapy. The doctor said that it was pleasing to note that the claimant had noticed some improvement in her condition, although she had admitted she continued to experience pain in her arms, legs and back though to a lesser extent than previously. Two days out of seven were bad days. Under the heading "Opinion" the doctor wrote as follows:

"Whilst Mrs Collins may have expressed you that it was her view that she would be able to return to work in April (*the claimant we think probably said March*) of this year, following discussions with me she acknowledges that although there has been some improvement in her

condition she is still significantly affected on a day to day basis, as described above in the body of my report.

For these reasons it is my opinion that Mrs Collins remains unfit to return to work and thereby provide you with reliable levels of attendance and satisfactory levels of performance but there remain prospects for further significant recovery in her condition over a longer time frame, particularly with her undergoing cognitive behavioural therapy and further multi-disciplinary treatment. There therefore remains a potential for significant improvement in Mrs Collins' health in the longer term, though this may take another few months yet. At that point it may become feasible for her then to contemplate a return to work particularly if she could be accommodated with a reduced hours contract."

The doctor went on to suggest that if the claimant noticed further significant improvement in her condition over the next few months she should be referred back for further assessments.

8.17. The appeal hearing was reconvened on 19 May 2017 and typed notes of that meeting are at pages 126 to 127. Speaking about her condition, the claimant said that she got on with it and it didn't hold her back. She disagreed with Dr Robinson's observation about not being fit to return to work and she felt that she could come back to work but would need help with heavy lifting. Mrs Wilbor expressed the concern that if the claimant was "re-employed" but then went off sick after a few shifts, that might make the position worse.

8.18. It appears that no decision was given at the conclusion of the appeal hearing and instead it was contained in Mrs Wilbor's letter of 19 May 2017 which is at pages 128 to 129. In that letter Mrs Wilbor referred to the medical evidence still being against a return to work. Referring to the Mrs D issue, Mrs Wilbor explained that all cases were different and she was unable to discuss the detail of Mrs D's situation.

8.19. She went on to refer to Mr Nettleship considering the medical evidence at the time of the decision to dismiss when it was felt that a return to work would not be likely in a reasonable timescale. There was reference to what Rachel Coult had said in her interview.

8.20. Mrs Wilbor's conclusion was that she felt the dismissal for continued incapacity was justified. The store had ensured up to date medical information was gained at numerous points throughout the absence. The advice was consistent in that the claimant was not well enough to return to work and it would take at least a few months for her to be in a place where that was a possibility.

8.21. Mrs Wilbor noted that Dr Robinson in his latest report had been able to see the potential progress made in the three months since his first report, however he was still of the view that the claimant was unfit to return to work and the timescale for possible return would be a few months depending upon the progress of pain treatment.

9. **The parties' submissions**

9.1. The claimant's submissions

Miss Clayton had prepared a skeleton argument and we gave consideration to that before hearing Miss Clayton's oral submissions which we summarise below. Miss Clayton pointed out that the respondent had managed without the claimant for seven months. At it's highest, the respondent's evidence was that a busy period was being approached but no specifics had been given as to any difficulties in providing cover by way of colleagues working overtime or that there was particular pressure. Mr Nettleship had accepted that he had had no discussion about those matters with Mr I'Anson. At the appeal stage Mrs Wilbor had accepted that she had no knowledge of that either. Mr I'Anson's written evidence was limited on the point and he had not been present to be questioned. Miss Clayton considered that the respondent needed to produce relevant evidence of actual difficulties. There had been no application for an adjournment so that Mr I'Anson could attend.

In terms of the inconsistency argument, there were similarities between the claimant's circumstances and those of Mrs D. However the claimant had been dismissed after seven months absence whereas Mrs D had not after 12 months absence. The respondent had not had to pay sick pay to the claimant for the latter period and the only financial obligation was holiday pay which, having regard to the size of the respondent was not a great burden. Mrs D's case had not been considered during the course of the claimant's process. Documents about Mrs D's case had only been disclosed recently. The respondent now contended that the attendance policy had changed in terms of the trigger which, when the claimant's situation was being considered, was three months whereas it had been six months when Mrs D's circumstances were being considered. Mr I'Anson had not said anything about this in his witness statement. To explain different treatment because different managers were dealing with two individuals was not a good reason. No reasonable employer would simply take Mrs Coult's word without further enquiry.

In relation to the unfair dismissal complaint there was a cross-over into the section 15 case when justification fell to be considered, although in the latter case the Tribunal was entitled to form it's own view.

With regard to the reasonable adjustments complaint, Miss Clayton agreed that adjustments such as reduced hours or changes to the role could only be considered if an employee was otherwise fit to return to work. Miss Clayton accepted that the claimant had not been imminently ready to return and so this point was not pursued.

In respect of the remaining part of the reasonable adjustment complaint, Miss Clayton referred to the two PCPs relied on and the adjustment would have been pushing back the dismissal date because in a few months the claimant might have been better. Her fibromyalgia was under control, but there were other health issues preventing an immediate return.

As to whether there would have been a dismissal anyway, the claimant's case was that it was the unrelated health condition that was keeping her away from work at the material time. The respondent would need to have investigated that further.

9.2. Respondent's submissions

Dealing first with the reasonable adjustments complaint, Mr MacPhail contended that there was no provision criterion or practice of requiring the claimant to work her contracted hours because the claimant had been off for a lengthy period and the respondent's policy allowed for time off. The Employment Judge asked Mr MacPhail to comment on the Aylott authority on which the claimant relied (where it was held that the duty to make reasonable adjustments applied to dismissals). Mr MacPhail explained that he could not comment as he had not read that case recently. In any event the claimant was not fit to return to work and never reached that stage.

If there was one or other PCP, Mr MacPhail contended that there was no disadvantage as the respondent would have considered options such as a phased return to work.

It had been reasonable for the respondent to conduct capability meetings on the basis of the medical evidence available, so how would it be a reasonable adjustment to push those meetings back? The claimant had been allowed longer than the three month period indicated in the policy before the long-term absence route was commenced. It was reasonable for the respondent to proceed because there was no immediate return likely, despite the claimant's optimism. Previous predictions of return dates had proved to be wrong. The most recent medical evidence was that no imminent return was possible and so why should the respondent have delayed further? It's business needs had been referred to by Mr Nettleship. The peak period was approaching and overtime by the claimant's colleagues could not be demanded and so it was more difficult to provide cover. It was not necessary for the respondent to provide specifics. It was forecasting a forward position.

With regard to the second PCP, consistent attendance at work was not required and so no such PCP existed. In any event there was no disadvantage because the claimant was off sick.

In relation to the section 15 complaint, the only relevant issue was justification and the respondent had provided further information about that in it's letter of 6 October 2017 to the Tribunal (pages 31 to 31). The proportionate means was the dismissal. The respondent needed to have employees who could carry out their roles. For one employee to be missing had an effect. To provide cover would mean taking somebody from other work or by arranging overtime. That would eat into the overtime budget which could be used for other purposes. The claimant's period of projected absence extended into the respondent's peak period. It was proportionate to dismiss so that the claimant could be replaced. A step would be proportionate even if it was not the only way of addressing the legitimate need. The claimant had not

suggested that the respondent should have used temporary staff. In any event it did not do so as a practice.

In relation to the unfair dismissal complaint, Mr MacPhail noted that the respondent had obtained numerous occupational health reports and conducted numerous capability meetings. To dismiss had been within the reasonable band. Mr Nettleship had before him Dr Robinson's 18 January report and although he did not have the subsequent report by Dr Boakye, the claimant made no criticism about that.

The claimant's views differed from those of Dr Robinson. Information from the claimant's GP was limited, whereas the occupational health reports were more detailed and Mr Nettleship had been guided by them.

In terms of consultation, there had been plenty of meetings and the claimant had been warned of the possibility of dismissal.

In paragraph 33 of Mr Nettleship's witness statement he had given evidence in general terms about the effect of the claimant's absence and Mr MacPhail contended that it was reasonable for him to proceed without having specific information. He had 28 years experience and he could make the forecast. Overtime was an issue. There was no need for specific data.

If there had been any unfairness in Mr Nettleship's approach, that was cured on appeal. The appeal did not just uphold the decision, there had been further enquiries and an additional medical report obtained. As Dr Robinson was only able to suggest a return within a few months that would have meant that the claimant's absence would have exceeded a year and would run into the respondent's peak period.

In respect of the inconsistency argument and the treatment of Mrs D, Mrs Wilbor had spoken to Mrs Coult. Mr MacPhail suggested that inconsistent treatment arguments were more appropriate in misconduct cases. In capability cases the employee had not chosen to be off ill and there was the need to cover the differing individual circumstances. It was fact specific. Mrs Wilbor had gone beyond what had been required. Mrs D's circumstances were different. Even if Mrs Wilbor had looked at Mrs D's case, her evidence had been that she would not have made a different decision. In any event a six month trigger applied to Mrs D and there was a different situation with regard to staffing levels, the number of people off long-term sick at the same time as the claimant (as opposed to those factors during the earlier period of Mrs D's absence). Mrs D had ultimately been fit to return to work.

If the dismissal was found to be unfair, Mr MacPhail contended that the claimant would have been dismissed in any event on health grounds. Although the claimant had said that she was ready to return, subsequent developments had shown that that would not have been the case. The claimant had provided fit notes to Job Centre Plus which referred to fibromyalgia. The claimant would have needed medical evidence in order to be able to return to work and the respondent could not extend her absence period indefinitely. Her position could not be

held open. In any event it was contended that the claimant had not suffered loss because at the material time she was not in receipt of sick pay.

10. **The Tribunal's conclusions**

10.1. Reasonable adjustments

10.1.1. The first issue here is whether the respondent had one or both of the provisions criterion or practices (PCPs) which are contended for. We remind ourselves that these are first, the requirement for consistent attendance at work and secondly, the requirement for the claimant to work her contracted hours in her substantive role.

10.1.2. We find that the consistent attendance at work was a PCP applied to the claimant in this case. It is at the heart of the employment relationship that the employee will actually attend work.

10.1.3. In relation to the second PCP, we note that the respondent says that there was no such requirement as the claimant's contracted hours could have been varied. Mr MacPhail, as we understand it, was also suggesting that it could not be a PCP because the respondent was obliged to accept that the claimant was not actually in work by reason of her ill health. However we take the view that the underlying requirement was for the claimant to do some work and we reject the respondent's argument here as being somewhat artificial. We would add that consistent attendance at work is also at the heart of the respondent's absence policy. It is that policy and it's application to the claimant that the claimant says should have been adjusted.

10.1.4. The next issue is whether the PCP has put the claimant as a disabled person at a substantial disadvantage in the employment in comparison with persons who are not disabled. Here we find that there was such substantial disadvantage. The claimant's disability related absence meant that she could not comply with the requirement to consistently attend work, so as to discharge her contracted or other hours, with the result that she was susceptible to the absence policy being applied to her. In these circumstances we find that the duty to take such steps as it is reasonable to have to take to avoid the disadvantage applied in this case.

10.1.5. The next issue is whether it was reasonable for the respondent to adjust it's absence policy triggers to allow the claimant a further period of time off work before the capability meetings were commenced which led to her dismissal (as contended for in the further and better particulars – see page 30 in the bundle). We accept that it was necessary for the respondent to have an appropriate dialogue with the claimant about her long-term absence, as it would turn out to be, and we also

accept that it was sensible for the employer to obtain regular medical updates. That is what had been happening from August 2016 up to the receipt by the respondent of Dr Robinson's report of 18 January 2017. The essence of the claimant's case is that it would have been a reasonable adjustment not to embark on the so called long-term incapacity route, which is what happened when Mr Nettleship wrote his letter of 26 January 2017 to the claimant inviting her to the meeting which ultimately took place on 2 February 2017. That letter is at pages 75 to 76. Within three weeks of that letter being written, the claimant had been dismissed. There followed what turned out to be an unsuccessful appeal.

10.1.6. We take the view that it would have been a reasonable adjustment not to escalate the absence policy into the long-term incapacity route. There was no good reason why the arrangements for formal review meetings and medical updates – which had been in place from August 2016 – could not have continued at least for a further period of time. The respondent was not obliged to make any payments to the claimant apart from possibly holiday pay. No convincing evidence has been put before us that the claimant's ongoing absence was causing any particular problem in the department. Mr Nettleship has candidly accepted that he was not aware of the specifics but merely anticipated that there could be difficulty in getting other employees to carry out overtime or that the budget for overtime might have been exhausted. He was not in receipt of any representations from the actual manager of that department, Mr I'Anson. In the circumstances it is something of a mystery as to why Mr Nettleship felt that it was necessary to engage in the more formal aspect of the policy which very quickly led to the claimant's dismissal. We also consider that the claimant's 28 years plus service to the respondent was a factor which made the holding off from the more formal aspect of the procedure a reasonable adjustment. Accordingly we conclude that the reasonable adjustments complaint succeeds.

10.2. <u>The section 15 complaint</u>

10.2.1. As it is accepted that the claimant's dismissal was unfavourable treatment because of something which arose in consequence of her disability, the issue that we have to determine is whether dismissal was a proportionate means of achieving a legitimate aim.

10.2.2. Whilst the statutory test is different from that in cases of unfair dismissal, we note that in **Post Office v Jones** [2001] ICR 805, the Court of Appeal held that the section 15 test was similar to the band of reasonable responses test. **Spencer v Paragon Wallpapers Limited** [1976] IRLR 373, referred to in Miss Clayton's written submissions, is an unfair dismissal case but we consider that the basic principle referred to in that case

– which is 'how long could the employer be expected to wait?' – has relevance to the justification of what would otherwise be a discriminatory dismissal under section 15.

10.2.3. The factors we have taken into account on the reasonable adjustment case apply equally here. The claimant was not costing the respondent anything (save possibly holiday pay) and there is no cogent evidence that her absence was causing particular problems. Accordingly there was no pressing need for the claimant to be replaced with a new employee. Mrs Wilbor was candid in her evidence to us that she, like Mr Nettleship, had no specifics about this. Again there is the claimant's length of service to take into account. An additional factor here is that by the time of the appeal hearing, the claimant's optimism about a return to work was now, albeit to a limited extent, being shared by Dr Robinson. We have quoted from his 26 April report and appreciate that there are various caveats. Nevertheless that report refers on more than one occasion to the potential for significant improvement. We conclude therefore that neither the dismissal of the claimant on 16 February 2017 nor the upholding of that dismissal on 19 May 2017 were proportionate means and so this complaint succeeds also.

10.3. <u>Unfair dismissal</u>

10.3.1. We find that the respondent has shown the potentially fair reason for dismissal of capability.

10.3.2. The next issue is whether that reason was actually fair having regard to the test set out in section 98(4) of the Employment Rights Act 1996. It is not for the Tribunal to substitute it's own decision, but instead we must consider whether the decision to dismiss came within the band of reasonable decisions. For the same reasons that support our conclusions in relation to the section 15 complaint, we conclude that no reasonable employer would have decided to dismiss the claimant at the point this employer did.

10.3.3. In the circumstances we have not felt it necessary to go on to consider whether the claimant's dismissal was also unfair because of alleged inconsistent treatment with Mrs D. We agree with Mr MacPhail's argument that inconsistency arguments are more likely to be seen in conduct cases rather than capability cases. Nevertheless it seems to us that in principle they could apply in a capability case. However bearing in mind that there needs to be truly parallel circumstances between the two cases, we feel that it will be much more difficult when comparing the ill health absences of two individuals for those to be found to be truly similar. That being said we are concerned about the superficial way in which the claimant's concerns about Mrs D's case were treated by Mrs Wilbor at the appeal stage. We add that we

can understand why the claimant, as a lay person, felt that there might have been injustice.

10.3.4. We then need to consider whether the claimant would have been dismissed in due course in any event. We need to consider this because it would not be just and equitable to award full compensation in a case where it was clear that despite an unfair dismissal the employee would subsequently either inevitably or probably have been dismissed fairly. We observe that the claimant concludes her witness statement by commenting that her dismissal left her extremely distressed and that she has been unable to find alternative employment "due to my ongoing disability". During the course of cross-examination the claimant explained that since dismissal she has been in receipt of ESA and that initially she had to provide to the benefit office fit notes, which she tells us described her as being unfit for work because of fibromyalgia.

10.3.5. The claimant has also told us that she had to undergo surgery for a new medical condition which obviously was not anticipated at the time of her dismissal or the appeal.

10.3.6. We find that a fair employer would have had considered the absence by reason of that surgery as a separate issue. However, and unfortunately, it seems clear that despite the claimant's optimism at the time of the appeal and the more optimistic medical opinion at that time, that optimism has not been realised. We conclude that had the claimant not been dismissed, her disability related absence from work would have continued up to today's date and indeed beyond.

10.3.7. In those circumstances the question again turns on how long a reasonable employer would wait before dismissing for capability. In the claimant's case, taking into account the length of service and the other factors which we have considered, we take the view that a further six months would have been necessary for a fair and proportionate absence policy dismissal to have been proceeded with and effected.

10.3.8. Accordingly rather than having been dismissed finally with effect from 19 May 2017, we conclude that the dismissal would have occurred on or about 20 November 2017 and so that has become a relevant consideration in relation to remedy.

11. **Remedy**

11.1. Unfair dismissal compensation

The parties were able to agree the amount of compensation the claimant was to receive for this complaint (see paragraph 4 of our Judgment).

11.2. Injury to feelings

11.2.1. This was a matter which remained in dispute between the parties. We heard other brief evidence from the claimant as to

how what we found to be unlawful discrimination had affected her.

11.2.2. We received further submissions from the parties. For the claimant Miss Clayton noted that in the schedule of loss the claimant had sought £6,000 for injury to feelings but she should not be held to that. Miss Clayton considered that the appropriate level would be middle band Vento and we were referred to the case of **O'Donoghue v Redcar and Cleveland Borough Council** [2001] EWCA Civ 701 a Judgment of the Court of Appeal. This was in support of the claimant's contention that injury to feelings in a discriminatory dismissal case should not be reduced simply because the employer could subsequently have fairly and in a non discriminatory way dismissed the claimant. We were invited to accept that the claimant had been plainly upset during her evidence but she had not been exaggerating. Her depression had worsened. The claimant sought injury to feelings compesation in the amount of £10,000.

11.3. Respondent's submissions

Mr MacPhail said that this was not a case where there had been an ongoing lengthy discriminatory campaign or overt discrimination. It was just 'one off' decision. The claimant had not tendered any medical evidence about injury to feelings. Whilst not obliged to do so it's absence was a factor to take into account. The claimant's depression appeared to be a pre-existing condition. Nothing in the occupational report had referred to depression. It would appear in the fit notes that the claimant had produced for the benefits agency that there had only been reference to fibromyalgia, not stress or depression. Mr MacPhail considered that an appropriate level of compensation would be £1,500.

11.4. Our conclusions on injury to feelings compensation

Having provided ourselves with a copy of the **O'Donoghue** decision, we took into account what is said in paragraph 72 of that Judgment. The Court of Appeal found that an Employment Tribunal had been in error when it subtracted from the sum which they would otherwise have awarded, an unspecified amount in respect of their finding that in six months time the appellant would have been fairly dismissed in any event. Commenting on this Lord Justice Potter said:

"Such "dismissal" was a notional event which never took place. It was properly to be taken into account as a cut off point in respect of any claim based on future loss of earnings … However it could not be similarly regarded, nor indeed would it have similar effect, in respect of the claim for injury to feelings, which there is no reason to suppose it would have dispelled or superseded. The appellant's claim for injury to feelings was based on and fell to be quantified as, damages for the sense of anger, upset and humiliation arising from her loss of her job because of sex discrimination, in the form of victimisation for bringing her earlier (successful) claim. To make a discount from those damages in respect of a separate (notional) future event which might

have exacerbated, but would hardly have reduced her sense of outrage was unjustified."

Taking into account this guidance we agreed that it would not be appropriate to make the type of discount the respondent was suggesting. It was not possible to say that the dismissal was partially discriminatory when in fact it was wholly discriminatory.

We also took the view that it would not be equitable to hold the claimant to the £6,000 figure she had referred to in her schedule of loss. Routinely Tribunals rarely award simply on the basis of what a claimant has put into a schedule of loss.

We do not have medical evidence but that is not obligatory. The claimant strikes us as someone who is relatively undemonstrative of their emotions but we have taken into account the fairly obvious effect that would have been felt when an employee with over 28 years service was dismissed with, in our view, indecent haste (once the formal process had begun).

Whilst we agree with Mr MacPhail that this was a one off discriminatory act, losing one's employment after 28 years is a very serious 'one off'. In these circumstances we considered that the appropriate level of compensation was £9,000, together with the appropriate level of interest the calculation for which is confirmed in paragraph 7 of our Judgment.

Employment Judge Little

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Date 28th February 2018