THE EMPLOYMENT TRIBUNALS

Claimant: **Ms H Ralph**

Respondent: **County Durham & Darlington NHS Foundation Trust**

Heard at: **North Shields** **On:** **11 & 12 April 2018**

Before: **Employment Judge Johnson**

Members: **Mr R Dobson**
Mr T A Denholm

Representation:

Claimant: **Mr A Legard of Counsel**
Respondent: **Ms C Souter of Counsel**

JUDGMENT

1 The claimant's complaint of unfair dismissal is well-founded and succeeds.

2 The claimant's complaint of unlawful disability discrimination (unfavourable treatment because of something arising in consequence of disability) is well-founded and succeeds.

3 The parties will be notified in due course of arrangements for a private preliminary hearing by telephone, at which case management orders will be made, including the listing of a remedy hearing.

REASONS

1 The claimant was represented by Mr Legard of counsel, who called to give evidence the claimant and her trade union representative, Mr Ronnie Nicholson. The respondent was represented by Ms Souter of counsel, who called to give evidence Ms Judith Allen (General Manager Radiology) and Mr Paul Frank (Associate Director of Operations for Family Healthcare Group). There was an agreed bundle of documents marked R1, comprising an A4 ring binder containing 188 pages of documents.

2 By claim form presented on 12 September 2017, the claimant brought complaints of unfair dismissal and unlawful disability discrimination. The disability claims include an alleged breach of section 15 of the Equality Act 2010 (unfavourable treatment because of something arising in consequence of disability) and failure to make reasonable adjustments, contrary to sections 20 and 21 of the Equality Act 2010.

3 The Tribunal wishes to place on record its appreciation of both counsel for the efficient preparation of the trial bundle, the courtesy displayed to each other, to the witnesses and to the Tribunal and in particular for the standard of advocacy and quality of closing submissions.

4 The parties had agreed a list of issues (the matters which the Employment Tribunal would have to decide), which were as follows:-

A Unfair dismissal (sections 94 and 98 of the Employment Rights Act 1996)

(1) Did the respondent have lack of capability as a potentially fair reason for dismissing the claimant?

(2) Did the respondent genuinely believe that the claimant was so incapacitated by ill health that she was incapable of fulfilling her duties and if so, did they have reasonable grounds for such a belief?

(3) Did the respondent carry out as much investigation as was reasonable in all the circumstances of the case?

(4) Did the respondent follow a reasonable procedure in dismissing the claimant?

(5) Did the respondent act reasonably in treating the claimant's capability as being sufficient reason to dismiss and was the decision to dismiss within the range of responses open to a reasonable employer faced with the same set of facts?

B Failure to make reasonable adjustments (sections 20 and 39(2)(c) of the Equality Act 2010

(1) Did a provision, criterion or practice employed by the respondent, namely the requirement that the claimant maintain a certain level of attendance in order to not be subject to the risk of disciplinary sanctions, place the claimant at a substantial disadvantage in comparison to persons who are not disabled?

(2) If so, what steps would it have been reasonable in all the circumstances for the respondent to have taken to avoid the disadvantage? For example, would it have been reasonable to disregard some of the claimant's sickness; to have imposed a lesser sanction or no sanction at all, to permit the claimant the opportunity to return to work or for further advice to be taken?

(3) Did the respondent fail to take those steps?

C Discrimination arising from disability (sections 15 and 39(2)(c)

(1) Did the respondent dismiss the claimant because of something which arose as a consequence of her disability, namely her sickness absence which stemmed from her Sjogrens Syndrome?

(2) If so, did the respondent have a legitimate aim in taking this action, namely the needs and efficiency of the Radiography Department and its patients and the health, welfare and safety of the claimant and the staff in the same department and was dismissal a proportionate means of achieving a legitimate aim?

5 Mr Legard and Ms Souter agreed at the end of the evidence that if the Tribunal were to find in favour of the claimant on the section 15 Equality Act claim, then it would be unnecessary for the Employment Tribunal to deal with the allegations of failure to make reasonable adjustments.

6 The simple chronology of the material dates in this case is as follows:-

6.1 The claimant's employment with the respondent began on 5 November 1987.

6.2 In 2012 Ms Allen asked the claimant to move from Shotley Bridge Hospital near Consett to University Hospital in Durham. The claimant declined to do so and she remained at Shotley Bridge Hospital.

6.3 In 2014 Ms Allen again asked the claimant to move from Shotley Bridge Hospital to Durham Hospital. The claimant again declined and was not required to move.

6.4 The claimant's long term absence began on 11 November 2016.

6.5 An occupational health report was obtained on 10 January 2017.

6.6 There was an absence review meeting on 12 January 2017.

6.7 There was a further occupational health report on 15 February 2017.

6.8 There was an absence review meeting on 27 February 2017.

6.9 There was an absence review meeting on 7 March 2017.

6.10 There was a further occupational health report on 29 March 2017.

6.11 The claimant was dismissed at an absence review meeting on 5 April 2017.

6.12 The claimant's appeal was dismissed on 17 May 2017.

7 The claimant was employed as a Dark Room Technician and then as a Radiology Assistant in the Radiology Department at Shotley Bridge Hospital. The claimant worked full time until 1999, when she reduced her hours to 22.5 hours per week following the birth of her son. The claimant's son was diagnosed with autism when he was four years of age. It was because of this child's behavioural problems that the claimant reduced her hours to 22.5 per week. It was suggested by the claimant that her dismissal was some kind of retaliatory act by Ms Allen, because the claimant had refused to transfer to Durham in 2012 and 2014. The Tribunal did not accept that allegation.

8 The claimant's original summary of terms and conditions of employment dated 25 March 1992, appears at page 74-76 in the bundle. At page 75 is a paragraph headed "Sickness and Absence" which states:-

> "You are required to notify your Head of Department by 10:00am on the first day of absence if you are not going to be available for duty for any reason, eg sickness. Full details of sick leave allowances and conditions governing these allowances are set out in the appropriate Whitley Council agreements, copies of which are available in the Personnel Department."

On page 76 under the heading "Disciplinary Procedure" it states as follows:-

> "There is an agreed disciplinary procedure for this Health Authority which specifies the way in which disciplinary action can be taken. Your designated Head of Department or the District Administrator has the right to take disciplinary action against you, however, only the District Management Team can dismiss you from your post. The disciplinary procedure indicates your rights if disciplinary action is taken against you but in particular gives you the right to involve your trade union or staff association at any stage if you so wish. A copy of the disciplinary procedure is available in the Personnel Department."

9 The respondent operates an attendance management procedure, a copy of which appears at page 77-105 in the bundle. Following that at pages 105a-v, is a copy of the respondent's disability policy.

10 Nowhere in the bundle is there any mention of the claimant's contractual entitlement to sick pay. Ms Allen believed that an employee was entitled to six months full pay followed by six months half pay, once they had been employed for a continuous period of 12 months. Mr Frank's evidence was that he believed that the six months full pay/six months half pay entitlement accrued after two years' continuous service. Mr Nicholson, the claimant's trade union representative, believed that the sick pay entitlement was available to those who had been continuously employed for five years. Clause 16 on page 95 headed "Sick Pay for Those Who Have Exhausted Sick Pay Entitlements" specifically deals only with employees with more or less than five years' reckonable service. The Tribunal found that employees with more than five years' service would be entitled to six months full pay, followed by six months half pay, in the event of long term absence. The Tribunal found that by the time of her absence in November 2016, that was the claimant's entitlement. The claimant was certainly paid her full pay from the date her absence commenced on 11 November 2016 until she was dismissed on 5 April 2017, a period of some five months.

11 At page 106-107 is a copy of the claimant's absence record from June 2005 to January 2017. In 2005 the claimant had an absence rate of 3.74%; in 2006 her absence rate was 8.95%; in 2007 it was 3.19%; in 2008 it was 32.1%; in 2016 it was 23.78% and in 2017 it was 26.57%. The only record of any steps taken under the absence management policy and/or disciplinary process was a Stage 1 hearing which took place in January 2008.

12 In 2016, the claimant was absent from work from 3 June until 19 July suffering from pericarditis. The claimant then commenced a period of long term absence on 11 November 2016 for what is described on her record as "abdo pain/muscle aches/depression". It is now accepted that these symptoms were linked to the claimant's Sjogren's Syndrome, which the respondent accepts amounts to a disability as defined in section 6 of the Equality Act 2010. The claimant did not return to work prior to her dismissal on 5 April 2017.

13 The claimant's first fit note on 18 November appears at page 108 and is followed by several others up to and including the one at page 116, which covers the period from 26 March 2017 to 18 June 2017.

14 In accordance with its management of attendance policy, the respondent invited the claimant to attend a first sickness absence review meeting. The letter is dated 24 November and is at page 125 in the bundle, inviting the claimant to a meeting on 15 December. That meeting was cancelled at the request of the claimant. Once the claimant had been absent for 28 calendar days, she became subject to that part of the long term absence management which deals with "long term or chronic sickness absence". That policy appears at page 91. The policy states:-

> "This can be defined as situations where the employee is continuously absent for twenty eight calendar days or more or recurrent periods of time or repeatedly absence over a similarly long timescale with a single underlying cause. Managers should deal with long-term/chronic sickness absence sensitively and in accordance with these procedures. Even when it is apparent that the sickness absence will be long-term, the manager should become involved at an early stage. This type of absence demands quite a different supervisory approach, as it requires a balance between acting compassionately to the employee and minimising disruption to the Trust. In the interests of the individual employee and the organisation, it must be remembered that the chances of an employee returning to work decreases rapidly with the duration of the absence. In the majority of cases, where absence has lasted less than 6 months, employees will be able to return to their normal duties following long-term absence. However, there will remain a few instances when a return to work will not be possible and managers must ensure that they work closely with HR and Staff Health and Wellbeing to deal with such situations properly. Managers should refer to the Trust's Rehabilitation/Redeployment Policy for further guidance on phased return to work or redeployment."

15 On 19 December 2016, Ms Allen referred the claimant to the respondent's occupational health department as she needed to understand whether the claimant would be able to work and also to try and establish a possible date for her to return to work. The claimant was examined by the occupational health doctor, whose report dated 10 January 2017 appears at page 129-130 in the bundle. The relevant extracts state:-

> "She currently suffers with wide spread muscular skeletal pain, significant fatigue and low mood. She is waiting a specialist rheumatoid assessment, schedule for 10 February 2017, following which a definitive diagnosis and a management regime may be available. Until that has taken place I am not able to give further advice. In my opinion she currently does not have the health capability to be at work to deliver her contractual role or any other work."

16 The claimant attended the absence review meeting on 12 January. The claimant was aware that she was entitled to be accompanied by a trade union representative, but chose to attend unaccompanied. The outcome of the meeting was recorded in a letter of 19 January 2017, which appears at pages 131-132 in the bundle. The letter notes that the claimant has an appointment

with her Rheumatologist on 10 February and specifically states that, "You are immune to most drugs that have been prescribed to aid your conditions stating that you have suffered some terrible reactions". It was agreed that there would be a further meeting in approximately four weeks time following a further occupational health referral appointment on 15 February 2017.

17 The second occupational health report is dated 15 February 2017 and appears at pages 134-135 in the bundle. The relevant extracts state:-

> "Miss Ralph is currently absent from work since 11 November 2016 due to generalised muscle aches, weakness and fatigue. She was kind enough to provide us with copies of the clinic letters from her Haematologist as well as the Rheumatologist, and it appears that even though a number of possible differential diagnoses have been suggested, no definitive diagnosis has yet been confirmed.
>
> She has been discharged from the care of the Haematologist, and is currently under the care of a Rheumatologist. Her next appointment is due to be held on 1 March 2017, following which we may have more clarity with regards to her condition. However it is by no means certain that a final diagnosis may be reached at the next consultation. The Rheumatologist mentioned that there is a possibility that she may be started on an immune-suppressant medication, hoping that this may help alleviate her symptoms. However, it generally takes a few weeks to a few months for this to have the desired effect, following which she may be able to return to work in some capacity.
>
> Her physical symptoms also seem to be having an effect on her psychological health, although clinically she appeared reasonably well settled, calm and composed. The mood was slightly low, although she appears to be managing reasonably well on her own. She is not on any medication at this stage for low mood.
>
> **Recommendations**
>
> You have requested a number of specific questions, although due to the lack of clarity with regards to her final diagnosis, I am unable to comment on the longer term prognosis. She is currently unfit for work and I would not anticipate any significant change in the short term. Assuming that she is started on appropriate medication and assuming that they have a positive impact on her symptoms, it may still take a few weeks to a few months for the desired effects to be established. With this in view, I would recommend another occupational health review in 2 months, following which I will be in a better position to comment on workplace adjustments and future prognosis."

18 The claimant attended another sickness absence review meeting on 27 February. The claimant again was unaccompanied but was happy to proceed with the meeting. Ms Allen's letter confirming what was said at the meeting is dated 7 March 2017 and appears at page 140-141 in the bundle. The claimant's evidence was that at this meeting she explained that the symptoms from which she suffered were linked to her Sjogren's Syndrome and that she would be starting some new medication on 8 March 2017. The claimant says that she explained to Ms Allen that her Consultant's opinion was that she should be fit to

return to work within a month, "once the correct medication was being used successfully". The claimant asked Ms Allen if they could wait for two months, to see what effect the immune-suppressant drugs may have. Ms Allen was reluctant to wait for two months and again referred the claimant to occupational health. The occupational health appointment was on 27 March. Ms Allen's letter to the claimant states as follows:-

> "You now believe that your issues are attributable to your diaphragm stating that you still feel constantly fatigued, weak and lack stamina. During a recent visit to your GP they had stated to you they believe your Rheumatologist will fix your on-going conditions. You stated that you will see your Rheumatologist again on Wednesday 8 March and you believe he will start you on a course of auto-immune suppressants. This medication you hope will have a positive effect on the inflammation you are currently experiencing in your connective tissue mucus membranes and muscles. We agreed that we would refer you again to occupational health in order to review your current health situation. I also stated I would ask if they felt redeployment would be suitable in your circumstances, you confirmed you understood. Carrie also noted that in the absence of a foreseeable return to work date the Trust may take the decision to terminate your employment on the grounds of your ill health capacity, you confirmed you understood."

(Carrie is Carrie Sherwen, the respondent's HR Advisor).

19 The claimant had meanwhile been to see her Rheumatologist, who for the first time diagnosed that the claimant's symptoms were due to her Sjogren's Syndrome. The claimant was prescribed with immune-suppressant medication to control her symptoms and began taking that medication on 8 March. Unfortunately she suffered from severe side effects of that medication, including severe vomiting. She had to stop taking the drug. The claimant's evidence (unchallenged by the respondent) was that the immune-suppressant medication was notorious for its side effects, which could either subside over time or in some cases continue. The claimant was advised that she may need to have a short break from the drug and then try it again or otherwise return to the Rheumatologist and see whether an alternative drug could be prescribed.

20 By letter dated 28 March 2017 (page 142) the claimant was invited to attend another absence review meeting. The letter is headed "Long Term Sickness Absence Final Review Meeting". The letter states:-

> "As we have previously discussed, due to the length of your absence and no foreseeable return to work in the near future, a decision on your continued employment will be taken at this meeting."

21 That letter was sent to the claimant before she had even attended a further occupational health review, which took place on 29 March 2017. A copy of Dr Chauhan's report appears at page 143-144. The relevant extracts are as follows:-

> "I would recommend that my report is read in conjunction with the previous report. Ms Ralph's symptoms are largely unchanged, and if anything, she has reported a further deterioration. Following relevant specialist consultations, alternative diagnoses have been ruled out and her current

symptoms have been attributed to her underlying medical condition (Sjogren's Syndrome). However, for the sake of completeness, her GP has also referred her to a Neurologist, for a full assessment; although she believes that there may be a waiting period of a few months for this appointment. Her depressive symptoms are also on-going, although due to the various drug interactions and side effects, she has not been started on any regular anti-depressant. She received a few sessions of counselling via the Employee Assistance Programme and is also on the waiting list to start counselling under the National Health Service.

A clinical examination today was consistent with low mood, which is largely due to the functional limitation caused by her medical conditions and due to her on-going personal stressors. In addition to this she now seems worried about her continued job prospects due to her long term sickness absence.

Recommendations

Ms Ralph denied any improvement in her symptoms and in my opinion she is still likely to be medically unfit for work. She was started on a new medication a few weeks ago, although due to the unfavourable side effects, it had to be stopped. She is due to recommence a trial of the same medication in a few days and in general it may take up to 3 months for these immune-modulatory medications to have the desired therapeutic effect. It is also likely that if she is unable to tolerate this medication again, she may be started on alternative medications, which may further delay her recovery period.

Her underlying medical conditions (Sjogren's disease, endometriosis, migraine and depression) are likely to be chronic in nature and may bring her under the remit of the Equality Act 2010.

I am hopeful that with appropriate medication her symptoms may improve, at least to an extent where she may be able to return to work in some capacity. However it is rather premature to definitively comment on a longer term prognosis. On balance it is likely that she may be left with some residual symptoms which she may be able to self-manage them more efficiently in the future.

Due to the wide variation in the recovery period following such symptoms, I see no merit in arranging a planned review appointment for her at this stage. However I would be happy to see her again once her symptoms have improved to an extent where she may contemplate return to work. I hope you find this report to your satisfaction although please do not hesitate to contact me if you require further assistance in this matter."

22 In her evidence to the Tribunal, the claimant explained how she had been disappointed with that occupational health report as it had only given the longest possible timeframe for her to return to work, by saying it might take up to three months. The claimant's concern was that the report did not confirm how soon she might return to work if the medication or an alternative medication was successful. The claimant had hoped to discuss this with Ms Allen at the meeting on 5 April, but her evidence to the Tribunal was that Ms Allen insisted that the claimant had agreed to the contents of the report being released to the

respondent and was therefore effectively bound by its contents. The claimant was also disappointed that the report suggested that her condition had deteriorated, whereas she felt that it was no more than the side effects of the immune-suppressant medication which had made her unwell, rather than the symptoms of the Sjogren's Syndrome.

23 At the absence review meeting on 5 April, the claimant was accompanied by her trade union representative Mr Ronnie Nicholson. The claimant was by then waiting to recommence the original immune-suppressant medication, and if that did not work, then a replacement. The claimant in fact began an alternative medicine called Colchicine at the beginning of May 2017, which medication proved to be successful. The claimant explained to Ms Allen at the hearing on 5 April that she was waiting to retry the first immune-suppressant drug and would only have to try it for three days to see if it worked. If not she would go straight on to trying an alternative drug. Ms Allen asked the claimant if she could specify exactly when the alternative drug would be provided if the original drug did not work. The claimant could not give a specific date but indicate that it would be "straight away" after any failure of the original drug. The claimant confirmed that she would seek an urgent appointment with her specialist should the first drug not work. Ms Allen asked if the claimant could give her a specific date for an appointment with the specialist, but the claimant was unable to do so.

24 Mr Nicholson, who accompanied the claimant to this meeting, confirmed in his evidence to the Tribunal that the claimant's version of what was said at the meeting was correct. In particular, the claimant had explained that the trial of the immune-suppressant medication had not worked the first time, but that there was to be a retrial, followed by alternative medication if that retrial did not work. Mr Nicholson explained to Ms Allen at the meeting that it may take four to five weeks for the claimant to glean the benefits of any new medication. Mr Nicholson's evidence was that the meeting lasted for approximately half an hour, followed by a short adjournment of approximately five minutes before Ms Allen gave her decision to terminate the claimant's employment on the grounds of incapacity owing to ill health. At that point the claimant stated that she would not take the immune-suppressant medication, but would again go back onto steroids to try and control her symptoms so that she could return to work immediately. Ms Allen's response to this was, "Oh, so you're coming back on Monday then?". The claimant stated that she would not be able to return to work by Monday, but did not agree that she would never be able to return to work in the immediate future in any capacity.

25 Ms Allen's evidence was that she was told by the claimant that she was due to recommence her trial of the immune-suppressant drugs that had previously made her unwell and that if they were unsuccessful, she would have to try an alternative medication. However, Ms Allen said that the claimant was unable to give a specific date when that trial would start. Ms Allen stated that the claimant confirmed at the meeting that there were no more adjustments which could be made for her to return to work. Ms Allen does accept that the claimant stated that she felt the occupational health doctor had misinterpreted her emotional state, but her view was that the claimant "never challenged the content of the report". The statement states:-

> "When I asked about the claimant's likelihood of returning to work in the foreseeable future she confirmed that she did not feel able to work in any capacity and could not provide a foreseeable return to work date. I adjourned to consider the appropriate outcome. Regrettably, because the claimant was not medically fit for work, there were no adjustments that we could make to support her and there was no foreseeable return to work date, I made the difficult decision to dismiss her on the grounds of ill health capacity. At this point the claimant stated that she would return to work and forego any further medical treatment. I asked whether she would be fit to return to work on Monday, 10 April and she was unable to confirm and immediately asked for annual leave. It was clear to me that the reality of the situation had dawned on the claimant and she wanted to avoid dismissal, but that in reality she knew that she would not be fit to return and that was why she had requested annual leave."

26 In that part of her witness statement dealing with "My decision", Ms Allen states:-

> "It was clear on the evidence available from occupational health that the claimant was not fit to return to her role or any other role within the Trust. Whilst I understood that the claimant was awaiting a retrial of a drug or a possible attempt at a new medication, I was also mindful that the first medication had not been successful in the first instance and when questioned, the claimant did not know when she might be starting an alternative drug if the retrial was also unsuccessful. Given the uncertainty regarding the possible success, the length of time until the treatment might commence and the claimant's uncertain diagnosis, I did not consider that it would be reasonable to wait any longer as I felt that we would ultimately be in the same position even if we allowed the claimant further time and I had to balance this against the impact of the claimant's absence on the Trust. It was evidence from the occupational health reports and the claimant's own evidence that she was not fit to resume her role and that she would not be able to work in an adjusted or different role. On this basis, the claimant's sickness absence could no longer be sustained by the Trust. At the time of the claimant's dismissal, she had been absent since 11 November 2016. I could not be confident that the claimant would be well enough to return to work in the foreseeable future."

27 Ms Allen's decision to dismiss the claimant was confirmed in a letter dated 5 April 2017, a copy of which appears at page 146-147. The relevant extracts state as follows:-

> "I now write to summarise the main points of our discussions. We discussed that you have previously had a poor absence record compromising of both long and short term absence periods. I asked what adjustments you have had previously or that could be put in place now that would facilitate a return to work on this occasion. You confirmed there were none and that you did not have a foreseeable return to work date, and would not have until you had found the right medication. I asked if you could estimate when this will be and you confirmed you would not know until it had been trialled. I asked if there was a foreseeable return to work date and you stated that you could not offer any guarantees until you had revisited your current medication and if that does not work tried a new

> medication. You confirmed you did not feel able to work in any capacity and could not provide a foreseeable return to work date. It was agreed that as it would not be possible for you to return to work in the foreseeable future in any capacity, that your employment would be terminated on the grounds of incapacity owing to your ill-health. At this point you stated that you would return to work and forgo taking any further medication to facilitate your return to work. I asked if you would be able to return to work on the morning of Monday, 10 April, you were unable to provide a definitive answer."

28 By letter dated 11 April 2017, the claimant submitted an appeal against her dismissal. The appeal hearing was arranged to take place on Wednesday, 17 May before Mr Paul Frank, Associate Director of Operations. Mr Frank was supported by Tracey Minns of Human Resources. The management response to the appeal was to be presented by Judith Allen herself, supported by Carrie Sherwen, a Human Resources Advisor.

29 The claimant did not specifically set out any grounds of appeal, nor is she required to do so under the respondent's policy and procedures. The relevant section at page 104 in the bundle simply states that the employee or their representative shall state the case for their appeal and the presenting manager and panel will be entitled to question the employee following presentation of their case. The presenting manager shall then state the management case and the employee or their representative and panel will be entitled to question the presenting manager following presentation of their case.

30 Ms Allen's "management report" for the appeal appears at page 153-156 in the bundle. It states that it was prepared by Ms Allen with the support of Ms Carrie Sherwen. The report itself runs to two and a half pages of A4 paper. The first page sets out the first long term sickness absence review meeting, second long term sickness review meeting and final long term sickness review meeting/dismissal. The report shows that at the first meeting "Ms Ralph could not provide a foreseeable return to work date as her condition had shown no noticeable sign of improvement". Under the heading for the second meeting, the report states, "Ms Ralph had a Rheumatology appointment on 8 March and was due to start new medication so we arranged to see her again on 5 April 2017 to enable a suitable timescale for the medication to take effect. Ms Ralph was informed that a decision on her continued employment would be taken if there was no foreseeable return to work in the near future". Under the heading "Final Long Term Sickness Absence Review Meeting/Dismissal", Ms Allen records that, "Ms Ralph stated that if the second trial was unsuccessful she expected to commence a trial with an alternative medication, and again could not indicate a timeline for this process. I referred to the occupational health report from her referral on 29 March. Dr Chauhan had stated Ms Ralph's condition had remained largely unchanged and that during the referral she had stated her condition had deteriorated further. In his opinion she was medically unfit for work with no foreseeable return date".

31 At the appeal hearing, Mr Nicholson had prepared a "Statement of Case for Heather Ralph". The basic grounds of appeal were as follows:-

31.1 The dismissal was unfair and that it contravenes the Trust's Disability Policy and operated outside of the Trust's management of attendance procedure.

31.2 The Trust's Disability Policy, section 4 states an individual with a disability should be treated in a fair, equitable and consistent manner.

31.3 The dismissal operated outside the Trust's management of attendance procedure in that a practice of having a first, second and then a final long term sickness absence review in which dismissal occurs is not contained with the attendance procedure.

31.4 How long would a reasonable employer in Heather's situation have waited before deciding to dismiss bearing in mind section 4 of the Trust's Disability Policy. It important to note that dismissal took place on 5 April but that Heather's true medical position was only diagnosed on 8 March where medication had also been first prescribed.

31.5 Heather believed that the condition is now diagnosed and the prognosis means Heather is able to make a successful return to work with any reasonable adjustments deemed necessary to enable this.

32 Minutes of the appeal hearing appear at pages 166-172 in the bundle. This is the only meeting in respect of which the respondent has provided any notes. There are no notes of any of the absence review meetings. The respondent's evidence was that, whilst handwritten notes may have been taken at the time of those meetings, the contents were subsequently reduced to writing in the outcome letters sent to the claimant, which had not been challenged at the time. The Tribunal found the respondent's explanation to be wholly unsatisfactory. The Tribunal notes that the respondent's management of attendance policy at pages 85, 86, 87, 88 and 90 all contain reference to an obligation by managers to keep notes and records of telephone discussions, meetings and other discussions. The Tribunal was critical of the respondent's process of destroying any notes once the outcome letter had been sent to the employee.

33 An issue arose at the Tribunal hearing about exactly which documents had been produced by the claimant at the appeal hearing. The claimant had attended the Rheumatologist on 3 May and at page 159-160 is a copy of the Consultant Rheumatologist's letter dated 3 May. That letter states:-

> "I saw Heather today and heard that she had been unable to tolerate Hydroxychloroquine. She continues to have episodic symptoms but has found great benefit from her gastric problems since commencing Metoclopramide and Esomeprazole in combination. We discussed her residual symptomatology and the need for her to have medication to take when episodes occur. These typically last 6-8 weeks but have a short prodrome during which intervention may prove effective. Given the presence of intermittent pericarditis and some other features that might be responsive to Colchicine, I have recommended the use of this drug 500 mcgs twice a day for a week at the onset of symptoms. I have given Heather a prescription for this and if she finds it effective in staving off episodes I would suggest she continues with this prn. This is a safe drug that doesn't require monitoring but in combination with the other drugs she has recently commenced for her tummy there is a small risk of some

> looseness of the bowels which I have mentioned to Heather. I do hope that this approach will help her with her appeal on 17 May as it is clearly a very important time for her both financially and from a social perspective."

34 At page 163 is a letter dated 16 May 2017 from the claimant's GP Dr A J M Beekman. The letter states:-

> "I can confirm that this lady is now fit to work again. She is on treatment and under the care of a Consultant Rheumatologist. Her health has improved so much that she should be able to resume her normal occupation. I hope this information is sufficient."

35 The evidence of Ms Allen and Mr Frank was that the GP letter at page 163 was not handed in at the appeal hearing. The evidence of the claimant and Mr Nicholson was that the letter had been handed in at the appeal hearing. Mr Frank confirmed under oath that had this letter been before him at the appeal hearing, it would undoubtedly have made a difference to the outcome. The claimant and Mr Nicholson stated that the letter was handed in and no more than "glanced at" by the appeal panel before being handed back. Mr Frank's evidence was that the document handed up was the fit note dated 19 April 2017 which appears at page 150 and states that the claimant was not fit for work from 26 March to 18 June. Because that fit note had already been seen by the appeal panel, it was examined and returned to the claimant at the appeal hearing. Mr Frank's evidence was that the GP letter at page 163 cannot have been handed in because it was "completely at odds with the claimant's own account of her health during the final sickness review meeting on 5 April and the advice in the occupational health report dated 29 March 2017."

36 Ms Allen's evidence was that the GP letter at page 163 was never shown to the panel or handed in to anyone at the hearing. Ms Allen also said that such a letter would have "stuck in my memory because I have been asking the claimant repeatedly whether there was any prospect of her returning to work in the foreseeable future or whether she had any indication of when she might receive further treatment and the responses were always that she was too unwell and she could not say when she would be fit to consider a return to work in any capacity."

37 The notes of the meeting at page 170 record Mr Frank asking "Do you have a sick note from GP?". To which Ms Ralph replies "I think it's a letter". Mr Frank then says, "Does it say that you are fit to return?", to which the claimant replies "Yes from now. I thought would be resolved at the SH and W appointment". Mr Nicholson then states, "The GP decided to issue the fit note. The final fit note was backdated as the dismissal had occurred. Heather was not going to be off until 19 June, the GP was trying to be helpful until the appeal date."

38 Nowhere is there any mention by anyone of any document which states, "This lady is now fit to work again. Her health has improved so much that she should be able to resume her normal occupation".

39 Having considered the conflicting versions of this particular document, the Tribunal unanimously concluded that the letter at page 163 was probably not handed in at the appeal hearing.

40 It is accepted that the letter from the Rheumatologist which appears at page 159-160, was not handed in at the appeal hearing. The Tribunal accepted the

claimant's evidence that she was under a misapprehension that this letter was already in the possession of the respondent. The claimant had attended an appointment with her Rheumatologist on 3 May 2017, which appointment had produced the letter at page 159-160. The claimant's evidence was that the new drug worked immediately and that she was well enough to go back to work. The claimant then met with her GP on 11 May and was told that the GP would produce a letter for her to collect later and take to the appeal hearing. The claimant also made an appointment to go and see the respondent's occupational health department, so that she could explain to them her current position and that this would hopefully permit her to return to work. The claimant said that her appointment was "a few days before my appeal hearing". The claimant arrived on the appointed day at the appointed time and waited for half an hour before one of the OH doctors' came out and told her that she could not be seen by occupational health because she was no longer an employee of the Trust. The Tribunal accepted the claimant's explanation that it was highly likely that she had given to the respondent's OH department a copy of the letter from the Rheumatologist dated 3 May which appears at page 159-160.

41 In answering questions in cross-examination, Mr Frank seemed uncertain as to which procedure was being followed by the respondent in dealing with its management of the claimant's absence. He was unclear about whether his conduct of the appeal was a rehearing of the original "final absence management review meeting", which would permit new evidence of the claimant's fitness to work at the date of the appeal, or whether he was simply considering the reasonableness of Ms Allen's decision to dismiss at the time of that decision. Mr Frank said that he believed that he was dealing with the latter position, namely simply considering whether Ms Allen's decision at that time was reasonable at that time. Having said that, he then did accept that it would undoubtedly have made a difference to the outcome of the appeal had he seen the letter from the claimant's GP dated 16 May.

42 The management statement of case prepared by Ms Allen shows that she was supported by Carrie Sherwen of HR. The minutes of the meeting show Mr Frank was supported by Ms Tracey Minns (HR Business Partner). The Tribunal found it noticeable from the minutes of the meeting that Ms Carrie Sherwen played a particularly active role at the appeal hearing, speaking on 26 occasions compared to 20 for Mr Frank and 14 for Ms Allen. The vast majority of Ms Sherwen's comments are clear and unequivocal attempts to justify the decision taken by Ms Allen. A further worrying aspect of the appeal process was when Mr Frank states in his statement that "the panel" was mindful of the fact that the claimant had been absent from work since November 2016. In the appeal outcome letter at page 174, Mr Frank also refers to, "The panel took an adjournment to carefully consider the facts of the case and all evidence presented by both parties". He goes on to say, "The panel as part of its deliberations considered that you felt that management had acted outside the attendance management procedure and disability policy. The panel concluded that they could not identify any procedural flaw within the process followed. The panel observed that reasonable adjustments and appropriate support has been afforded throughout the course of your employment. The panel concur with management that each absence case should be reviewed on its individual merit. The panel concluded that the management of this case was appropriate. Taking

into account the actions undertaken during this time and the circumstances laid out by both parties, the panel felt that on balance the decision to dismiss was proportionate given the range of options explored and the lack of a foreseeable return to work date on the date of dismissal. I therefore confirm that the appeal panel upheld the decision of the dismissing officer."

43 Mr Frank's evidence to the Tribunal was that the decision to dismiss the claimant's appeal was his and his alone. The Tribunal did not accept Mr Frank's evidence in this regard. The minutes clearly state, "Hearing adjourned while the panel consider". The Tribunal found that Mr Frank's deliberations and decision were highly likely to have been influenced by Ms Sherwen and that Ms Sherwen was highly likely to have been part of the decision making process, rather than simply being present as an advisor.

44 Mr Frank's evidence was that after hearing all of the evidence, he adjourned to make a decision and "based on the presentation of the hearing took the decision to uphold the dismissal which had been taken at the final sickness absence review hearing".

45 Mr Frank's reasoning for his decision was that the claimant had been absent from work since November 2016 and was at the time of the appeal signed off as unfit for work until 18 June 2017. She had been unable to work for an extended period of time and despite all reasonable adjustments that had been explored and the treatment she had received, she was unable to carry out the role for which she had been employed or any adjusted alternative roles. He felt that the decision to dismiss the claimant had been fair and reasonable because the claimant had repeatedly stated that she was no better or indeed was feeling worse and there were no adjustments that the Trust could make, nor could she envisage a foreseeable return to work. Mr Frank was satisfied that the respondent's treatment of the claimant was consistent with any other employees in the same circumstances. He did not accept that the claimant's dismissal was outside the Trust's procedure. He did not accept the claimant's assertion that she was at the time of the appeal, fit to return to work. He considered this to be "completely at odds with the fit note that the claimant presented at the appeal hearing as this stated she was medically unfit to work until 18 June 2017".

46 The claimant was advised of the outcome of the appeal hearing by letter dated 30 May which appears at page 173-175 in the bundle. It states that the decision of the appeal hearing was final and there was no further level of appeal against the decision.

47 The claimant lodged her claim form with the Employment Tribunal on 12 September 2017.

The law

48 The relevant statutory provisions engaged by the claims brought by the claimant are contained in the Employment Rights Act 1996 and the Equality Act 2010. Those statutory provisions are as follows:-

Unfair dismissal

Employment Rights Act 1996

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

98 General

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

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

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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.

Unfavourable treatment because of something arising in consequence of disability

Equality Act 2010

15 Discrimination arising from disability

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

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

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

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

Unfair dismissal

49 Both representatives agreed that the reason proffered by the respondent for its dismissal of the claimant was a reason related to her capability to perform work of a kind for which she had been employed by the respondent, namely because of her long term absence. That is a potentially fair reason under section 98(2)(a) of the 1996 Act. Both representatives agreed that the relevant authorities which provide guidance on the interpretation of section 98(2)(a) and section 98(4) in cases such as the claimants, are:-

Spencer v Paragon Wallpapers Limited [1977] ICR 301;

BS v Dundee City Council [2014] IRLR 131;

East Lindsay District Council v Daubney [1977] ICR 566;

HJ Heinz Company Limited v Kenrick [2000] IRLR 144.

The basic principles established by those cases are as follows:-

49.1 It is essential to consider whether the employer can be expected to wait any longer for the employee to return. The Tribunal must expressly address this question, balancing the relevant factors in all the circumstances of the individual case.

- Those factors include whether other staff are available to carry out the absent employee's work, the nature of the employee's illness, the likely length of his or her absence, the cost of continuing to employ the employee, the size of the employing organisation and the unsatisfactory situation of having an employee on very lengthy sick leave.
- A fair procedure is essential. This requires in particular, consultation with the employee, a thorough medical investigation (to establish the nature of the illness and injury and its prognosis) and consideration of other options (in particular alternative employment within the employer's business).

- The employee's opinion as to his or her likely date of return and what work he or she will be capable of performing, should be considered.
- In one way or another, steps should be taken by the employer to discover the true medical position prior to any dismissal. Where there is any doubt, a specialist report may be necessary. The employer must take into account not only the employee's current level of fitness, but also his or her likely future level of fitness.

50 The Tribunal found in the claimant's case that the respondent had failed to discover the true medical position before it decided to dismiss the claimant. The respondent did not carry out a reasonable investigation into the claimant's true medical position. Its reliance upon its own occupational health reports in all the circumstances of this case, was unreasonable. At the third absence review meeting there was sufficient evidence before the respondent to show that the claimant was undergoing a course of treatment and/or medication which had a reasonable prospect of alleviating her symptoms and thereby facilitating a return to work. The Tribunal found that it was unreasonable of the respondent not to give the claimant a further opportunity for the medication to work. The Tribunal found that a reasonable employer would have requested further information from the claimant's Rheumatologist about the prospects of the medication working and thus facilitating a return to work. By the time of the appeal hearing there was a clear dichotomy between the respondent's occupational health advice, that of the claimant's treating clinicians and the opinion of the claimant herself. The Tribunal found that it was unreasonable of Mr Frank to insist on dealing with the claimant's appeal purely on the basis of the evidence which was available to Ms Allen at the original dismissal meeting. The Tribunal found that there was sufficient doubt about the claimant's condition, treatment and likelihood of recovery that it was reasonable in all the circumstances for the respondent to have sought a specialist report. Furthermore, the respondent failed to give sufficient weight to the claimant's opinion as to her own likely recovery and prospects of returning to work.

51 The Tribunal found that the respondent had failed to follow a fair procedure in all the circumstances of the claimant's case. Despite their protestations to the contrary, the Tribunal found that the respondent had followed the three stage procedure which is properly applicable under paragraph 12 of the process relating properly to short term/persistent sickness absence. The respondent's documents all refer to a first meeting, second meeting and final meeting. The Tribunal found that this showed that the respondent adopted a policy of dealing with the claimant's absence at three consecutive meetings and no more. That is not the policy which is supposed to be followed by the respondent under its procedure for managing long term or chronic sickness absence. Their own policy states:-

> "This type of absence demands quite a different supervisory approach as it requires a balance between acting compassionately to the employee and minimising disruption to the Trust. In the interests of the individual employee and the organisation it must be remembered that the chances of an employee returning to work decreases rapidly with the duration of the absence. In the majority of cases where absence has lasted less than six

> months employees will be able to return to their normal duties following long term absence. However there will remain a few instances when a return to work will not be possible and managers must ensure that they work closely with HR and staff health and wellbeing to deal with such situations properly."

The claimant was an employee with almost 30 years' service. She had no live warnings relating to absences at the time of her dismissal. She had been absent for less than six months. The respondent's own sick pay policy provides full sick pay for six months followed by half sick pay for a further six months. The respondent's witnesses agreed that this envisages that there may well be cases where an employee may be absent for up to 12 months. The Tribunal found that the respondent had provided no meaningful explanation as to why the claimant's employment had been terminated with such haste. The respondent's slavish reliance upon the phrase "there was no foreseeable date for return to work" was unreasonable in all the circumstances of this case.

52 The Tribunal found that the respondent had failed to show that the impact of the claimant's absence of five months was such that it could no longer reasonably be expected to wait for the claimant to return to work. Ms Allen's evidence was that the claimant's absence resulted in the Trust having to backfill shifts with the use of overtime shifts or bank staff, "which incurred additional cost to the department in terms of financing shift cover and reimbursement of travel costs." No statistics were provided as to those finance costs. The remainder of Ms Allen's evidence in this regard is simply that "**IF**" the department was unable to cover the shift or "**IF**" I was unable to cover the claimant's work or "the overall list for the day would need to be reduced" and finally "this **would have** potentially impacted upon patient waiting times". The Tribunal found that the respondent's evidence in this regard was no more than showing that there was a potential for such impact, but none that there had actually been such an impact. The Tribunal found that it was unreasonable for the respondent to conclude at this stage they could no longer be expected to wait any longer for the claimant to return to work. The respondent unreasonably focused on what it described as its previous steps to make reasonable adjustments for the claimant and thus failed to show that it had properly addressed its mind to the possibility of alternatives other than dismissal at the relevant time.

53 For those reasons, the claimant's complaint of unfair dismissal is well-founded and succeeds.

54 It was accepted by the respondent that its dismissal of the claimant would properly and fairly fall within the definition of "unfavourable treatment" in section 15 of the Equality Act 2010. The respondent further accepted that the dismissal was because of the claimant's absences and that those absences were "something arising in consequence" of her disability. The necessary factors for the claimant to establish a potential breach of section 15 are therefore present. The onus then transfers to the respondent to show that its dismissal of the claimant in all the circumstances of the case was a proportionate means of achieving a legitimate aim. The Tribunal accepted that it is a legitimate aim for the respondent to uphold the needs and efficiency of its Radiography Department and its patients and the health, welfare and safety of the claimant and the staff in the same department. However, the Tribunal was not satisfied that the

respondent's dismissal of the claimant at this time and in these circumstances was a proportionate means of achieving that legitimate aim.

55 The burden of proof lies upon the respondent to show that its dismissal of the claimant was a proportionate means of achieving a legitimate aim. The question for the Tribunal is whether the dismissal of the claimant was "proportionate". The role of the Tribunal in assessing the employer's justification under section 15(1)(b) was considered by the Employment Appeal Tribunal in **Hensman v MoD UKEAT/0067/14/DM**:-

> "The role of the Employment Tribunal in assessing proportionality is not the same as its role when considering unfair dismissal. In particular it is not confined to asking whether the decision was within the range of views which were reasonable in the particular circumstances. The exercise is one to be performed objectively by the Tribunal itself. The Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer."

56 Those views refer to earlier guidance given by the Court of Appeal in **Hardies & Hansons Plc v Lax [2005] ICR 1565** where Pill LJ stated:-

> "It is for the Employment Tribunal to weigh the real needs of the undertaking, expressed without exaggeration, against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate. The Tribunal must therefore seek to weigh the justification against its discriminatory effect. What is required as a minimum is a critical evaluation of whether the respondent's reasons demonstrate a real need to dismiss the claimant. If there is such a need, consideration should be given to the seriousness of the disparate impact of the dismissal on the claimant and an evaluation of whether the former was sufficient to outweigh the latter."

57 The Tribunal found that the respondent had failed to provide any or any adequate evidence to justify its dismissal of this particular employee in these circumstances. The bundle contains documents relating to the claimant's absences going back to 2005. The respondent's witnesses went to some lengths to describe the various adjustments which had been made to the claimant's work, to accommodate her disability and the demands of her son. There were at least two members of the respondent's HR Department present throughout the Employment Tribunal hearing. However, the respondent has failed to produce any statistical evidence whatsoever to show how much overtime it incurred during the claimant's absence, how many bank staff had to be utilised and at what cost, whether radiology appointments were extended or delayed, whether any such appointments were cancelled or indeed anything to meaningfully describe the impact of the claimant's absence on the department. The claimant only worked 22.5 hours a week. Her job was to get the patient undressed, position patients on beds, undertake data entry and provide general report to the Radiographer. Whilst Ms Allen described the possibility of an impact on the department caused by the claimant's long term absence, there was no meaningful evidence about any actual impact. The respondent has failed to provide any meaningful evidence in support of its contention that its business needs meant that the claimant had to be dismissed after a five months absence.

Ms Allen and Mr Frank both failed to show that the respondent could no longer continue to support the claimant's absence. The Tribunal found that the respondent had failed to discharge the burden of showing that the dismissal of the claimant, with her length of service and after an absence of only five months, was proportionate in all the circumstances of the case.

58 Accordingly, the claimant's complaint of unfavourable treatment because of something arising in consequence of her disability, contrary to section 15 of the Equality Act 2010, is well-founded and succeed.

59 A remedy hearing will be arranged in due course.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

14 May 2018