Case Number: 2501059/2017

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Miss Tess Ward	**AND**	**Northumberland, Tyne & Wear NHS Foundation Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On:** **6, 7, 8 & 9 March,**
Deliberations: 14, 26 March 2018

Before: **Employment Judge Hargrove** **Members:** **Miss E Jennings**
Mr T A Denholm

Appearances

For the Claimant: **Mr Y Bakhsh**
For the Respondent: **Mr E Morgan of Counsel**

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is as follows:

1 The claimant's complaints of being subjected to detriments up to and including her dismissal because of something arising in consequence of the claimant's disability and of failures to make reasonable adjustments, and of unfair dismissal are well-founded.

2 If a fair procedure had been followed, and absent discrimination, there is a 50% chance that the claimant would have been fairly dismissed within 4 months .

3 The claimant's claim of a breach of contract in respect of notice pay is not well-founded.

4. Within 4 weeks of promulgation of this decision, the parties must notify the Tribunal whether a hearing for remedies is required. A telephone preliminary hearing may then be listed to make case management Orders for it.

REASONS

1 On 8 September 2017 the claimant submitted claims of disability discrimination, unfair dismissal and breach of contract to the Employment Tribunal having entered early conciliation on 11 July and received a certificate on 11 August 2017. The claimant had been employed by the respondent as an occupational therapist from February 2000 until her dismissal on 10 May 2017.

2 On 9 October 2017 the respondent submitted a response denying any act of discrimination and asserting that the claimant had been fairly dismissed for reasons related to capability, or some other substantial reason, namely the claimant's history of sickness absences and the effect upon the respondent's service and, if there was or were any discriminatory acts or failures to make reasonable adjustments, these were justified.

3 Despite two case management hearings no satisfactory agreed list of issues was submitted to the Employment Tribunal by either party. The hearing commenced on Tuesday, 6 March with a reading day, but having failed to agree a list of issues, the parties' representatives were ordered to attend at 9:30am and the claimant was ordered to submit a draft list of issues by 1:00pm; and the respondent was ordered to set out its position as to the claimant's impairment of depression. Fortunately the parties complied with these orders. There was also produced by the claimant a list of the claimant's sickness absences on an annual basis from May 2011 to 10 May 2017 (the date of the claimant's dismissal); and by counsel for the respondent, a chronology. This enabled the Tribunal to start the hearing on day 2. The claimant gave evidence first. The respondent called the following witnesses:-

3.1 Chloe Mann (CM), team manager of the Community Mental Health Team and the claimant's line manager from May 2015. She dismissed the claimant at a sickness absence meeting at stage 4 on 10 May 2017. She took over as the claimant's line manager from Liz Baker who no longer works for the respondent. CM managed a team of some 40 members based at the Molineux Centre in Newcastle upon Tyne. This consisted, in addition to up to two occupational therapists (OTs), of social workers, admin staff and other support staff. The team was responsible for the care of service users in the community many of whom had mental health problems, some complex and serious.

3.2 Terry Dunsford (TD), who was clinical lead occupational therapist responsible not only for clinical care at the Monnineux Centre in the east of the city, but also at another centre in the west of the city. She was the claimant's clinical and professional supervisor from September 2011 and retired in November 2016 but returned to work in a different capacity in January 2017 and provided further supervision of the claimant up to March 2017.

3.3 Suzanne Miller (SM), previously a senior manager of the respondent, who in that capacity chaired the hearing of the claimant's appeal against dismissal on 26 June 2017.

The respondent also relied upon the witness statement of Angela Faill, Head of Information Governance, setting out the alleged circumstances of the location in November 2017 of a written stage 1 sickness absence review/warning given to the claimant on 10 May 2011. This document had not been produced by the respondent during the disclosure process ordered by the Tribunal but had been produced in response to a subject access request made by the claimant in November 2017. It is a document of considerable importance in the case. In effect the claimant's representative Mr Bakhsh urges the Tribunal to find that it had been deliberately withheld by the respondent in the disclosure process or at least that it ought reasonably to have been found, the claimant having referred to its existence in an early stage of the chronology which follows.

At the conclusion of the evidence on Friday, 9 March there was insufficient time for closing oral submissions and the parties agreed to provide closing submissions and replies for the Employment Tribunal in time for deliberations, which took place on Wednesday, 14 and 26 March 2018. However, before adjourning on Friday, 9 March the Tribunal provided a revised list of issues to assist in the drafting of the closing submissions and it has not been submitted by either party that that list of issues is inaccurate or faulty.

4 We now set out the essential background facts in the course of which we will identify some important factual and legal issues which we need to decide to reach our conclusions:

4.1 **Disability**

The claimant has two impairments separately constituting disability; the first being ME/CFS which was first diagnosed in 2009 and of which the claimant informed the respondent. The respondent conceded in its response that this constituted a disability at all material times. The second was depression. The respondent did not make any concession of disability in that connection in the ET1, or until the claimant had disclosed her GP records and a disability impact statement in or around December 2017. Indeed no concession was made as to this disability until the first day of the hearing. The concession is that the claimant satisfied the relevant test in June 2016, and by 29 June 2016 the respondent was aware of it. No further dispute arises about disability.

4.2 **The respondent's sickness absence management policies (SAMP)**

There were two policies in force in the period 2013 up to and including the claimant's dismissal in May 2017. The first, ratified in agreement with the trade unions in **January 2013** was implemented in **March 2013** (see pages 59-88). The second was ratified and implemented in **February 2015**. We have considered all of the passages in both policies to which we have been referred but refer only to those parts particularly material to the result of this case. There are introductory passages contained in paragraph 1 of the first policy. In paragraph 2.2 headed *Purpose* it states:-

"Managers should review absence in order to

- Provide support and assistance wherever possible to employees.
- Develop plans to support employees back to work or identify other actions needed.
- Continue to promote healthy lifestyles and wellbeing of the workforce.
- Identify any environmental and work related problems to which high levels of sickness absence could be attributed and take action as needed.
- Deal effectively and sensitively with individual cases.
- Ensure attendance at work is acceptable and high standards of patient care/service delivery remain our priority".

2.3 On the occasions where sickness absences are considered to be at an acceptable levels appropriate action will be taken in accordance with this procedure using capability processes (see definition of absence, section 13 for trigger points) …

2.4 The Trusts recognises it has a duty of care for the health, safety and welfare of its employees. This includes being aware of and complying with its obligations under the health and safety legislation of the Equality Act 2010".

Under paragraph 12.1 headed *Sickness Absence and Disability*:-

"12.1 The Trust and its employees have a duty not to treat disabled staff less favourably than it they would treat non disabled staff either because of disability or for a reason arising in connection with the person's disability or, by applying a PCP which it applies to all employees alike but which puts a disabled person at a particular disadvantage when compared to Trust staff who do not share the disability in question. This includes a duty to make reasonable adjustments where the duty arises.

12.2 Potential adjustments will be fully considered, explored and any reasonable adjustments implemented before consideration is given to dismissing an employee due to ill health/capability in accordance with this policy and a discussion with a member of the case management team".

There is then a reference to guidance notes in Appendix 5 – "Equality Act 2010 Check List of Reasonable Adjustments". There are examples of some reasonable adjustments in paragraph 12.5. Then, under paragraph 13 – *Definition of absence*:-

"13.1 Short Term Sickness Absence

13.1.1 The Trust will monitor patterns of absence and the following will be used as trigger points to indicate when this policy should be followed:-

- Three periods of absence within a 12 month rolling period (this includes both long term and short term).

- Regular patterns of absence for example around weekends or days before and after bank holidays."

There are also provisions for return to work meetings to take place within one to two days of a return from sick leave. In paragraph 15 the policy identifies a three stage process; namely stages 1, 2 and 3 (see page 70). Warnings may be given at each level. At paragraph 15.5.4 it states:-

> "In cases where there appears to be an underlying health problem the manager may wish to take occupational health advice before agreeing the targets to be achieved with the member of staff".

Attached to the policy are a series of appendices under the heading of *Equality and diversity impact assessment screening tool*. At page 81 there is a reference to disabled people. Under the heading of *What positive and negative impacts do you think there may be for each equality target groups?* The following appears:-

> "Employers are not automatically obliged to disregard all disability related sickness absences but they must disregard some or all of the absences by way of an adjustment if this is reasonable. If an employer takes action against a disabled worker for disability related sickness absence this may amount to discrimination arising from disability".

As to the **March 2015** SAMP the following passages are or may be relevant:-

> "Paragraph 1.4 on page 93
>
> The Trust aims to trust absence sensitively but appropriately in order to achieve improved attendance. It recognises that although absence due to illness is inevitable such absences:-
>
> - Are disruptive.
> - Place additional work pressure on work colleagues.
> - May lead to additional costs being incurred.
> - Can impact on the quality of care given to service users".

Paragraph 4 of the policy contains at page 95 a definition of short term sickness:-

> "This is defined as three or more periods of sickness within a rolling 12 month period or a total of eight days or more within a 12 month period".

At paragraph 8.1.1 at page 100 it states:-

> "The Trust will monitor patterns of absence and the following will be used as trigger points to indicate when the policy should be followed:-
>
> - Three periods of sickness absence within a 12 month rolling period or eight days within a 12 month period.

- Regular patterns of absence for example around weekends or days before and after bank holidays".

At paragraph 9 related to disability related absence there is a similar statement of the duty at 9.1 and 9.2 to that contained in the earlier policy. Examples of reasonable adjustments in paragraph 9.4 are also identical. 9.5 is slightly different:-

> "If after discussion with the employee and full consideration of the recommendations of reasonable adjustments it is deemed that reasonable adjustments cannot be facilitated the capability process suitable alternative employment/termination appendix 1 should be implemented."

Appendix 1 at page 110 sets out a series of steps which the manager is intended to take in considering alternative employment or termination.

Paragraph 10 sets out the stage 1 to 4 process to be followed and contains reference to a flow chart at appendix 3 which is at page 114 of the bundle. The threshold for an employee to enter stage 1 at the attendance meeting is set out at paragraph 10.1: An employee who has either three absences due to sickness in a rolling 12 month period or a total of eight days absence due to sickness in a rolling 12 month period. The provisions relating to reasonable adjustments are not the same as those cited above in relation to the first policy at page 81. The relevant checklist for reasonable adjustments is at appendix 5, pages 117-120. There is no reference to the possibility of disregarding disability related sickness absence or disregarding some or all of the absences by way of an adjustment if this is reasonable. That may well be a change which had something to do with the judgment handed down by the EAT in the case of **Griffiths v The Secretary of State for Work and Pensions UKEAT/0372/13** on **15 May 2014**. We will however refer to that decision later in the judgment and it is to be noted that insofar as it is relevant its effects were overturned by the Court of Appeal in a judgment handed down on 10 December 2015 (**2015 EWCA Civ 1265**).

In summary there are substantial similarities between the trigger dates in both the 2013 and 2015 policies although the 2015 policy includes a further trigger of eight days absence in a rolling year. It is to be noted that neither policy applies to sickness absences which took place prior to 2013, for example in this case in 2011. We will infer, however, from other evidence including a letter from a then manager to the claimant in May 2011 that there were similar trigger points in force at that time.

4.3 On **10 May 2011** the claimant was issued with a first written warning at stage 1 at a stage 1 absence review meeting, following three periods totalling eight days of absence in **February, March and May 2011**. The then clinical manager, Steve Hopkins, wrote on the same day to confirm it – see pages 237-238. It was copied to the staff side representative Mr Cafferty and to Kath Elliott, the claimant's clinical lead. Materially the letter states:-

> "I explained at the meeting that you were issued with a first warning which will remain live on your file for 12 months. The warning was

> issued as you have had three further episodes of sickness within your review period as identified below".

There is a table which then identifies periods of sickness.

> "At the meeting we reviewed your occupational health report from your assessment on **30 December 2010**".

This document has not been produced to the Tribunal but we conclude that it must have contained a reference to the claimant having ME/CFS. The letter continues:-

> "Nevertheless the report states that you are fit to work with no adjustments but you are likely to have a higher than average sickness absence rate.
>
> In reviewing the targets set in the letter following our stage 1 sickness absence review meeting on 15 February 2011 "aiming for 100% attendance over next 12 months" it is clear that this target has not been met".

Then, at page 238:-

> "After a short adjournment I informed you that I would be issuing you with a first written warning as stated above. I also informed you that the new target for your sickness absence will be no more than five episodes of sickness absence in next 12 months". (Tribunal's emphasis).

It is clear from this letter that Mr Hopkins did not disregard the claimant's absences in giving the warning but did have regard to the claimant's higher than average sickness absence rates by adjusting the then policy trigger of three episodes to no more than five episodes. That was in our view an example of a reasonable adjustment.

4.4 It is significant that there is no record of any sickness absence review meetings at threshold stage 1 being triggered between **10 May 2011** and **9 April 2015**. The claimant's representative produced on day 1 a schedule of sickness absences from each year from 2011 using a start date of 10 May 2011. It records the number of sickness absences and also their length and the ascribed condition. The respondent does not dispute their record but there is a dispute as to which were referable to the claimant's then disability of ME/CFS, which is a matter which will be addressed by this Tribunal by reference to the Team Prevent occupational health reports which are in the bundle commencing in **2015**. There were five episodes of sickness absence in the year ending May 2014 (not more than five); and there are notes of two return to work meetings with the claimant's then line manager Kath Elliott on 29 July 2014 – page 239 in relation to two days absence in that month for gastrointestinal problems, and a statement that there were five episodes in that year. There is also a recognition that the claimant had a disability in relation to CFS. The second return to work interview form is dated 27 October 2014 recording an absence from 22 September to 28 September 2014 with a reference to dental problems (infection). Under the question *Does this individual have a sickness monitoring action plan?* it is stated: "Acknowledged that test unlikely to meet improved sickness levels due to LTC – (long term condition), to be discussed."

4.5 On **10 April 2015** TD (clinical lead) wrote to the claimant having conducted a stage 1 sickness review meeting with the claimant at the Molineux Centre, and also with the claimant's team manager Joan Stock in attendance. Kath Elliott had retired. The letter is incorrectly dated but the correct date is on the version at page 245(a). It is not in dispute that the claimant brought to that meeting a letter from her GP Dr Bailey dated **31 March 2015** which is at page 245. That letter states:-

> "I am writing in support of my patient (the claimant) who I believe is having her sickness record looked at. Donna has been a patient at our practice for a number of years. She has a long recurrent history of problems with low mood for which she has had help in previous years. In 2009 she was under the chronic fatigue service at Newcastle because of a new diagnosis of chronic fatigue which caused her problems with excessive tiredness and she had to have periods of time off work and then a graded return to work.
>
> Although her symptoms have improved from that period she still gets periods when she can suffer from excessive tiredness and can end up sleeping for up to 12 hours a day.
>
> In addition to this she gets migraines which occur on average at present about two a month and on the day they are at their worst she can be quite severely incapacitated and unable to work.
>
> More recently she has seen one of my colleagues who has diagnosed her as being perimenopausal and she is getting a lot of symptoms from this with hot flushes and this is also affecting her concentration and increasing her levels of tiredness. She is currently on antidepressants for her low mood which has also flared up.
>
> A combination of all these things has meant that she has had periods when she is excessively tired and being unable to work. However she is very keen to continue working and whenever possible has tried to get into work if her symptoms have abated".

Returning to TD's letter of 10 April 2015, she stated that she had reviewed the claimant's last occupational health report from Team Prevent dated 14 August 2014. Again that is not within the bundle of documents:-

> "As you have hit a number of triggers in the policy in relation to short term sickness five absences in the 12 month period, and persistent absence we agreed that a re-referral to Team Prevent would help to identify any underlying issues which may impact on your ability to carry out your role as a community OT in a busy CMHT environment or consider any reasonable adjustments which need to be considered … We agreed a plan that you would aim to have a two months period of full attendance and no sickness as a first step. This would be reviewed after two months at a stage 2 review".

4.6 It may be of some significance that the new revised policy had been approved from **February 2015**. TD's evidence is that she had a number of discussions with the claimant about her absences at around this time in

addition to **9 April**. More importantly TD claims that she told the claimant at that time that the three trigger target was being reimposed. The claimant claims that she did mention the extended no more than five trigger arrangement in place from 2011 but did not have the letter to confirm it. The claimant claims that she was not told that the five trigger target was removed until **June 2015**. The letter at page 241 does not mention the removal of the five trigger target. The letter did however refer to a two month period of full attendance and no sickness to be reviewed at a stage 2 meeting, then scheduled to take place on **17 June 2015**. In the meantime a referral was agreed to Team Prevent. For reasons that we will explain in greater detail later we do not accept that the claimant was expressly told that the relaxed five figure target was being removed but that was the effect of the giving of the warning on that date.

4.7 The team report was sent out on **22 April 2015** (see page 247). It is an important document. The maker, an occupational health physician, Ms or Dr Birkett, saw the claimant on that day. The letter states:-

> "As you are aware from the previous report from my colleague on 14 August 2014 Tess has chronic medical conditions and the advice with regard to these conditions remain the same. Tess is managing all her conditions well and is guided by medical input and advice. In addition to these she has recently suffered with an episode of low mood which is being managed and monitored by her GP and to be reviewed with him again in two weeks. Tess today is very keen to continue managing an increase control of her conditions and is keen to increase her levels of motivation and mood. She has seen a decrease in symptoms from her BPPV ear condition. She will continue to suffer with perimenopausal symptoms the same as any woman at or around her age but will eventually resolve over the normal length of time that this condition is know for. A side effect of this is that it may increase her tiredness and concentration.
>
> Psychosocial factors – Tess enjoys her work and people she meets, even though at times the workload can be heavy. She is keen to explore ways of working in regard to her conditions to help to reduce the impact they may have on work and indeed home life. Fitness to work – after discussion and in my professional opinion is fit for work. Whilst ultimately a legal decision in my opinion Tess does have medical conditions which may meet the scope of the Equality Act 2010 as they are long term and do significantly impact on day to day activity. It is reasonable to expect Tess to have a higher absence due to her conditions to that of somebody who does not suffer them. Tess has advised that she has had adjustments made to her working hours in the past and that these were successful in reducing her symptoms of tiredness and fatigue. A later start in a morning sounds to be beneficial with a later finish. (Tribunal's emphasis). This as reported by Tess reduces her tiredness and fatigue and this may then if able to be accommodated help her to engage in interests, hobbies and increased exercise out of working hours …".

4.8 The claimant had one day's absence on **18 May** with migraine which was the subject of a return to work interview on **20 May 2015**. On that day and **21 May 2015** there is an exchange of e-mails concerning the claimant's absences with Elaine Kelly of HR (see pages 251-254). The claimant relies upon these to demonstrate that the trigger extension had not yet been removed, contrary to the evidence given by TD. The claimant had given to CM an overview of her background and the things that had impacted on her sickness in the past at the meeting on 20 May. The first e-mail, timed at 15:09, states:-

> "Hi Elaine, Is there any chance you can attend a stage 2 meeting for a lady Tess Ward at 10:00am on 8th June? She is to bringing a union rep and there has been some issues raised with flexibility on sickness targets".

Elaine Kelly responded later that afternoon:-

> "Can you give me a little background in terms of when was her stage 1 meeting. Was it under old or new policy?
>
> Absences in the last 12 months and reasons.
>
> Details of the flexibility on sickness targets, what does this mean, are we referring to extending triggers etc?"

On the same day CM responded:-

> "I have attached the last sickness meeting at stage 1. It was under current policy with Liz Baker. She has since had a further absence from work only this week. Her next meeting was already planned for June where her supervisor Terry Dunsford will attend and she is also bringing union rep. I'm getting her Team Prevent report sent over asap and will forward these on. Yes the flexibility on sickness targets I meant extended triggers will get back with this asap".

That chain does not suggest that CM had removed the extended triggers. The e-mail chain continues at page 253. The claimant was again off work from **1 to 5 June** – with "gastro". There is a further exchange of e-mails between CM and Elaine Kelly on **8 June 2015**, see page 260. This was prefaced by a communication about the postponement of the stage 2 hearing originally scheduled for that date and which the claimant did not attend, apparently because she was taking her mother to hospital. Chloe Mann stated in the e-mail to Elaine Kelly:-

> "Just waiting to hear back from union rep as everyone else can attend. Just an update on the case Tess has had a further two periods of sickness in last three weeks so will be moving onto stage 3 following review. I spoke with Terry Dunsford her supervisor and she was previously allowed five sickness absences in 12 months rather than the usual three". (Tribunal's emphasis)

Elaine Kelly of occupational health responded on that day:-

> "As you know the increased triggers can no longer apply and she should have been told or about to be told at the meeting that these no longer apply". (Tribunal's emphasis).

This passage confirms our previous view that the claimant had definitely had the advantage of the relaxed trigger of five out of 12 rather than three out of 12 sickness absences in place from 2011. It also confirms our view that the claimant had not been told in April that this adjustment was to be removed but that Elaine Kelly was stating that the increased triggers were no longer to apply and that the claimant should have been told or be told at the upcoming meeting.

4.9 A further occupational health report was obtained from Team Prevent on **19 June 2015** (see pages 266-267):-

> "Donna as you are aware continues to suffer with diagnosed long term CFS. Chronic fatigue syndrome causes persistent fatigue (exhaustion) that effects everyday life and doesn't go away with sleep or rest. There is no cure so treatment aims to reduce the symptoms. Tess generally manages the symptoms of this condition by pacing strategies and life activity moderation. The symptoms of this condition will be exacerbated with stress; there is a chance that significant exacerbation can result in absence from work. Donna is looking to re-refer herself back to the CFS Society (there follows a website reference). Donna has also been diagnosed recently with premenopause and low mood both of which will add to the already existing fatigue that Donna suffers and can cause migraines for which she is being treated by prescribed medication … Donna is receiving counselling from Care First to help with management strategies for low mood and stress management. Donna reports that her stress levels have increased due to set targets and workload. Donna enjoys her work and manages her conditions as well as possible retaining presence in work as much as her conditions allow. *Fitness to work:* In my opinion Tess is fit to remain at work with the following recommendations if you are able to accommodate:
>
> - Working from home on days when Donna is suffering with increased symptoms and some debilitation would be beneficial as she is in a calm, quiet environment so improving concentration levels and productivity when in a busy office environment and not feeling well these can be disrupted.
> - Donna has discussed a reduction to working four days a week for a two months trial period. Again if you can accommodate to see if this has a beneficial effect on her overall health, physical and psychological. This obviously would then need reviewing with you to discuss the way forward.
> - Donna has discussed a working pattern that she has followed over the last five years which she has found very beneficial in not only helping manage her conditions but also in maintaining presence and productivity in work. A discussion between yourself and Donna regarding this continuing if it can be accommodated would be beneficial.

- Whilst ultimately a legal decision in my opinion Tess does have medical conditions which meet the definition of a disability within the scope of the Equality Act 2010 as they are long term and do significantly impact on day to day activities. It may be a reasonable adjustment to expect her to have more absence than another person without these conditions".

4.10 This document is in the view of the Tribunal a very significant document because it is to be looked at against the background that the claimant had had an adjustment in place, at least up to April 2015, from 2011 of the trigger points and which we accept that the claimant told Dr Birkett, and is referred to obliquely in the third bullet point above. There also is the comment in the last sentence in the fourth bullet point. In the meantime, the stage 2 hearing on **8 June** had been postponed due to the unavailability of various parties including the claimant's representative and the claimant on 26 June. There is a further relevant exchange of internal e-mails at pages 275-279. Tess Ward had copied the occupational health report to CM and TD on **24 June**. CM copied it to Elaine Kelly and Jennifer Lycett. Fiona Kilburn, one of the recipients, a senior occupational health manager responded by stating:-

> "Can you arrange a meeting with Tess and Terry (the claimant and TD) to discuss what she specifically requires and work out if we can meet these needs. I'm unsure what has been referred to as a previous five year working pattern but am concerned that this relates to the previous agreement that she could have five absences before hitting a flag. We have never been able to find any documented evidence that this was ever agreed."

Jennifer Lycett contributed on **25 June**:-

> "Case law passed last year confirmed that we are not automatically required to increase triggers for absence so if this is what Tess is referring to she will need to be informed that this has changed. I'm not saying we could not have it in place as a reasonable adjustment going forward but would be a good time to review this with her now".

Fiona Kilburn, service manager, responded to that suggestion:-

> "I would be keen for us not to continue with that arrangement as it appears to have done little to reduce sickness".

Jennifer Lycett's contribution was:-

> "It's probably something that will need to be raised with Team Prevent in the future – whilst I appreciate that it might not be assisting in the reduction of absence it demonstrates that we have made reasonable adjustments and even with those in place absence has continued – just thinking worst case scenario if the case (or any other like it) was to go all the way".

4.11 We consider that the reference to "new case law" was a reference to the **EAT** judgment in **Griffiths v The DWP** handed down on **15 May 2014** to

which earlier reference has been made. This case concerned an appeal by an employee of disability discrimination for failure to make reasonable adjustments. She had a continuous period of sickness absence of 62 days which her GP diagnosed as being for "post viral fatigue". She was referred to a consultant who confirmed the diagnosis and on her return to work was referred for occupational health assessment. The assessment report confirmed that the claimant was not only suffering from viral fatigue syndrome but also from fibromyalgia causing widespread pain and extreme tiredness. The occupational health assessment was that she was disabled for the purposes of the Act. Under this employer's attendance policy her absence had triggered a written improvement warning pursuant to clause 3.25. She was issued with a warning outlining the potential serious consequences and that they might include dismissal or demotion. A grievance was lodged against the issue of the warning citing her disability and seeking two reasonable adjustments. First, that the absence period should be disregarded for the purposes of the policy and the warning withdrawn, and secondly, that the number of days of absence which would activate the usual attendance policy in the future, should be increased. The trigger in that case was "eight working days of sickness absence in any rolling 12 months … but may be increased as a reasonable adjustment if you are disabled". The grievance was rejected and neither of the requested adjustments were made, and an appeal was pursued, again unsuccessfully. The claimant then brought a claim to the Tribunal. By a majority the Employment Tribunal decided that there had been no breach of the employer's duty to make reasonable adjustments and accordingly, by a majority, the claim failed. The issue which essentially arose which is material to the present case was whether or not it could be a reasonable adjustment to adjust the trigger points. The EAT's decision on this narrow aspect of the case is set out at paragraph 33 of the Judgment:-

> "Far from approaching the matter contrary to domestic judicial authority we conclude that the majority of the ET was faithfully applying it as Mr Leach (counsel for the respondent) rightly submitted the cases show that the proper comparator in Ms Griffiths' case is a non disabled person absent for sickness reasons for the same amount of time but not for disability related sickness. If a claimant is treated at least as well as such comparators she/he cannot be at a disadvantage let alone a substantial disadvantage".

This reasoning and decision was firmly overturned by the Court of Appeal in a judgment reported on **10 December 2015**, but about which there would have been some publicity in legal journals. The judgment with which the other two Lord Justices agreed is that of Lord Justice Elias. See in particular at paragraph 41:-

> "41 Was the duty (to make reasonable adjustments) engaged?
>
> In order to engage the duty there must be a PCP which substantially disadvantages the appellant when compared with a non disabled person. In this case the PCP was in the words of the

ET a requirement to attend work at a certain level in order to avoid receiving warnings and a possible dismissal.

42 Both the ET and the EAT considered that the policy applied equally to all in circumstances which gave rise to no disadvantage. Indeed to the extent that the policy permitted a more lenient application of the principles to disabled employees by permitting them longer periods of absence before the imposition of sanctions is considered. The policy was potentially more favourable to disabled employees".

There then followed at paragraph 43 references of two EAT judgments in **The Royal Bank of Scotland v Ashton** and **Newham 6th Form College v Sanders**. Continuing at paragraph 46 Lord Justice Elias states:-

"Mr Leach, counsel for the employer, relies heavily on this analysis. There are in my view two assumptions behind the EAT's reasoning both of which I respectfully consider to be incorrect. The first is that the relevant PCP was the general policy itself. If that is indeed the correct formulation of the PCP then the conclusion that the disabled are not disadvantaged by the policy itself is inevitable given the fact that special allowances can be made for them. It may be that this was the PCP relied upon in the **Ashton** case. But in my view formulating the PCP in that way fails to encapsulate why a sickness absence policy may in certain circumstances adversely affect disabled workers – or at least those whose disability leads to absences from work. Moreover, logically it means that there will be no discrimination even where an employer fails to modify the policy in any particular case. The mere existence of a discretion to modify the policy in the disabled worker's favour would prevent discrimination arising even though the discretion is not in fact exercised and the failure to exercise it has placed the disabled person at a substantial disadvantage.

47 In my judgment the appropriate formulation of the relevant PCP in a case of this kind was in essence how the ET framed it in this case:- The employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That is the provision breach of which may end in warnings and ultimately dismissal. Once the relevant PCP is formulated in that way in my judgment it is clear that the minority member was right to say that a disabled employee whose disability increases the likelihood of absence from work on health grounds is disadvantaged in more than a minor or trivial way. Whilst it is no doubt true that both disabled and able bodied alike will, to a greater or lesser extent suffer stress and anxiety if they are ill in circumstances which may lead to disciplinary sanctions, the risk of this occurring is obviously greater for that group of disabled workers whose disability results in more frequent, and perhaps longer absences. They will find it more difficult to comply with the requirement relating to absenteeism and therefore will be disadvantaged by it".

At paragraph 63 following analysis of the arguments concerning the House of Lords decision in **Malcolm** it is stated:-

> "For these reasons I accept the appellant's submissions that both the majority in the ET and the EAT were wrong to hold that the section 20 duty was not engaged simply because the policy applied equally to everyone. The duty arises once there is evidence that the arrangement placed the disabled person at a substantial disadvantage because of a disability which in my judgment was unarguably the position here".

4.12 The stage 2 attendance meeting eventually took place on **23 July** chaired by CM. There are no notes of that meeting but the outcome letter is at page 286-287. We find as a fact, although it is not expressly set out in that letter, that the claimant was informed at the meeting that the relaxed 5/12 figure was removed. We can detect the decision making process that was being made during the e-mail exchanges set out above. The respondent may have been under the impression that there was no duty to make the kind of adjustment which the claimant was seeking to continue and about which she relies as a substantial part of her case. The letter refers to three specified absences namely those on **18 May, 1 June to 5 June and 18 June to 23 June 2015**. The letter does however set out other adjustments following the latest Team Prevent report of **26 June.** These were identified as:

- Reducing your hours of work to 30 hours over a four day period with a trial for eight weeks could be reviewed earlier if necessary.
- Flexibility with working hours using mobile kit working from home prior to or following assessments if work is in that area and also basing yourself at other NTW sites.
- Regular supervision from TD to ensure adequate support is in place clinically.
- Management supervision bi-monthly from myself.

The claimant was however made the subject of a target to maintain 100% attendance during this period to be followed at the end of the two month monitoring period with a stage 3 review. If the claimant's attendance had improved she was to be monitored at stage 3 for a period of 18 months with the triggers remaining of three episodes or eight days absence in any rolling 12 month period. If there was no improvement during the 12 month period there would be a further two month monitoring period met with the final stage following this.

4.13 The claimant relies upon the actions of the respondent in instituting stage 2 of the policy in **April 2015** as constituting a detriment in respect of the non continuation of the extended trigger. The claimant relies upon the actions of the respondent at the meeting on **23 July** as being an act of discrimination arising from something to do with her disability by the removal of a reasonable adjustment; and the additional detriment of progression with the SAMP policy towards to conclusion which could include dismissal. She also relies upon it as a failure to make a reasonable adjustment under the new policy.

The respondent however relies upon the adjustments notified at that meeting as constituting all of the adjustments which it would have been reasonable to have made.

4.14 On **19 August 2015** (page 296) CM wrote to the claimant notifying her of a stage 3 attendance meeting to take place on **24 September 2015** in line with the Trust's SAMP. The meeting was to review a formal two month monitoring period following the stage 2 meeting on 23 July and ending on 23 September. The outcome of that meeting at stage 3 was notified in a letter from CM dated **24 September 2015** at page 300. The claimant was represented. It was noted that the claimant had not achieved 100% attendance because she had been off work for **one day on 20 August** with gastrointestinal problems. It was agreed that the following adjustments would continue:-

- Ongoing reduction of your working hours to 30 hours over a four day period.
- Flexibility with working hours using mobile kit working from home.
- Regular supervision from TD.
- Ongoing support from myself and other members of the leadership team.
- Ongoing review of workload to ensure that this is manageable within working hours.

A further two month period of 100% attendance was expected at the end of which there would be a meeting at the final stage to review attendance which, if improved, would be monitored at the final stage for a period of 24 months with the usual triggers. If there was no improvement during that period the claimant was notified that a possible outcome was the termination of her employment. There were regular supervisions with TD to which we have been referred. The other adjustments insofar as they were adjustments including working from home and the reduced hours continued.

4.15 There was then a final stage attendance meeting on **24 November 2015** the outcome of which was notified by CM in a letter dated **26 November** at pages 308-309. The two hearings on 24 September 2015 and 24 November 2016 are also identified by the claimant as constituting acts of detriment arising from something to do with her disability and a continuing failure to make a reasonable adjustment. There was a continuation of the normal trigger of three episodes of absence or a total of eight days over a rolling 12 month period resulting in, if the policy continued to be breached ,a final stage meeting would be reconvened at which a possible outcome was the termination of the employment. Between **24 September and 24 November 2015** the claimant had no further absences from work. However there were further absences; from **17 December to 24 December 2015** – chest problems; on **31 December** with laryngitis; and from **3 February to 14 February 2016** with a fracture caused in a car accident. The respondent via CM wrote to the claimant on **18 March 2016**

notifying her of a reconvened final stage (stage 4) attendance meeting to take place on 1 April.

4.16 In the meantime there was a further reference to Team Prevent and a report was obtained from Dr Wong, consultant occupational physician, dated **18 February 2016** (see page 330-331). The report noted under the current position the claimant's recent absences noted above and continued:-

> "Unfortunately there would not have been any adjustments that would have reduced the sickness absence recently. I am pleased to hear however that she has recovered and is now back at work".

Under *Future plans* he stated:-

> "In relation to continued the above that you have provided are likely to be unofficial and as indicated above continue flexibility within her working schedule (home working if necessary) would be beneficial. Due to her underlying health conditions she may take slightly longer than expected to carry out some duties, especially if some duties require her to use equipment to complete. Please do take into account on reviewing her workload.
>
> In relation to the most recent absences please do take into that although her underlying health condition is unlikely to cause a chest infection or road traffic accident, her underlying health condition may mean that she will take slightly longer than expected to recover, compared to an individual who does not have this underlying health condition. Some employers are also able to take into account any absences that may be related to her underlying health condition to be considered as a long term chronic condition".

He noted that the claimant had underlying health conditions likely to fall under the remit of the Equality Act. He also suggested that the respondent should consider formally addressing any areas of stress which the claimant had raised within the workplace with a stress risk assessment.

4.17 On **1 April 2016** the second final stage reconvened attendance meeting took place. The outcome was notified on **4 April 2016**, at pages 359-362. Chloe Mann made reference to the latest Team Prevent report and the recommendation for a stress risk assessment and at page 360 some specific outcomes were notified. In addition the claimant was given permission to take time out to attend an appointment for her bloods to be taken to assist with a referral back to the chronic fatigue team. It is to be noted that the letter confirms that the claimant had returned to working 37½ hours per week since **January 2016**. There was to be a further review in June. It is to be noted that in that letter, in addition to referring to the three absences between 17 December and 14 February 2016, also listed a day's absence on **17 March 2016** for gastrointestinal problems. The letter continued:-

> "We discussed that none of the above absences related to your long term health conditions. You feel that there is nothing that could have prevented you being absent during these periods".

That statement is contentious. There is a letter dated **18 May 2016** from CM to the claimant setting out events at a meeting on 16 May setting out some steps to be taken in regard to the claimant's workplace. On **7 June** the claimant was invited to a second reconvened final stage attendance meeting on **13 June**. The notes of that meeting are at pages 393-394. On **15 June 2016** the claimant went off work with depression and did not return to work until **26 August 2016**. This was a total of 73 days. The claimant however attended the resumed final stage attendance meeting on **13 June** and it is described in a letter at pages 406-410. On **29 June** the claimant was again referred for the third or fourth time in this chronology to Team Prevent. The material parts of the report are at pages 413-414. Under *Background* the RGN states:-

> "I understand from your referral dated 17 June 2016 that Tess is absent from work with depression. She has other health issues and has workplace adjustment in place. She is subject to stage 4 of the attendance policy and is very stressed and anxious about this and her future job security. Advice is sought regarding her fitness for workplace support and counselling".
>
> Under *Assessment* Tess reports the following medical conditions:-

- Chronic fatigue syndrome diagnosed in 2005. She states she strives to manage this with pacing but struggles with it when at work and relates this to the workload primarily relating to documentation.
- Recurrent back pain exacerbated by a road traffic accident in February 2016. She had physio advice by telephone but had not received the documented exercise. We have chased this and Tess now has the appropriate information and states it had gone into her junk mail.

  Right wrist pain persistent and recurring. Tess states this is a repetitive strain injury. She had had cortisone injection on a number of occasions and reports today the pain is settled. Left wrist pain secondary to fractured wrist in childhood … Tess states her current absence is due to depression. She has had low mood often on over the years and has had counselling twice. She was diagnosed with depression in May 2016. She feels this is being exacerbated by anxiety and relates this to the pressure of the attendance policy and worrying about losing her job. Whilst ultimately a legal decision in my opinion the conditions will meet the definition of a disability within the scope of the Equality Act 2010 because they are long term".

On the following page at 414, third paragraph:-

> "Tess has chronic long term medical conditions. She will experience exacerbation of these despite treatment and she will have more absence than another person without the condition. Her absence record is demonstrating this and Tess states she cannot achieve the expectation set out for her and certainly from the information available I think there have been absences this year

she could not have avoided. In my opinion Tess is currently not fit to work due to the impact of her symptoms … I request management looks at what reasonable adjustment can be put in place to support her return to work and what can be sustained to support her going forward. This may include reviewing her absence tolerance. Reducing her caseload to 80% of another person without her condition. Sustaining flexible working including home working".

4.18 It is from that date and the receipt of that report that the respondent has recently made the concession in relation to depression as a disability. On **28 November 2016** CM wrote again to the claimant (see pages 475-476) inviting her to a further reconvened final stage attendance meeting on **5 December**. The letter recounted all of the sickness absences since December 2015 including a long period of absence with depression between 15 June and 26 August and adding a further absence of one day for headache/migraine on **27 September**. The outcome of the meeting, which took place on **6 December** is set out in a letter dated **12 December** (pages 477-478). The letter sets out at page 477 the adjustments claimed to have been made following advice from occupational health. It was noted the claimant had again reduced her working hours to 30 per week following a phased return; that her caseload was capped at 80% equating to around 12 face to face contacts per week; that her role had been changed to a generic occupational therapist within the team and that Terry Dunsford having retired someone else had taken over as her clinical supervisor. The claimant was notified of a further period of monitoring of 24 hours with the same 3/12 targets and a reconvened final stage attendance meeting to be arranged. Once one was reconvened she was notified that one possible outcome of the meeting could be the termination of her employment.

4.19 The next and final reconvened stage 4 meeting in fact took place on **10 May 2017**. It resulted in the claimant's instant dismissal. Since the previous reconvened stage 4 meeting on 6 December 2016 there had been the following absences recorded:-

(i) **10 January** – one day vomiting;

(ii) **17 January to 3 February** (14 working days) – chest infection (in respect of which the claimant e-mailed her line manager at the outset stating at page 488, "I have a chest infection and my sleep has been very poor last night due to coughing therefore my CFS is affected due to insufficient sleep and compromised immune system". She offered to work from home but this was declined on the basis that if she was unwell she should not be working at all (see e-mail chain at page 488); and

(iii) **25/26 April** (2 days) – this was initially recorded as unknown causes/unspecified according to the respondent's letter of 26 April at page 515. However the return to work meeting notes at page 514D states, "ME", and there is a handwritten note attached which refers to a "cold and ME".

Also prior to the final final stage meeting there were a series of e-mails between the claimant and CM including on **14 February 2017** (page 496) where the claimant says she was "really struggling with my CFS at the moment" and ascribing number of reasons including a virus. She had "all the symptoms of a flare up". She had managed to visit the office that day and had been able to complete one appointment but had then needed a two hour break to sleep … "will continue to make appointments but I think currently a couple per day is going to be manageable; I will need to work from home as much as possible to cut down on unnecessary journeys and to enable me to take rest breaks …". CM responded sympathetically on **15 February 2017** (page 498).

On **28 March** the claimant requested by e-mail that she be re-referred for counselling.

There was a **final Team First report obtained dated 20 April** (see pages 509-511). It may be that the online referral form is that at page 514A (although it has the handwritten date "21 April 2017" on the top).

There is an entry at page 514B, "Previous multiple referrals to Team Prevent. Under chronic fatigue specialist and treat by GP for depression". CM also writes, "Also I would like to ask are the following absences related to Tess' underlying conditions?".(Tribunal's emphasis)

There is then a reference to **10 January** absence, gastrointestinal, and the **17 January to 3 February** absence, chest and respiratory.

We describe the contents of the referral outcome report in some detail. The reporter had ticked the box *Outcome*, "Fit for work: permanent adjustments recommended …". Under the paragraph headed *Background and reason for referral* (page 510) she states:-

> "I understand from your referral that Tess is stage 4 of the sickness policy. Tess is requesting referral back for counselling. You have asked if the following absences are related to Tess' underlying conditions" [she then refers to the two absences above] and also for further advice as outlined in the specific questions below".

There then follows under the paragraph *Assessment and opinions*:-

> "As you know Tess has chronic fatigue syndrome and ME diagnosed in 2005. Tess reports fluctuating symptoms of fatigue, migraines, headaches, blurred vision, brain fog, loss of coordination, susceptibility to other illnesses and disturbed sleep pattern. She also has a past history of depression. Tess states that she has found that stress has been a significant exacerbate of her symptoms and she has worked hard to achieve better management of this with compliance with active medical treatment, self care strategies and self focus at group and online course. Tess reports today that her mood is now settled and she no longer requires medication. She states that this has been greatly helped by workplace management support and adjustments including reduced hours and reduced caseload. She is looking at further ways to maximise her general health and wellbeing and with that I have referred her to Care First to access therapy. Tess reports

> anxiety about work relating to the attendance management policy and I note from your referral she has recently had two further absences which you have asked if they are directly linked to her underlying condition. It is difficult to state categorically whether these were directly related but management should consider that Tess has a medical diagnosis which is considered to be linked with immune system problems hence it is likely that she may have greater susceptibility to other opportunistic conditions and have more absence than another person without the underlying condition".

Under the question *Is there a need for the employee to be absent from work to attend regular medical appointments?* the reporter responded:-

> "Tess has a chronic condition which may flare up in the future. She will need to attend ongoing medical appointments and reviews. Some of these may fall in her work time. Tess may have future absence. It is likely this will be greater than another person without the underlying condition".

Question 3 was *Should this member of staff be considered for any employment changes eg redeployment?* The reporter responded:-

> "In my opinion with management support Tess is fit to undertake her current role.
>
> As the condition is likely to fall within the scope of the Equality Act 2010 management has a duty to consider reasonable adjustments to support her at work and during a relapse. I therefore suggest management completes with her a tailored adjustment plan to identify the appropriate reasonable adjustments. I have attached a link to the employer's disability form template for you to consider with Tess".

Under *Recommendations and summary* she continues:-

> "Tess has a chronic condition which may flare up in the future. She is currently at work and undertaking her work activities with management support. I recommend management completes a tailored adjustment plan to identify the reasonable adjustments to support her going forward". (Tribunal's emphases above),

No evidence has been put before the Tribunal that any tailored adjustment plan was ever prepared or discussed with the claimant between the date of this report and her dismissal on 10 May.

4.20.There are no notes of the meeting on **10 May** but CM's outcome letter of **17 May** at page 520 onwards gives detailed material, including an updated list of absences; and list of adjustments made. The most recent Team First report was referred to. It is to be noted that the claimant's representative made the following reference at page 521:-

> "Your union representative Carol explained that although the policy detailed the triggers as three episodes in 12 months the previous policy stated that for any staff with a disability the trigger should be five episodes in 12 months. Carol advised that she had recently

> undertaken disability absence training and employment law stated that for anyone with a disability the triggers should be five episodes in 12. You advise that you did not feel that you would have progressed through the policy to stage 4 if the triggers had been five episodes in 12 months".

Further in the letter at page 522, CM stated that she had taken into consideration the claimant's comments about increasing the absence triggers to five episodes in 12 months but noted that "your absences over the last few years has been five episodes in 12 months or higher" The claimant's dismissal was confirmed with immediate effect but she was to be paid in lieu of notice.

4.21 The claimant appealed by letter of **22 May** (pages 524-527) in which she raised a number of points concerning her absences and referred to the previous flexibility on sickness triggers of five episodes in 12 months.

The appeal hearing before SM took place on **26 June**. CM responded to the claimant's appeal letter in a management statement of case (see pages 528-532). She identified the respondent's adjustments said to be reasonable in paragraph 5. She gave a summary of the absences and a reference to the latest occupational health report in paragraph 7; the matters she took into account in deciding to dismiss in paragraph 8 and the following reference to the claimant's claim of extended triggers in paragraph 14 on page 530:-

> "I am unable to find evidence that Tess was previously provided with extended triggers for her absence five in 12 months and on review of her absences over the past two years Tess has hit five or more triggers in each 12 month period. Therefore if the five triggers in 12 months had been in place this would not have prevented Tess from continuing through the sickness policy".

We do not regard the first phrase in that sentence as being entirely truthful since CM was aware from e-mails with TD that those relaxed triggers had in fact been in place for some considerable time. The claimant challenged these assertions in detail in her response to the management statement of case at pages 536-540. See in particular at 538-539:-

> "Chloe Mann states that she has been unable to find any evidence that Tess was previously provided with extended triggers of absence of five in 12 months. Am I to take from this statement that I am being accused of fabricating this information? I find this comment to be defamatory in nature.
>
> Again had I not been denied access to electronically stored information I may have been able to obtain an electronic communication in which this agreement is referred to (I will continue to pursue access and present further evidence at the hearing on 26 June if I am able). It was agreed approximately 2010 with my manager at that time Mr Steve Hopkins and Unison representative Mr Peter Cafferty".

She went on to state that she had requested a search of Unison records but that as she had not received the management case admission until 17

June the response to be given by 20 June – one working day, she had had insufficient time to investigate or prepare fully.

There are full notes of the appeal hearing **on 26 June** where the claimant was represented by a trade union representative, at pages 566-572. There are specific references to the claimant's claimed extended triggers at points 8-10, 62-67, see also point 150.

SM's outcome letter rejecting the appeal is dated **14 July** (see pages 594-597). We refer in particular to the passage on page 594 under the heading *Policy change*:-

> "Chloe advised she was unable to find evidence that you were previously provided with extended triggers for your absence five in 12 months and on review of your absences over the past two years you have hit five or more triggers in each 12 month period. Therefore if the five triggers in 12 months had been in place this would not have prevented you from continuing through the sickness policy".

That concludes a summary of the salient facts identifying at least some of the issues.

5 We now set out the list of issues identified at the end of the evidence by the Tribunal and on which the parties based their closing submissions and replies:-

5.1 Has the claimant proved evidence from which the Tribunal could reasonably conclude that the act of removing or not continuing the application to the claimant of an extended attendance target of no more than five absences in a rolling 12 months in the period April to June 2015 constitute an act of unfavourable treatment/detriment because of something arising in consequence of the claimant's then disability of CFS?

5.2 Did the application of the target of three absences in a rolling 12 month period commencing April to June 2015 put the claimant then and thereafter at a substantial disadvantage because of her then disability compared to someone who was not disabled? Was there a failure to make reasonable adjustments by not restoring the relaxed trigger or did the respondent make such other adjustments as were cumulatively reasonable to alleviate the disadvantage to the claimant?

5.3 Did any continuing failures to make reasonable adjustments and/or any further application of the 2015 SAMP thereafter constitute acts of unfavourable treatment/detriment to the claimant arising from something to do with her disability including allegations 3-9 in the claimant's list of issues?

5.4 If yes, has the respondent proved that its actions had nothing to do with disability or does the respondent show that the treatment of the claimant was a proportionate means of achieving a legitimate aim?

5.5 Was the claimant's dismissal for capability reasons/some other substantial reason fair or unfair?

<u>Time points</u>

5.6 Was the conduct of the respondent conduct extending over a period or were the acts or omissions separate acts not constituting part of a series such that the claim in question was brought outside the period of three months from the date of the act or the last of a series of acts?

5.7 If yes, would it be just and equitable to extend time for any period?

5.8 If the dismissal is found to be to any extend unfair or an act of less favourable treatment contrary to section 15 of the Equality Act 2010 or resulting from a failure to make a reasonable adjustment, what are the chances that, if a fair procedure had been followed, and absent discrimination, the claimant would have been dismissed in any event and if so when?

5.9 Was the claimant entitled to notice pay calculated at the rate of 37.5 hours per week or only at 30 hours per week?

6 **The relevant statutory provisions**

6.1 **Discrimination in relation to disability**

Section 15 of the Equality Act 2010 – Discrimination arising from disability – provides:-

> "(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".

Section 20 of the Act – Duty to make adjustments – materially provides:-

> "(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 (PCP) 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".

Paragraph 20 in schedule 8 to the Act – Lack of knowledge of disability etc – provides:-

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

Section 39:-

> "(2) An employer A must not discriminate against an employee of A's (B) –
>
> …
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment.
>
> …
>
> (5) A duty to make reasonable adjustments applies to an employer".

Section 123 – Time limits – materially provides:-

> "(1) Proceedings on a complaint within section 120 may not be brought after the end of –
>
> (a) the period of three months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section –
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it".

Section 136 – Burden of proof – materially provides:-

> "(2) If there are facts from which the court could decide in the absence of any other explanation that a person A contravened the provision concerned the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

6.2 **Unfair dismissal**

Section 98 of the Employment Rights Act 1996 provides materially as follows:-

> "(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 performing work of the kind which he was employed by the employer to do.

(3) In subsection (2)(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".

7 Conclusions

7.1 We have considered in our deliberations the very lengthy written submissions and replies. We do not repeat them here, however our reasons will incorporate references to the principal points raised by the parties in their written submissions.

7.2 Allegations 1 and 2

These relate to the events of **April to June 2015**. We take these allegations together because they are clearly associated. However they include consideration of whether the respondent made such other adjustments as were reasonable not only in that period but also during the succeeding period leading up to and including the dismissal.

We have already found that Mr Hopkins in 2011 did implement a relaxed target of no more than five episodes (not only five) in 12 months. The letter at page 237 confirms that fact. We additionally find that that arrangement remained in force at least until April 2015 when the respondent first imposed the three episodes in 12 months under the policy then in force. In fact the three episodes in 12 months policy must have been in force in 2011. We find that management, in particular CM, was aware of the relaxed target being applied to the claimant, from the claimant herself in or about April 2015, and it was corroborated by TD. We are asked by Mr Bakhsh to conclude that documentary evidence, at least in the form of the letter of 10 May 2011, must have been available to management in 2015 and either not looked for, or more probably suppressed or ignored. It was certainly not disclosed to the claimant during the normal disclosure process. We can well understand why such an allegation should be made in the light of the claimant's insistence from an early stage in the process that there was a written record; and in fact that it was only found in late 2017 when she made a subject access

request. We regard this letter as being of great importance to the outcome of the case. We regard the circumstances of its non disclosure as being suspicious but we are not satisfied that it was deliberately suppressed even in circumstances where one would have expected such a document to be retained on the claimant's personal file in hard copy form. It does no credit to the respondent that it should be suggested that the claimant had concealed it for some reason in a personal file to which management did not have access. Despite acquitting the respondent of such serious impropriety however we are satisfied that despite knowing from the reliable source that the claimant had had in place what amounted to an adjustment, the respondent, in particular CM, chose to give it little credence or weight because there was apparently no documentary evidence to support it. This, spuriously in our view, was used as a part of the reasoning for not continuing with the adjustment and, indeed removing it.

We have however had to step back to consider whether there was any PCP applied to the claimant which put the claimant at a disadvantage as a disabled person. It is clear to us that the PCP which was applied to the claimant from 2011, and continued to be applied in an even more restricted form from April 2015 was that the claimant "must maintain a certain level of attendance at work in order not to be subject to a risk of disciplinary sanctions. That is the provision breach of which may end in warnings and ultimately dismissal …". See the judgment of Lord Justice Elias in **Griffiths** at paragraph 47. See also the following passage at paragraph 58:-

> "Therefore the whole purpose of the section 20 duty is to require the employer to take steps as may be reasonable, treating the disabled differently than a non disabled would be treated, in order to remove the disadvantage. The fact that the able bodied are also to some extent disadvantaged by the rule is irrelevant".

It is not the SAMP in general which generated the disadvantage to the claimant but the application of the targets under the various versions of the SAMP to the claimant's various sickness absences. That also involves consideration of the next issue which is whether the application of the targets put her at a disadvantage because of her disability or because of something arising from her disability, under section 15 of the Act. Assistence in the assessment of the latter test – something arising in consequence of disability - is set out in the Code of Practice on Employment issued by the HRC in 2011, paragraphs 5.8 to 5.10:-

> "5.8 The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.
>
> 5.9 The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to

> walk unaided or inability to use certain work equipment. Others may not be obvious for example having to follow a restricted diet".

There is then an example of a woman disciplined for losing her temper at work. The behaviour was a result of severe pain caused by cancer of which her employer was aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability namely her loss of temper. There is a connection between the something (that is the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker.

Here the contents of the various Team Prevent reports have to be considered. That of **2011** is not in the bundle but we know from the letter of 10 May of that year that the claimant was likely to have a higher than average sickness absence rate. That of **22 April 2015**, at page 247, stated:-

> "It is reasonable to expect Tess to have higher absence due to her conditions to that of someone who does not suffer them".

That of **15 June 2015** inter alia states:-

> "Whilst ultimately a legal decision, in my opinion Tess does have medical conditions which meet the definition of a disability within the scope of the Equality Act 2010 as they are long term and do significantly impact on day to day activities. It may be a reasonable adjustment to expect her to have more absence than another person without these conditions". (See page 267).

We have to consider now the nature of the reasons for her various absences from **2011 to 2017**, using the helpful document compiled by Mr Bakhsh. It is a matter of record that some of the medical reasons ascribed do not obviously relate to the disability of CFS, or from **June 2016** onwards to CFS or depression. There is a fundamental issue here between the parties. The claimant asserts that all of them were disability related except "fracture" – incurred in a car crash for which she was absent from **3 to 14 February 2016**; dental absence, **22-28 September 2014;** back pain**, 18-23 June 2016.** The respondent's case is that very few of the absences were in fact disability related. The Team Prevent reports however, particularly during the later period, contain information which in our view does show a connection between many of the absences and the claimant's disabilities – see the report of Dr Wong, consultant physician at page 331 (date):-

> "In relation to her most recent absences please do take into account that although her underlying health condition is unlikely to cause a chest infection or a road traffic accident, her underlying health condition may mean she will take longer than expected to recover, compared to an individual who does not have this underlying health condition. Some employers are also able to take

> into account any absences that may be related to her underlying health condition to be considered as a long term chronic condition".

In this connection the final Team Prevent report of **20 April 2017** is of particular importance. We have cited this report in our chronology above and we repeat the following:-

> "Tess reports anxiety about work relating to the attendance management policy and I note from your referral she has recently had two further absences (this may be a reference to migraine, vomiting or chest infection) which you have asked if they are directly related to her underlying condition. As it is difficult to state categorically whether these were directly related management should consider that Tess has a medical diagnosis which is considered to be linked with her immune system problems hence it is likely she may have a greater susceptibility to other opportunistic conditions and have more absence than another person without the underlying condition … Tess has a chronic condition which may flare up in the future. She will need to attend medical appointments and reviews, some of these may fall in work time. Tess may have future absence. It is likely this will be greater than another person without her underlying condition".

It is noteworthy in connection with another issue we have to decide that attached to this report was a tailored adjustment plan which the report suggested management completes.

7.4 In summary, we conclude that at least most of the absences were disability related, either directly, or, indirectly because of CFS the claimant had greater susceptibility to other illnesses or sicknesses, and the absences were likely to be longer. The sicknesses were likely to increase her tiredness which was itself a side effect of the CFS. There is no medical evidence directly linking the claimant's depression to CFS or the respondent's treatment of her, nor is there evidence linking the claimant's increased anxiety and stress, which may itself be linked to the depression, to the imposition of the stricter absence targets. We have significantly <u>not</u> seen the respondent's referral forms for the earlier Team Prevent reports, but it does not appear that the respondent ever made express enquiries of Team Prevent as to whether the absences were in some way disability related until the last report of 20 April 2017. If they had done so, it is probable that they would have known of the indirect links between CFS and her absences. What is clear is that the respondent was told that her underlying condition was likely to lead to increased sickness absences from the start.

The next issue was whether the adjustment which the claimant was seeking to be continued in 2015 qualifies as an adjustment which it would have been reasonable to have made or continued. The appropriate test is covered in paragraph 65-66 of the judgment of Lord Justice Elias J in **<u>Griffiths</u>**:-

> "65 In my judgment there is no reason artificially to narrow the concept of what constitutes a step within the meaning of section 20(3). Any modification of or qualification to the PCP

in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for it to be taken.

66 In my view the proposed steps would if taken be capable in principle of ameliorating the disadvantage resulting from the operation of the policy. Indeed, the first adjustment involving the discounting of the 62 day disability related illness absence would plainly have that effect because it would involve the withdrawing of the written improvement warning. That would reduce the risk of dismissal for further absences; or at least delay it. Similarly the second might make it less likely that the appellant would be disciplined in future, although whether it would in practice have that effect would depend upon the length and frequency of disability related absences."

7.6 Further the step that could have been taken need not have even needed fully to have ameliorated the disadvantage. There only needed to be a real prospect (**Romec v Rudham [2007] All ER 206**, a chance **Cumbria Probation Board v Hollingwood [2008] All ER 4**, or a prospect **Leeds Teaching Hospital NHS Trust v Foster UKEAT0552/10**.

We conclude that there was ample evidence that the continuation of the existing adjustment would have "ameliorated the disadvantage resulting from the application of the policy". The first reason we reached that conclusion is because the claimant was able to continue in employment (thus satisfying one of the objectives at which section 20 is aimed) from 2011 onwards without a break. There were episodes of sickness absences in that period but not such as to exceed the adjusted target of more than five in a year. More particularly, although Mr Morgan contests this, there is no evidence whatsoever that the claimant was subjected to any warning under the policy nor is there evidence of concerns being expressed as to her work performance. Secondly, if it had been continued, perhaps alongside other adjustments which the respondent did make the claimant would not have hit the relaxed target of no more than five absences if the absences taken into account were calculated on a year to year basis from 10 May, except in year commencing **10 May 2015**. It is to be noted that the claimant is not arguing for a wider adjustment of discounting all sickness absences, although she could have, on the authority of **Griffiths**. If the extended target adjustment had been made, we accept the fundamental point that the claimant would not have entered the SAMP absence management process, or had warnings there-under, at least until 2016, nor was it likely that the claimant would have reached the stage where her continued employment was under threat.

The application of the SAMP to the claimant at the restricted level, and the giving of warnings there-under, clearly constituted a detriment under section 39(2) of the Equality Act with effect from **April 2015**, and a failure to make a reasonable adjustment. The next issue to consider is whether the respondent made such other adjustments as were reasonable to

ameliorate the relevant disadvantage to the claimant. The first point to be made is that no other adjustments were made immediately upon the effective removal of the extended trigger at the time of the stage 1 hearing in April 2015. Reference to Team Prevent was not in itself an adjustment. The next general point to be made is that the adjustments which were made from time to time were either not adjustments which ameliorated disadvantage or in particular the threat of application of the unadjusted target at all, or only to a limited extent. What is abundantly clear to us is that the respondent did not make the most effective reasonable adjustment to enable her to remain at work without the threat of warnings at least until 2016 although it is to be acknowledged that the eight day per annum limit would have been triggered if no adjustment had been made to that separate target, which would also have been reasonable.

The reason for the respondent's failures to continue the reasonable adjustments were the respondent's apparent determination to apply the new SAMP from 2013, at least from the change in the management structure in 2015, strictly to all employees including those with a disability. This was probably triggered by the reporting of the erroneous EAT judgment in **Griffiths** in late 2014.

In these circumstances we find that the removal of the extended trigger and that the failure to adjust the triggers in the 2013 policy constituted acts of discrimination contrary to section 15 and failures to make reasonable adjustments under section 20 of the Act.

7.8 The next question we have to answer is: Did any continuing failures to make reasonable adjustments and/or any further application of the 2015 SAMP thereafter constitute acts of unfavourable treatment/detriment for the claimant arising from something to do with her disability, including allegations 3-9?.

We find that each of the extended application of the policy at stages 2, 3 and 4 (the latter on three occasions), and the dismissal itself constituted further failures to make reasonable adjustments and/or acts of detriment. For the reasons set out above:-

> "A detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment". See the judgment of Lord Hope of Craighead in **Shamoon v The Chief Constable of the RUC [2003] ICR page** 337.

The burden lies upon the respondent to show that the treatment in question had nothing to do with disability or to show that the treatment in question was justified as pursuing a legitimate objective under section 15(2) of the Act. That treatment includes the detriments outlined above and including the dismissal. We have already concluded that the treatment was for reasons related to the disability and did constitute a failure to make reasonable adjustments. That continued up to and including the dismissal. If the relevant adjustment had been made the respondent would probably not, or not then (in May 2017), have reached the stage in the policy where dismissal would have occurred. In any event, it is necessary for the respondent to show that the treatment and in

particular the dismissal was justified as pursuing a legitimate objective. Treatment which may constitute a breach of section 15 may nonetheless be justified. Since the respondent did not recognise that it was under a duty to make reasonable adjustments to the trigger points, it cannot be the case that the respondent gave proper and adequate consideration to the balancing of the legitimate needs of the respondent's service in particular to service users with the discriminatory effects of its decision to dismiss the claimant. The relevant balancing exercise did not in fact take place. We recognise however that the respondent did have legitimate concerns for the quality of the occupational health element of the service being provided to vulnerable service users at the Molineux Centre; and that the claimant's disability related absences did have deleterious affects upon the quality of that service since she was one of the only two occupational therapists. The claimant's e-mails in particular from December 2016 onwards indicate that she was seriously struggling with her even reduced workload. We conclude however that the failures to make the reasonable adjustment and the repeated application of the trigger policy did have an adverse effect upon the claimant's anxiety and stress and upon her work performance. The respondent importantly failed to undertake the tailored adjustment plan process recommended in the last Team Prevent report. It did not consult with the claimant properly as to whether there were further adjustments it could make at that late stage. It did not follow its own redeployment policy. For these reasons, we find that the defence of justification does not succeed. The issues raised however are also relevant to the application of the **Polkey** test below.

7.3 **The time points**

These points can be dealt with shortly. We find that there was a continuing failure to make the reasonable adjustments from April 2015 which had a series of repeated consequences each of which from June 2016 constituted a series of detriments which were repeated without a break up to and including the dismissal on 10 May 2017. It is not disputed that the dismissal claim was presented within time. We consider that the acts of detriment constituted an ongoing situation or a continuing state of affairs as envisaged in **Hendricks v Metropolitan Police Commissioner [2003] IRLR page 96** (Court of Appeal).

8 **Was the dismissal fair or unfair?**

We have accepted that the reason or principal reason for the claimant's dismissal was a reason related to capability or some other substantial reason which might have justified dismissal but we find that the dismissal was procedurally and substantively unfair for many of the reasons which we have set out for rejecting the respondent's justification defence, although we accept that the tests are to not precisely the same: See Judgment of Underhill LJ in **O'Brien v Bolton St Catherine's Academy 2017 EWCA p.145, especially at paragraphs 53-55**.

9 **What are the chances that if a fair procedure had been followed and absent discrimination the claimant would have been dismissed in any event and if so when?**

This requires the application of the Polkey test in relation to the unfair dismissal claim; and the similar test for discrimination claims set out in **Chagger v Abbey**

National PLC 2010 IRLR page 47 CA. See especially at paragraphs 56-60 per Elias LJ. We have already indicated that the claimant's sickness absence record put a strain on the Respondent's ability to maintain a proper OT service to service users at Molineux in year 2015- 2016, during which the claimant had a single absence lasting 73 days in addition to more than 5 other absences. There is the distinct possibility that the claimant could have been justifiably and fairly dismissed; and certainly the SAMP stages would have been triggered at stage 1, even if the adjustment been in place. As of 6 December 2016 the claimant's role had been changed to a generic OT role not doing any assessments. There is a real issue as to whether and for how long the respondent could reasonably have continued with that adjustment. Despite the fact that she was only working for 30 hours per week and on 80% of her caseload, she continued to struggle with her health; and to request more working from home, which was not a practical solution, although she would not have been under such pressure if she had not had imposed the full rigour of the 2015 SAMP targets. I(t is highly unlikely that if the respondent had followed the redeployment policy to the letter, any alternative OT job would have been found for the claimant which she could have undertaken; and she would not have accepted a less qualified job of lower status. On these circumstances we find that there was a 50 % chance that she would have been dismissed within 4 months of 10 May 2017 in any event.

10. **The breach of contract claim**. The claimant's claim fails. The claimant had been working only a 30 hour week for at least 6 months. Her contract had been amended from 37.5 hours to 30 hours: See the documentary evidence at page 456, an internal email which she did not see The letter to which Mr Bakhsh refers at page 598 merely confirms the position after the event. At no stage up to 10 May did she assert that she was entitled to be paid at 37.5 hours notwithstanding she only worked 30.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
26 March 2018