EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Mr Simon Jackman	**AND**	**The Council of the City of Newcastle upon Tyne**

Heard at: North Shields **On: 30 October 2018 – 1 November 2018 inclusive**

Before: Employment Judge A M Buchanan
Non-Legal Members: Mrs S Mee and Mr R Dobson

Appearances

For the Claimant: Mr Mark Monaghan of Counsel
For the Respondent: Mr Andrew Crammond of Counsel

JUDGMENT having been sent to the parties on 18 November 2016 and written reasons having been requested in accordance with Rule 62(3) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the following reasons are provided:

REASONS

Preliminary matters

1.1 The claimant instituted these proceedings on 5 April 2018. The claimant entered into early conciliation with the respondent on 2 March 2018 and the conciliation ended on 7 March 2018.

1.2 A response was filed on 3 May 2018 in which the respondent denied all liability to the claimant.

1.3 At a private preliminary hearing held on 20 June 2018 before Employment Judge Johnson the issues in the various claims were defined. Further particulars of the

claim were filed on 13 July 2018 (page 33/34) and a response to those particulars was filed on 26 July 2018 (pages 43/44).

1.4 At the conclusion of the hearing the Tribunal issued its Judgment with full reasons orally and send out a short judgment to confirm its conclusions on 2 November 2018. Subsequently a request for full reasons was received from the claimant and these reasons are issued in response to that request.

The claims

2 The claimant advances the following claims to the Tribunal:-

2.1 A claim of ordinary unfair dismissal relying on the provisions of sections 94/98 of the Employment Rights Act 1996 ("the 1996 Act").

2.2 A claim of disability discrimination by an alleged failure to make reasonable adjustments relying on the provisions of sections 6, 20/21, 39 and Schedule 8 of the Equality Act 2010 ("the 2010 Act").

2.4 A claim of discrimination arising from disability relying on the provisions of sections 6, 15 and 39 of the 2010 Act.

3 The Issues

The following issues were agreed between the parties as the matters for determination by the Tribunal:

Unfair dismissal

3.1 Did the Respondent rely upon a potentially fair reason to dismiss the Claimant?

3.2 Did the Respondent act reasonably in all of the circumstances in treating this as sufficient to justify the dismissal of the claimant? Was the decision to dismiss within the band of reasonable responses? Did the respondent follow a fair procedure? (The Claimant alleged that this dismissal was unfair for the reasons detailed at paragraph 4.1 of the Further and Better Particulars (pages 33 – 34)).

Failure to make reasonable adjustments

3.3 Is the Claimant's ***claim*** of ***failure to make reasonable adjustments*** in time? If not, is it just and equitable to extend time?

3.4 Did the Respondent have in place / apply a Provision, Criterion or Practice ("PCP") (namely, as pleaded by the Claimant, a PCP of refusing to agree a reasonable request for a career break made pursuant to their own policy)?

3.5 If so, in respect of the PCP, did this put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison to a person who was not disabled (namely, as pleaded by the Claimant, because the career break requested was to assist him recovering from disability related ill health and consequent absence from work to the point where he was likely to be in a position to return to work)?

3.6 If so, did the Respondent take such steps as were reasonable to have to take to avoid the disadvantage; and, in so doing, did the Respondent implement reasonable adjustments? (The Claimant asserts that the reasonable adjustment the Respondent failed to take was to grant his request for a career break prior to the date of his dismissal on 5 December 2018).

Discrimination arising from disability

3.7 Did the Respondent subject the Claimant to unfavourable treatment (namely, when the Respondent refused his request for a career break and instead dismissed him)?

3.8 If so, was it because of something arising in consequence of the Claimant's disability (namely, his disability related absence from work)?

3.9 If so, can the Respondent show that it was a proportionate means of achieving a legitimate aim(s)? Without prejudice to the evidence generally, the Respondent refers to the following legitimate aim(s):
3.9.1 The proper, effective, efficient and/or fair management of sickness absence in the workplace, including the maintenance, protection and/or development of health, welfare / wellbeing and/or safety of children in the Respondent's care;
3.9.2 The maintenance, protection and/or development of health, welfare / wellbeing and/or safety of children in the Respondent's care;
3.9.3 The efficient running of the Respondent's business, reducing costs and/or the need to provide a good service to members and stakeholders, including the children and/or families in the care of the Respondent;
3.9.4 The need to ensure that roles within the business are adequately and reasonably covered; and/or
3.9.5 The need to ensure an efficient and effective workforce, with minimal and/or not unreasonable impact (including the Claimant) on staff and/or the business and/or the proper and reasonable management of sickness absence of staff (including the Claimant) within the business.

4 Witnesses

Claimant

4.1 The claimant gave evidence and called no other witnesses.

Respondent

For the respondent evidence was heard from:

4.2 Sharron Pattinson ("SP") – the claimant's line manager

4.3 David Forster ("DF") – the investigation manager of the claimant's grievance

4.4 Jill Liddement ("JL") – HR Officer

4.5 Abigail Waites ("AW") – the Dismissing Officer.

5 Documents

We had an agreed bundle before us running to 252 pages. Some pages were added during the hearing. Any reference to a page number in this Judgment is a reference to the corresponding page in the agreed trial bundle.

6 Findings of Fact

Having considered the evidence from the witnesses and the way in which that evidence was given and having considered the documents to which we were referred, we make the following findings of fact on the balance of probabilities:

6.1 The claimant was born on 6 July 1968. At the material time the respondent accepts the claimant was disabled by reason of the mental impairment of post-traumatic stress disorder ("PTSD"). The respondent accepts it had knowledge of both the disability and the effects of the disability at all material times.

6.2 The claimant served in the army from 1984-1994 and the PTSD from which he suffers arises from events witnessed by him during those years of active service. The claimant began work for the respondent on 6 January 2001 as a Residential Care Officer and he was doing this job at the time of his dismissal.

6.3 The claimant worked at a childrens' home known as Airey Terrace. There were six young people aged 12-18 housed there. They were all vulnerable young people because of their experiences when young children. Their needs are the paramount concern of the respondent.

6.4 The claimant had difficulties with a young person "T" at Airey Terrace in September 2016 and the behaviour of T caused him to become ill. The ultimate diagnosis was of PTSD because the behaviour of T caused him to recall incidents in the Gulf War in which he served and he became seriously ill with that mental health impairment.

6.5 The claimant had had a lengthy absence from work in 2015 by reason of a shoulder operation and that absence had lasted some 153 days.

6.6 The claimant asked to drop shifts on 7 and 17 October 2016 and this was allowed to accommodate the claimant's domestic issues at the time. He was due to be on annual leave from 24 October to 7 November 2016. He saw SP before that leave and she was sufficiently concerned about the claimant's health to refer him to Occupational Health ("OH") at that time. The claimant did not return to work after 23 October 2016.

6.7 The OH report dated 31 October 2016 (page 104) indicated the claimant was not fit to work and had agreed to a referral to Northern Guild which offered counselling support.

6.8 The claimant met SP on 1 December 2016 (page46(i)) for an informal attendance meeting when the claimant indicated he would not expect to be able to return until he had completed his 6 sessions of counselling which the respondent had agreed to fund pending him being able to access counselling through his own

GP. By this point in time, the claimant had undertaken two counselling sessions on 21 and 28 November 2016.

6.9 There was a further informal meeting on 23 December 2016 (page 46c) when the claimant indicated that counselling was continuing and that he was not taking medication for depression which had by then been prescribed. It was agreed that there should be another referral to OH after the last of the counselling sessions had taken place on 25 January 2017.

6.10 There was communication between the claimant and the Deputy Manager Jill Yorke on 6 and 9 January 2017 (page 107) and reference was made again to the claimant's shoulder injury and the ongoing counselling.

6.11 A further reference to OH was made on 25 January 2016 (page 108) and it was stated the claimant was not fit for work and would be presenting a further fit note for 4 weeks absence. He was evincing symptoms of depression and anxiety/stress and needed longer term more in-depth counselling support.

6.12 There was a further informal meeting on 14 February 2017 (pages 111/112) between the claimant and SP at which the claimant recounted some of his traumatic experiences in the Gulf War and wished to see T spoken to about the things she had said to him which had led him to become ill. That was resisted by SP. The claimant raised the possibility of working in a different home and SP said she would investigate the matter but would prefer the claimant to return to Airey Terrace. There had been an offer made previously of a move to Slatyford Lane but the claimant had not wanted to accept that move. The claimant was told that the next meeting with him to discuss his absences would be a formal meeting and that a warning could be issued as the claimant's level of sickness had far exceeded the prescribed limits. The outcome of that informal meeting was recorded in a letter dated 14 February 2017 (page 111).

6.13 On 23 February 2018 the claimant was seen again by OH (page 113). The claimant had completed his 6 counselling sessions and had been fast tracked by his GP into Talking Changes – more intensive counselling. It was opined that the claimant suffered from depression which amounted to a disability under the 2010 Act and that he was not fit for work. It was noted that the claimant was still having problems with his shoulder for which he was receiving physio-therapy but was not taking medication. The claimant was not taking anti-depressant medication.

6.14 SP was concerned about the content of the report from OH on 23 February 2017 and so sought permission from the claimant to instruct a psychologist. Ultimately a psychiatrist was instructed and a report received from Dr G E P Vincenti in May 2017 (pages 124/215).

6.15 Notwithstanding the decision to appoint a specialist to report, the formal sickness meeting went ahead on 20 March 2017 (notes at 47-49 and typed notes at 49a-49c). The claimant was represented by Lyn Hardie ("LH") of Unison. The claimant agreed to the referral for a specialist report at that meeting. The claimant relayed his feelings of helplessness and turmoil about the issues with T and other areas of his life. There was reference in the meeting to the claimant suffering from PTSD. LH raised the question of a career break of between 6 and 9 months. It was

noted that the claimant had had 309 days absence at that point. The meeting adjourned for 16 minutes and SP announced that she could not agree to a career break because she could not recruit to fill the gap created by the claimant's absence in the time of the career break. She stated she felt she needed to issue a warning and meet again in 4 weeks and if there was no prospect of a return, she would consider a sickness hearing which could lead to dismissal. Some of these matters were confirmed to the claimant in a letter written by SP dated 21 March 2017 (page 118/119).

6.16 The claimant appealed against the imposition of that warning (page 120). The basis of the appeal was that proper consideration had not been given to a career break and he had not been asked even to complete an application form. SP made the application form available to the claimant and he then completed a formal application (page 203) on 13 April 2017 and requested a career break to *d* expressed in these terms:
" As there have been a series of events at work that have distracted me and knocked my confidence, I am respectfully requesting time away from the workplace rather than leave my job which on the whole I have enjoyed for over a decade. I have been fortunate enough to be trained in several relevant areas that complement the department's strategies for looking after vulnerable young people. I would therefore not wish to see that invaluable training and experience go to waste for what I feel is a temporary setback in my role as a RCCO. In our last meeting I requested a career break and I feel that I may have underestimated the amount of time needed to take away from the workplace. It was put to me that the initial request was not long enough. In retrospect I can see this may be correct".

The respondent decided not to deal with that renewed request until the specialist report, which by then had been commissioned, was receive (page 208).

6.17 The report from Dr Vincenti was received on 31 May 2017 by the respondent (pages 185-8). The report refers to the claimant's perception of management inaction in respect of T. The claimant had suffered from low level PTSD since the early 1990's. There is reference to him being a "*shade depressed".* He was not well enough to return to work in the environment of the care home, he would need to complete his treatment for PTSD which had only just begun before a return to work could be considered and a diagnosis of late onset PTSD and co-morbid depression was given. It was anticipated that he would need "*quite a lengthy course of treatment over the space of a number of months …"* The idea of a career break was supported in these terms:

"In broad terms, a career break is often a good idea, as it allows an individual to recharge their batteries, reflect on their life situation and take stock of where they have got to in life and where they want to go to next. A career break has a lot of psychological advantages therefore. It is however not always useful in promoting an individuals return to work. Sometimes an individual makes use of a career break to change direction in life, and move on in a different direction altogether rather than return to their former job. I would certainly recommend that Mr Jackman has a career break in order to think through and reflect on his life and where he wants to go next and I think that would assist him with regard to his treatment for PTSD and depression. I cannot say that career break will assist him in returning to his former job, as that will depend on the outcome of the career break and to what use he puts

it, and the outcome of his deliberations during that career break process, which I do not believe can be foreseen in advance. Similarly, I do not think I can say that three years is better than two years, or better than one year. Clearly a "career break" of one week would be of little value and a decent spell is required. There is really no evidence of which I am aware to guide us as to the length of career break that is most helpful. As I understand it, most career breaks are about six months to a year in length. I do not think I can be more helpful than this. In principle however, I would definitely support a career break as part of the overall package of help for Mr Jackman".

6.18 The claimant's appeal against the imposition of the written warning went ahead on 19 May 2017 and was taken by Stafford Devine. The appeal was dismissed by letter of 31 May 20-17 (pages 72/74). The reasoning to reject the appeal was set out at page 73 in these terms:

"I confirm my decision to reject your appeal. My reasons for this decision are: I am satisfied that the absence management procedure has been followed as regular contact has been maintained during your absence. Informal reviews and referrals to Occupational Health have been made in order to support you. You were offered a placement at another home. I do not believe that it would have been necessary to wait until a psychiatric report was available before a formal review was convened. I consider that your absence levels are unsustainable and adequate evidence was presented to support the decision to issue you with a warning. The decision as to whether or not to support your career break request is outside of the absence management procedure and this is not within my remit to give a decision".

6.19 Having considered the report of Dr Vincenti, on 10 July 2017 the respondent wrote to the claimant to reject his formal application for a career break. That decision is at page 221. The rationale was that the children at Airey Terrace require stability and there was very limited turnover of staff which met the attachment needs of the children. The letter continued: "*While it could be argued that we could try and recruit to a fixed term contract over a three year period, this would mean that the longer term stability of the staff group would be negatively impacted and risks of attachments with children in our care broken".* In addition, a career break was not always useful in promoting a return to work and the pressures of the role would not change and the claimant would be disadvantaged by the lack of training which could further negatively impact his emotional wellbeing.

6.20 The claimant went from full salary sick pay to half pay on 6 May 2017 (page 49d).

6.21 The claimant raised a formal grievance in respect of the refusal of the career break by letter dated 3 August 2017 (page 211/213). He argued that a person leaving on maternity leave would equally have a negative impact on the long-term relationships and attachments of the young people. The claimant stated he would agree to attending keeping in touch days and training days during the career break. He would be prepared to return to work at a different unit. The claimant noted that in addition to Doctor Vincenti, a career break was also supported by a therapist from Talking Therapies Steve Wood (page 209/210). That report included the following statement:

"…in the long term he would like to continue in the role but he has come to recognise that in the short term he must address the psychological issues before he is able to function effectively in the workplace. In my view a short career break would be of benefit in allowing Mr Jackman the space and time he requires to learn to manage his PTSD effectively, and the opportunity to return to his post afterwards would also reduce the stress associated with financial worries the long term".

6.22 DF was appointed to investigate the grievance. He saw Myra Milne on 22 August 2017 (pages 142) and she was recorded as saying in that meeting: "*the needs of the children are paramount. Children are extremely vulnerable. Once you give this to one person would have to give it to others and the business could not function……..a career break would not help him if he is dipping in and out of training and having to keep in touch with developments at work".* SP was seen on 21 August 2017 (pages 145/147) and said there were no circumstances in which a career break would be granted. Adjustments already in place were stepping down from 37 hours to 30 hours which meant less intensive work and a difference to sleep ins. Turnover of staff at Airey Terrace was not high and a career break would not assist the welfare of the children.

6.23 The claimant was seen by DF on 6 September 2017 (pages 148-151) and he was accompanied by LH of Unison. He stated that a deputy manager at Airey Terrace had been given a year off about 5 years before. Medical redeployment had been suggested but he did not wish to go down that route given the risks involved. The claimant stated he could not give a definitive answer as to when he would be able to return to work but he would like a career break to enable him to focus fully on his recovery and the policy of the respondent allowed a career break if a job was at risk.

6.24 The decision of DF on the grievance was given by letter on 14 September 2017 (pages 154/157). It was stated that a career break was not an automatic entitlement - each application had to be assessed on its merits. The reasons for not granting the career break rested on the Vincenti report question 5 and the response to it. The next reason to refuse was the needs of the service argument. The reasonable adjustments already in place were noted as an agreed reduction of working hours, suggestion of medical redeployment and taking some shifts off. No-one else had been allowed a career break given the needs of the young people in care. It was concluded that consistency in the lives of the children was extremely important and that a career break would not be a reasonable adjustment. Management had given full consideration to the request. The decision to refuse the career break was upheld and thus the grievance was dismissed.

6.25 On 21 September 2017 an appeal against the grievance was submitted (page 219/220) and a hearing was arranged for 27 November 2017 (page 160a). A case was prepared by DF for that hearing (pages 130-134). In the event, that hearing never took place.

6.26 At the same time the respondent moved to progress the absence management of the claimant. The claimant was seen by OH on 7 August 2017 (page 126) where it was noted the claimant remained absent from work with a fit note until mid-October 2017. The report noted that the claimant's mood showed that he was reporting "*severe symptoms of anxiety and depression which is a*

deterioration since my last assessment on January 2017". No date could be given for a return to work. A formal meeting took place on 10 August 2017 (page 128) which resulted in a decision to move to a formal sickness hearing. The letter written to confirm the meeting stated: "*Due to the level of sickness currently 484 days up to the end of your sick note on 13 October 2017 and that you have a current live formal sickness warning on file issued on the 20 March 2017, I believe it is necessary to progress to the next level of a sickness hearing to consider ending your employment on the grounds of capability due to ill health. However as discussed during the meeting you will be able to put your case to the independent chair of the sickness hearing who will then make a decision".*

6.27 The date for the sickness absence meeting was originally set for 21 September 2017 (page 76) but was rearranged at the request of the claimant to 17 October 2017 (page 159). At the hearing the management case was presented by SP (pages 80-87) with 23 appendices (pages 88-130). The management case was presented followed by questions from the claimant. The case for the claimant was advanced by LH and it was noted that if the claimant was dismissed he would lose the right to his grievance appeal. The hearing was adjourned to enable the chair of the meeting Abigail Waites to consider the papers the claimant had produced at that meeting (pages 165-221).

6.28 The adjourned meeting was re-arranged for 3 November 2017 but adjourned to 1 December 2017 as LH could not attend and then again adjourned to 5 December 2017 at the request of the claimant (pages 160-161).

6.29 On the day of the reconvened hearing 5 December 2017, the claimant did not attend as he had mixed up the dates but said he was happy to go ahead with LH without him. New information was placed before the panel being supervision notes and an incident report in respect of T of 8 September 2016. LH was not prepared to go ahead when the claimant had not seen the notes. AW offered to delay the start to enable the claimant to attend but he did not reply to telephone calls. LH withdrew from the hearing in the absence of the claimant.

6.30 AW decided to go ahead in the absence of the claimant and LH. She asked questions of SP. SP confirmed the claimant's last fit note ran out on 13 October 2017 and a further note had not been submitted. It had been difficult to contact the claimant and as he was on nil pay, a decision had been taken not to progress as a disciplinary matter for unauthorised absence. Questions were asked about a career break and SP replied: *"Consistency. Had lengthy discussions with our management. Relationships with service users aged 11-18. So a 3 year break would not be easy on service users plus a lengthy gap for SJ to readjust on his return, training etc. Would be difficult to advertise not known length".*

6.31 The decision reached was to dismiss the claimant with 12 weeks' notice paid as a lump sum. The decision was confirmed in a letter dated 16 December 2017 (pages 241/244). The following so-called "*key factors"* were taken into account by AW. The claimant had been absent for 13 months due to work-related stress, shoulder problems, depression, psychological distress and stress and could not provide a return to work date. The claimant had exceeded the respondent's target for sickness absence for three consecutive years. In 2015/16 there had been 153 days of absence, in 2016/17 148 days of absence and in 2017/18 236 days of

absence to date. A formal sickness warning was issued on 10 August 2017 with a return to work expected within one calendar month. The most recent OH report had indicated a deterioration in the claimant's anxiety and depression. No fit note had been received since the expiry of the last note on 13 October 2017. No return to work date had been offered. Regular contact had been made with the claimant. Claimant had not kept in regular touch with the management himself. The claimant's grievance in respect of his unsuccessful application for a career break had been properly dealt with. The claimant was disabled but all reasonable adjustments had been considered and implemented. The letter concluded "*Your ongoing absence continues to have a detrimental impact on the Service and young people. Your absence continues to be covered by other residential care officers working overtime which increases the pressure on them and potentially their interactions with service users. Young people will not have the same amount of time afforded to them due to the increased demands of a staff team operating with one less team member".* The claimant was advised of his right to appeal. No appeal was submitted. The grievance appeal fell away with the dismissal.

6.32 The respondent has a Career Break Policy ("the CB Policy") (pages 196 -201). This CB Policy speaks of a career break for a period between three months and three years. Career breaks can be taken for any reason apart from the purpose of taking up alternative salaried/waged employment. The CB Policy states that if an employee is being managed under the respondent's sickness absence scheme and there is a possibility of the contract being ended, that employee may apply for a career break should there be the potential of a return to work after an extended period of leave. The CB Policy continues: "*each application is assessed on its merits and it is not automatic that a career break will be granted".* Salary ceases for the duration of the career break. A person on a career break is expected to keep in touch with his designated contact every three months. It is noted that any request to extend or reduce a career break would be given due consideration and that no guarantees could be given that a request would be granted. A career break application should be completed using the appropriate application form and a decision will be made within 28 days. If a career break was applied for unsuccessfully, a grievance could be launched.

6.33.The Absence Management Policy (pages 92/93) of the respondent states that absences should be managed informally and once an absence becomes unsustainable, a formal procedure should be followed. Step one of that formal procedure is a formal warning to the effect that if attendance does not improve or if a return to work is not achieved within a specified time scale, then consideration should be given to ending employment on the grounds of capability. Step two is a sickness hearing organised when an employee hits a trigger point during the warning period or does not return to work in the timescale specified in the formal warning. There are rights of appeal at every stage of the formal procedure.

Submissions

Claimant

7.1 For the claimant Mr Monaghan made oral submissions which are briefly summarised.

7.2 It was submitted that there was little discussion in March 2017 about the possibility of a career break. The adjournment lasted some 16 minutes and full consideration was not given. Reasons for refusal related to the continuity of care of the children and recruitment issues. No documentation has been produced by the respondent to show that recruitment was a real issue. There is no evidence that offering temporary contracts would not produce the appropriate level of replacement and no preparatory work at all was done in relation to being able to consider a career break for the claimant. No costing exercise was carried out. No evidence has been produced that the colleagues of the claimant were adversely affected by his absence and there is no evidence of *"burnout*". The claimant had been out of the workplace for around 11 months and the longer his absence went on, the less compelling is the argument about continuity of care of the children. No evidence has been produced that any child was actually harmed by the claimant's absence. That absence could be properly explained to the children involved.

7.3 The medical evidence endorsed a career break. Whilst there is no specific conclusion that the career break would work, the positive endorsements of such a step far outweigh the negative endorsements. It was more likely than not that the claimant would return to work at the end of the career break. The respondent could have asked for a review of the claimant's position during the course of the career and it would have been logical to do so.

7.4 It was submitted that the respondent had failed to consider the career break properly and that it would have removed substantial disadvantage from the claimant. The respondent knew the claimant was disabled and ought to have drilled down in more detail as to the cause of the disability and not issued a final warning which would only serve to increase his anxiety as it did. The request for the career break was taken too literally and it was more fluid than a bald request for a three year break. The report from Dr Vincenti ought to have triggered a further review: the claimant was in crisis with significant mental health issues but it was far from certain that the career break of three years was required. The respondent ought properly to have considered a shorter period and it simply failed to make reasonable adjustments in respect of the career break. The respondent did not act fairly in dismissing the claimant and did not act proportionately.

7.5 The **Salford** decision (below) can be distinguished on several grounds. First there is a different PCP in this case and secondly and most importantly the career break policy in that case did not envisage a career break being used in the circumstances of an employee being away from the workplace due to illness. The policy of the respondent however does envisage that possibility and therefore that goes to the heart of this claim.

7.6 In relation to time issues, the question of the adjustment was a continuing matter. The adjustment of a career break was sought to the point of the dismissal and is in time. Even if the allegation is out of time, then it would be just and equitable for time to be extended in the circumstances of this case.

Respondent

8.1 For the respondent Mr Crammond submitted written submissions extending to 67 paragraphs which are briefly summarised as are the oral submissions which supplemented the written submissions.

8.2 The claim of discrimination on the basis of marriage or civil partnership was apparently not pursued.

8.3 The respondent has discharged the burden to prove a potentially fair reason for dismissal namely one related to the capability of the claimant. The starting point in considering the question of fairness of the dismissal is the decision in **Spencer -v- Paragon Wallpapers Limited 1976 IRLR 363** and the question is basically whether the respondent can be expected to wait any longer before moving to dismiss the claimant and, if so, how much longer. Other factors to consider are the nature of the illness of the claimant, the needs and resources of the respondent, the effect of the claimant's absence on other employees, the duration of the illness, how the illness was caused, the effect of sick pay and health insurance schemes, alternative employment possibilities and the length of the claimant's service with the respondent.

8.4 It was submitted that the decision to dismiss fell well within the band of reasonable responses open to the respondent as a local authority with statutory responsibility including towards children in its care. The respondent could not reasonably, or at all, have been expected to sustain or manage the absence of the claimant any longer. The claimant's absence went well beyond the trigger points and targets in place. Over a period of around two years, the claimant was mainly out of the workplace as opposed to in it. None of the medical evidence could indicate any timescale for the claimant to return to work. The respondent had undertaken substantial medical consultation. The absence of the claimant was having adverse impact on the respondent's ability to carry out its statutory functions. The claimant was consulted properly and thoroughly throughout and had the benefit of union assistance. The respondent has a duty of care and statutory responsibilities towards the children in its care and it was not reasonable for those obligations to have been placed at risk any longer than already had been the case as a result of the claimant's absence from work. The effect on the claimant's colleagues was considerable in terms of the pressure of working additional overtime. Not to agree a career break is not a reason to render the dismissal of the claimant unfair. There is no obligation on any employer whether as a matter of law, policy or otherwise to agree to a career break. It is incorrect in law to suggest that declining a career break takes a dismissal outside the band of reasonable responses nor is it a failure to make reasonable adjustments. From April 2017, the claimant was requesting a three-year career break. It was not reasonable to expect the respondent to grant a three-year (or any) career break especially against the backdrop of the lengthy absence to date and the uncertainty (at best) around the claimant's willingness or ability or otherwise to return to work at the end of the break. On the evidence available at the time the decision to dismiss was made, there was no reasonable prospect that a career break would result in the claimant actually returning to work. The respondent gave proper consideration to the continuity of care of the children for whom it was responsible. Given the claimant's financial and personal circumstances, he would have had to work elsewhere during

the career break. It is not reasonable to expect the respondent to agree to a career break for it inevitably to fail after three years during which time the respondent had been put to the burden, cost and risk of covering his absence. The career break policy does not allow the claimant to work during the career break. The respondent would have had to pay the claimant's pension contributions during the career break. Concerns around explaining to the children in the care of the respondent why the claimant was not in the workplace are legitimate. The decision to dismiss was fair.

8.5 The claimant alleges one failure to make a reasonable adjustment namely the failure to grant a career break. The claimant received the decision on his original request in March 2017 and on his formal request in July 2017. The claim is out of time and it is not just and equitable to extend time.

8.6 An adjustment is only a reasonable one if it would remove the disadvantage from the employee and if it is not to enable him to return to work, it will not be reasonable. The focus is on returning a disabled employee to work not removing them from the workplace. Emphasis was placed on the decision of the EAT in **Salford NHS Primary Care Trust -v- Smith UKEAT/507/10.** The PCP pleaded by the claimant was a refusal to agree a reasonable request for a career break and there is no evidence that anyone else suffered such a refusal and therefore there was no such PCP. The claimant was not put to substantial disadvantage in any event. The career break in this case at its very best would have been a trial or an exploratory investigation as to whether the claimant could return to work. It is not capable of being a reasonable adjustment. The claim falls at every hurtle.

8.7 If there was unfavourable treatment of the claimant, it was justified. The aims pursued by the respondent are legitimate and proportionately pursued and there were no other less discriminatory alternatives to dismissal. The career break was at best a speculative possibility and that is not good enough. There was no reasonable prospect of a return to work. If there had been a career break for three years as requested, that would have meant the claimant had been away from the workplace for over four years. It was unrealistic to think that a career break would ever work. All claims should be dismissed.

The Law

9. We reminded ourselves of the various statutory provisions in respect of the claims advanced and of the relevant leading authorities:

9.1 Failure to make Reasonable Adjustment Claim: sections 20/21 of the 2010 Act

Section 20:

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

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion or practice of A 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 take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid".

Section 21

(1) A failure to comply with the first second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has contravened this Act by virtue of subsection(2): a failure to comply is , accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 8

The Tribunal has had regard to the relevant provisions of Schedule 8 of the 2010 Act and in particular paragraph 20 which reads:

" (1) 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, second or third requirement".

9.2 The Tribunal reminded itself of the authority of **The Environment Agency v Rowan [2008] IRLR20** and the words of Judge Serota QC, namely:

"*An Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the 1995 Act by failure to comply with section 4A duty must identify –*

(a) the provision, criterion or practice applied by or on behalf of an employer;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate);

(d) the nature and extent of the substantial disadvantage suffered by the claimant.
It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice

applied by and on behalf of an employer" and the 'physical feature of the premises', so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice or feature placing the disabled person concerned at a substantial disadvantage".

The Tribunal notes this guidance was delivered in the context of the 1995 Act but considers it equally applicable to the provisions of the 2010 Act.

9.3 The Tribunal has reminded itself of the guidance in respect of the burden of proof in claims relating to an alleged breach of the duty to make reasonable adjustments in the decision in **Project Management Institute -v- Latif 2007 IRLR 579** where Elias P states:

"It seems to us that by the time the case is heard before a Tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative……that is why the burden is reversed once a potentially reasonable adjustment has been identified…..the key point…is that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made……we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

9.4 We have reminded ourselves of the guidance from Elias LJ in the Court of Appeal in the decision in **Griffiths –v- Secretary of State for Work and Pensions 2015 EWCA Civ 1265.**

In this context I would observe that it is unfortunate that absence policies often use the language of warnings and sanctions which makes them sound disciplinary in nature. This suggests that the employee has in some sense been culpable. That is manifestly not the situation here, and will generally not be the case, at least where the absence is genuine, as no doubt it usually will be. But an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision. As I mention below, the fact that some of the absence is disability-related is still highly relevant to the question whether disciplinary action is appropriate.

As to the second proposed adjustment, the reasoning of the majority is in my opinion more opaque. But I think implicit in its analysis is the belief that there is no obvious period by which the consideration point should be extended. If the worry and stress of being at risk of dismissal is to be eliminated altogether, then all disability-related illness must be excluded. But if that step is not taken - and no-one was suggesting that it should be - then in a case like this when lengthy further periods of absence are anticipated, the period by which the consideration point should be extended becomes

arbitrary. As the majority point out in paragraph 49 when drawing an analogy with the O'Hanlon case, in so far as the alleged disadvantage is with the stress and anxiety caused to a particular disabled employee, it would be invidious to assess the appropriate extension period by such subjective criteria.

Also, where the future absences are likely to be long, a relatively short extension of the consideration point is of limited, if any, value. It will not in practice remove the disadvantage if the absences remain over 20 days. No doubt there will be cases where it will be clear that a disabled employee is likely to be subject to limited and only occasional absences. In such a situation, it may be possible to extend the consideration point, as the Policy envisages, in a principled and rational way and it may be unreasonable not to do so. But in my view the majority has taken the view that this is not appropriate in a case of this nature. In my judgment, the majority was entitled to reach that conclusion.

9.5 We note that where a position is reached when there is nothing an employer can reasonably do to alleviate a disadvantage then the duty to make adjustments falls away: this will be the case where the position is irretrievable and this may be the position reached during a period of extended ill health. This may be the case also where the employer has caused the employee's predicament where, even in that situation, there is no unlimited obligation to accommodate the employee's needs. If an adjustment proposed will not in fact procure a return to work then it will not be a reasonable adjustment. We note also that the EAT in **Lincolnshire Police –v- Weaver 2008 AER 291** made it clear that a Tribunal must take account of the wider implications of any proposed adjustment and this may include operational objectives such as the impact on other workers, safety and operational efficiency. The purpose of an adjustment in the employment context is to return the employee to work.

9.6 We have referred to and considered the authority of **Salford NHS PCT -v- Smith 2011 (above).** We have noted the conclusions of the Tribunal led by HH Judge Serota QC. In particular we note the following extracts from the decision:

*"47. At this point we stress that reasonable adjustments are limited to those that prevent the PCP or feature placing the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. Reasonable adjustments are primarily concerned with enabling the disabled person to remain in or return to work with the employer….The short answer to this appeal is that this was not a reasonable adjustment. Similarly, so far as the cross-appeal is concerned, the suggestion that the Respondent should have permitted the Claimant to take a career break was equally not a reasonable adjustment for the reasons given by Elias J in **Tarbuck** and given by me in **Rowan**.*

60. I have had the benefit of sitting with two lay members who have considerable industrial experience. Their view on the facts before this Employment Tribunal was that this employer did not have a closed mind; it did what an employer should have done, and explored retraining the Claimant in IT (something she was unwilling to undertake). It proposed her attending at Burrows House to keep in touch with fellow employees; something she did not feel able to do. It ascertained that there was no job which the Claimant was capable of doing at the time, whether part-time or otherwise, let alone her original post. The Claimant never disagreed with any of the letters sent to her, in which the efforts made by the Respondent had been set out. She chose not to attend two meetings intended to discuss possible adjustments. The Claimant could not even attend Burrows House simply to meet colleagues because she found this too stressful.

61. The career break that was argued for in the cross-appeal is incapable of being a reasonable adjustment. My colleagues have never heard of a career break being used in the way the Claimant suggested. They would regard it as highly irregular and contrary to proper and recognised industrial practice, let alone good industrial practice. It would be contrary to the terms of the career break policy which Mr Grundy referred to (page 146 of our bundle) and would in no way be a substitute for long-term sick leave. Had the Respondent proposed that the Claimant should be transferred from long-term sick leave to a career break, the Claimant would have had legitimate cause for complaint,

for being moved from long-term sickness absence with benefits, including at the time half pay, to an unpaid career break which in no way would have prevented the disadvantage caused to the Claimant by the PCP, as found by the Employment Tribunal, or alleviated her inability to multi-task, deal with clients, set up emotional barriers, or "climb the mountain."

62. As Mr Clancy pointed out during the course of submissions, how would a change of label from long-term sick leave to career break enable the Claimant to return to work? Mrs Gallico pointed out that transfer to a career break could prejudice the Claimant by frustrating the possibility of ill-health retirement, because she would not have been shown to be sick. She would also of course lose her half pay. We are all agreed that a transfer would have set a highly undesirable precedent".

Section 15 of the 2010 Act – Discrimination arising from disability

9.7 The Tribunal has reminded itself of the provisions of **section 15 of the 2010 Act** which read:

"(1) A person (A) discriminates against a disabled person (B) if –

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

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

(2) Sub-Section (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.

9.8 We remind ourselves that in considering a claim pursuant to section 15 of the 2010 Act, we need to consider what breach of section 39 of the 2010 Act is established, whether there was unfavourable treatment of the claimant, whether there is something arising in consequence of the disability and finally whether the unfavourable treatment was because of the something arising from the disability. In respect of the meaning of unfavourable in section 15 we noted **Trustees of Swansea University Pension & Assurance Scheme –v- Williams 2015 UKEAT/0415/14** and we have noted in particular the guidance:

"I accept Mr O'Dair's submission that it is for a Tribunal to recognise when an individual has been treated unfavourably. It is impossible to be prescriptive of every circumstance in which that might occur. But it is, I think, not only possible but necessary to identify sufficiently those features which will be relevant in the assessment which this recognition necessarily involves. In my judgment, treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be".

9.9 A useful explanation of the difference between claims under section 15 and those under sections 20/21 of the 2010 Act was provided by Judge Richardson in **General Dynamics –v- Carranza UKEAT/0107/**14 in the following terms.

"The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability – S.15 of the Act. The second is the duty to make adjustments, S.20-21 of the Act. The focus of these provisions is

different. Section 15 is focused upon making allowances for disability. Unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. Sections 20-21 focus upon affirmative action – if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage. In many cases the two forms of prohibited conduct are closely related – an employer who is in breach of the duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct. But not every case involves a breach of the duty to make reasonable adjustments, and dismissal for poor attendance can be quite difficult to analyse in that way. Parties and employment tribunals should consider carefully whether the duty to make reasonable adjustments is really in play, or whether the case is best considered and analysed under the new robust S.15".

9.10 We have reminded ourselves of the guidance of Simler J in **Pnaiser –v- NHS England 2016 IRLR 170** in respect of the proper approach to adopt in cases involving section 15 of the 2010 Act.

9.11 We have reminded ourselves that in considering so called justification, that we must consider an objective balance between the discriminatory effect of the PCP engaged and the reasonable needs of the party who applies it. We have noted the words of Pill LJ in **Hardys and Hanson -v- Lax 2005.** This was a decision of the Court of Appeal taken in the context of a claim of indirect discrimination but this test was applied to claims advanced under section 15 of the 2010 Act by the EAT in **Hensman –v- Ministry of Defence UKEAT/0067/14/DM**.

Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

9.12 We have reminded ourselves of the decision in **Carranza** (above) and the guidance given in that case in respect of justification:

If this case had been put forward as a case of discrimination arising from disability, it would have been easier to analyse - for in truth this was not a case about taking practical steps to prevent disadvantage, but a case about the extent to which an employer was required to make allowances for a person's disability. If the case had been put that way it would to my mind in any event have been doomed to failure. It might have been established that the dismissal and the underlying written warning were "unfavourable treatment". But it was legitimate for an employer to aim for consistent attendance at work; and the carefully considered final written warning was plainly a proportionate means of achieving that legitimate aim. The Employment Tribunal as a whole proceeded on that basis, and the majority found against the Respondent only because it had shown

some mercy before the last lengthy period of absence. It was really unarguable that dismissal after that further very substantial absence was not a proportionate means of achieving a legitimate aim.

9.13 We have reminded ourselves of the decision of Judge Richardson in **Buchanan-v- Commissioner of the Police of the Metropolis 2016 IRLR 918** in respect of the defence of so called justification to which we were particularly referred by the claimant:

The starting-point must be the words of section 15(2)(b) of the Equality Act 2010. This requires the putative discriminator A to show that "the treatment" of B is a proportionate means of achieving a legitimate aim. The focus is therefore upon "the treatment"; and the starting point therefore must be that the ET should apply section 15(2)(b) by identifying the act or omission which constitutes unfavourable treatment and asking whether that act or omission is a proportionate means of achieving a legitimate aim.....In this case, therefore, the ET was required to consider whether each of the six steps taken by the Respondent and found by the ET to be unfavourable treatment arising from disability was justified - that is to say, whether it was a proportionate means of achieving a legitimate aim. It will probably not be difficult to deduce the aims of the Respondent, and for this purpose the policies which it adopted will of course be highly relevant; if the aims are not explicit within the policies, they may well be implicit. In addition to the usual aims of attendance management, which in the case of those who are absent long-term no doubt include supporting them so far as reasonable, considering medical discharge and considering termination fairly where absence can no longer reasonably be supported, the ET may wish to consider whether there was a particular aim in the Respondent's case to assist and support those who had been injured on duty. The ET will then consider whether the steps in question were proportionate means of achieving those aims. Paragraph 103 of the majority's Reasons shows that they were concerned about one aspect of Ms Cunningham's criticism of the Respondent - giving return dates which the employee could not meet. They were concerned that, if it was always unlawful to give such a return date, the Respondent would be unable to operate within the Regulations in the more serious cases, where absence was likely to be prolonged. I do not think the majority need have been concerned. The question will always be whether it was proportionate to the Respondent's legitimate aims to take a particular step under the UPP. In making that assessment it is of course relevant to take into account that Parliament has laid down a procedure to be followed before an officer can be dismissed on grounds relating to capability; so long as it is also appreciated that neither Parliament nor the Respondent's own policies require a mechanistic application of the procedure. It is also relevant to take into account the impact of applying the procedure in a particular way on a particular officer. I would, however, caution the ET to make careful findings as to the Respondent's aims; I think the policies show they may have been more sophisticated than simply "to move in stages towards either a return to work or dismissal".

9.14 We have referred to the decision of HH Judge Clark in **H M Land Registry –v- Houghton and others UKEAT/0149/14/BA** to which we were referred by the claimant. We have noted the guidance given in that decision on the question of Justification:

As to justification, it is common ground between Counsel that at paragraph 26 this Employment Tribunal correctly directed themselves as to the classic test propounded by Balcombe LJ in Hampson v DES [1989] ICR 179 at 191E: "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. .....Ultimately, the balancing exercise, once properly identified, is a matter for the Employment Tribunal absent any irrelevant factors being taken into account or relevant factors disregarded.

Unfair Dismissal– Section 98 Employment Rights Act 1996 (the 1996 Act)

9.15 The Tribunal has reminded itself of the provisions of section 98 of the 1996 Act which read:

"*98(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 in 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) The reason falls within this subsection if it –

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

(b) relates to the conduct of the employee …

(4) In any other case 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 reasons 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".

9.16 The Tribunal has reminded itself of the decision of **British Home Stores Limited v Burchell [1978] IRLR379** and notes that it is for the respondent to establish that it had a genuine belief in the lack of capability of the claimant at the time of the dismissal and that that belief was based upon reasonable grounds and the dismissal followed a reasonable investigation and a reasonable procedure.

9.17 We have reminded ourselves of the authority of **Spencer-v-Paragon Wallpapers Limited 1976 IRLR 373** and the words of Phillips J:

"What is required will vary very much indeed according to the circumstances of the case. Usually what is needed is a discussion of the position between the employer and the employee. Obviously what must be avoided is dismissal out of hand. There should be a discussion so that the situation can be weighed up, bearing in mind the employer's need for the work to be done and the employee's need for time in which to recover his health…..Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and if so, how much longer?..".

9.18 We have noted the decision in **Luckings –v- May and Baker Limited 1974 IRLR 151** where it was stated that even if a return to work is predicted that does not mean a fair dismissal cannot be effected. We have noted the decision of the Court of

Session in **BS-v- Dundee City Council 2014 IRLR 131** and the guidance given on the duties of an employer in cases of ill health of an employee:

Three important themes emerge from the decisions in Spencer *and* Daubney*. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasise, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.*

9.19 We have noted the decision of the Court of Appeal in **McAdie –v- The Royal Bank of Scotland 2007 EWCA Civ 806** and the statement that in situations where an employer has caused the ill health of the claimant then it had a duty to "go the extra mile" before moving to dismiss. We also note the approval given in that case to parts of the decision of the EAT at an earlier stage in the proceedings as follows:

Thus it must be right that the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him for ever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work. Employees who have been injured as a result of a breach of duty by their employers are entitled to compensation in the ordinary courts, which in an appropriate case will include compensation for lost earnings and lost earning capacity: tribunals must resist the temptation of being led by sympathy for the employee into including granting by way of compensation for unfair dismissal what is in truth an award of compensation for injury. We also agree with Morison P in sounding a note of caution about how often it will be necessary or appropriate for a tribunal to undertake an enquiry into the employer's responsibility for the original illness or accident, at least where that is genuinely in issue: its concern will be with the reasonableness of the employer's conduct on the basis of what he reasonably knew or believed at the time of dismissal, and for that purpose a definitive decision on culpability or causation may be unnecessary.

Conclusions and Discussion

10.1 We consider it appropriate to deal with the claims advanced in the following order:

10.1.1 The claim of failure to make reasonable adjustments.

10.1.2 The claim of discrimination arising from disability.

10.1.3 The claim of ordinary unfair dismissal.

Claim of failure to make reasonable adjustments.

10.2 Did the respondent have in place the PCP contended for namely the refusal to agree a reasonable request for a career break which was available through the CB Policy?

10.3 This PCP is centred on the CB Policy to which we have referred above and it brings into sharp focus the decision made by the respondent not to allow the claimant the career break he requested. A one-off decision is capable of amounting to a provision, even if not a criterion or a policy, as set out in **British Airways -v- Starmer 2005 IRLR 862** and that is so even though, as a one off discretionary decision, it was applied to no one else. There is clear evidence in this case of a policy not to grant any requests for career breaks in this area of the respondent's business. We have considered the words attributed to Myra Milne at the grievance investigation meeting on 22 August 2017 (page 142) where it was clearly stated that if a career break was given to one member of staff (the claimant) then it would have to be given to others and that as a result the business could not function. We have also considered the words attributed to SP at the grievance investigation meeting on 21 August 2017 (page 146) when she clearly stated that the three-year career break would have a significant impact on the service and that the children for whom the respondent was responsible required stability of carers and the setting where they lived. She stated that the last thing the children need was different people coming in and out of their lives. When asked if there were any circumstances that a career break would be granted SP replied: "*not now, this would never be granted".* That is sufficient to enable us to conclude that there was a PCP applied by the respondent not to allow career breaks at all in the area of the business of the respondent in which the claimant worked. However, that is not the PCP advanced by the claimant in his pleadings.

10.4 The PCP as framed speaks of the refusal to agree a "reasonable" request for a career break rather than a "reasonable career break". That begs the question when is a request reasonable? Is it the manner or the substance of the request which has to be reasonable? Framing the asserted PCP in this way causes confusion and potentially conflates the PCP with the question of whether there should be a reasonable adjustment to it to permit an exception of a reasonable career break. The PCP as asserted by the claimant was not applied by the respondent. The PCP applied by the respondent was to refuse any request, reasonable or not, for a career break in this area of the business of the respondent. The PCP contended for by the claimant was not in fact applied by the respondent either generally or specifically to the claimant for there was no reasonable request for a career break as we set out below.

10.5 In case our criticism of the PCP contended for in this case is wrong and there was such a PCP in play, then we have considered if the PCP contended for by the claimant put the claimant at a substantial disadvantage compared to people who were not disabled. We can identify substantial disadvantage to the claimant in the PCP contended for. The CB Policy specifically applied to persons being managed under the sickness absence scheme and, as a disabled person, the claimant was more likely to be subject to that scheme than a non-disabled person who would have no or less sickness absence. The claimant was seeking a career break because he was ill and seeking to use it as a tool to aid his recovery and a non-disabled person would not be in that position. Thus, we identify substantial disadvantage – reminding ourselves that in this context "substantial" means something more than minor or trivial.

10.6 And so we turn to the central question in this case namely was the failure to allow the claimant a career break a failure to make a reasonable adjustment to the PCP contended for if, contrary to our first conclusion, there was such a PCP in play. We spent a long time considering this point which was at the heart of this claim. Would the granting of a career break remove the substantial disadvantage and enable the claimant to return to work?

10.7 The medical evidence provided some support for the claimed adjustment. The Vincenti report (page 188) speaks of a career break often being a good idea with psychological advantages and the report from Talking Changes (page 209) speaks of a short career break being of benefit in allowing the claimant the space and time required by him to learn to manage the PTSD effectively.

10.8 We have given due regard to the decision in **Salford NHS FT -v- Smith** that a career break is incapable of being a reasonable adjustment (para 61). On the face of it, a career break is a very unusual adjustment because it removes the claimant from the workplace whereas the principal purpose of an adjustment in this context is to keep the claimant in the workplace. We distinguish **Smith** on the basis advanced by Mr Monaghan because in this case the respondent's own policy envisages a career break being used in the context of an absence from work due to illness whereas that in **Smith** did not. We recognise that with a career break, there is a chance of the claimant returning to the workplace at the end of that break whereas without it, and absent any improvement in his condition, he will leave the workplace on dismissal by reason of lack of capability due to ill health.

10.9 What persuades us that the contended adjustment is not reasonable is the fact that there was no indication that any length of career break would result in the claimant returning to the workplace. The claimant requested a career break of up to three years contrary to what the report from Talking Changes (page 210) recommended namely a "*short career break".* The Vincenti report makes it clear that it could not be said that a career break would necessarily assist the claimant in returning to the workplace for that depended on what happened during the career break and that, of course, could not be foreseen in advance. We accept that it is clear that a career break would have been akin to a trial or an exploration of what was possible and adjustments of that nature are not in the main capable of amounting to reasonable adjustments. In short, what was proposed was a break from the workplace of up to three years which offered no guarantee of returning the claimant to the workplace at all. It was at best a possibility and the result of it would not be known until it ended and that could be, on the claimant's application, three years distant in time. We conclude that a career break was a potential adjustment to the PCP contended for but not a reasonable adjustment.

10.10 We are re-enforced in that conclusion when we note that the question of the reasonableness of any adjustment must be viewed in the context of the respondent's area of operation. The respondent has a statutory obligation to care for very vulnerable young people who crave and deserve as much stability in their lives as possible and therefore every effort is properly made to have as few staffing changes at Airy Terrace (and other similar establishments run by the respondent) as possible. Whilst that factor is not the only relevant factor as the respondent effectively asserted it to be, it is nonetheless a very important factor in the assessment of what was a reasonable adjustment. The granting of a career break

of up to three years would have brought uncertainty and potential unwelcome change in respect of the staff in an environment where exactly the opposite was required. We have taken account of the genuine concerns expressed by the managers of the respondent in this regard which we accept. In addition, we accept the difficulty arising for the respondent of appointing someone to take the place of the claimant on a fixed term basis as opposed to a permanent basis and the consequent potential adverse effect on other employees of the respondent who would be required to fill in during periods of absence of the claimant and any fixed term replacement. The ongoing cost of the adjustment contended for is also a factor away from its reasonableness particularly when there is placed in the scales the cost to the respondent of having supported the absence of the claimant up to the point of his request for the adjustment.

10.11 Having assessed the question of the reasonableness of the proposed adjustment, we conclude that a career break of up to three years as contended for by the claimant was not a reasonable adjustment and thus the claim of discrimination by failure to make reasonable adjustments fails and is dismissed.

10.12 If that should be wrong, then we deal with the time limit point. We conclude that the failure to allow a career break was conduct extending over a period of time within section 123(3)(a) of the 2010 Act. At the time the claimant was dismissed there was an ongoing appeal against a grievance submitted in respect of the refusal to allow a career break and the career break policy provided that if a career break was not granted then a grievance should be raised. We therefore conclude that the failure to allow the adjustment was conduct extending over a period of time and even if it were not, then it would be just and equitable for time to be extended to allow this matter to be considered for remedy. The claimant raised the matter properly in the workplace, the respondent has been able to deal with this issue without any difficulty in terms of the relevant witnesses or the cogency of the evidence and, if there was a delay in raising this matter, it was a short one. Had it been necessary to do so, we would have extended time for this matter to have been considered in terms of remedy.

The claim of discrimination arising from disability - Section 15 of the 2010 Act.

10.13 We conclude without difficulty that the dismissal of the claimant was unfavourable treatment within section 15 of the 2010 Act. We also conclude without difficulty that the claimant was dismissed because of his absence from the workplace and that that absence was arising, at least in part, from the impairment of PTSD which the respondent accepts amounted to a disability for the purposes of section 6 of the 2010 Act. The absence was *"something arising*" from the disability of the claimant.

10.14 We have considered whether in moving to dismiss the claimant the respondent was seeking to achieve one or more legitimate aims. The respondent asserted that the aims it was pursuing were first, the proper, effective, efficient and fair management of sickness absence in the workplace, secondly the maintenance, protection and development of the health, welfare and well-being of the children in its care, thirdly, the efficient running of its business by reducing costs and the need to provide a good service, fourthly, the need to ensure the roles within the business

were adequately and reasonably covered and finally the need to ensure an efficient and effective workforce.

10.15 We have considered those aims and conclude that they are all of them legitimate aims for the respondent to pursue. The respondent is a public authority responsible for public funds with statutory responsibilities in particular to the young children in its care and with whom the claimant worked. The respondent has a duty to ensure that public funds are efficiently and properly deployed and that means that it has a duty to ensure the effective and fair management of sickness absence in the workplace. In common with all public authorities, the respondent has a duty to ensure it runs an efficient business and reduces the costs of so doing so far as is reasonable and proper. The respondent also had a duty to its other employees and in particular those who worked with the claimant at Airey Terrace. We conclude that the aims asserted by the respondent as being pursued in this case were all of them legitimate aims within the meaning of section 15(1)(b) of the 2010 Act.

10.16 We turn to the centrally important question of whether the respondent in dismissing the claimant acted proportionately in pursuit of those legitimate aims. We take account of several factors in reaching our conclusion on this question. The claimant had been absent from the workplace for a very considerable period of time when the respondent dismissed him and at that point in time the claimant could not offer a return to work date. The most recent OH report had indicated a deterioration in the claimant's condition and since October 2015 the claimant had had over 530 working days of absence from the workplace with differing conditions. The report obtained from Dr Vincenti did not suggest a further review of the claimant and indeed all the medical evidence obtained suggested that no return to work date could be offered at all for the claimant.

10.17 We take account of the fact that there was no failure on the part of the respondent to make reasonable adjustments in the way the claimant was dealt with leading up to the time of his dismissal and there was no allegation advanced by the claimant that the procedure followed by the respondent was anything other than reasonable and fair. We considered carefully the fact that the claimant was effectively dismissed on 5 December 2017 in his absence but we are satisfied that the claimant had had every opportunity to attend all the meetings which had been scheduled and the excuse that the claimant had muddled up the dates is not acceptable explanation. We take account of the fact that the claimant had exhausted his entitlement to six months full pay followed by six months half during his sickness period and was at the point of his dismissal not receiving pay at all from the respondent. The trigger points in the respondent's sickness absence procedure had been exceeded in the case of the claimant and very considerable latitude had been afforded to him by his line managers.

10.18 We have considered the medical evidence which was before the respondent at the time of dismissal. We have noted the contents of the 0H reports and in particular the Vincenti report. Whilst the Vincenti report offers some support for a career break, it makes it clear in answer to specific question five (page 188) that there was no guarantee that a career break would assist the claimant in returning to his former job as that would depend upon the outcome of the career break and the use to which the claimant put it. We have noted and have taken account of the fact that the absence management policy of the respondent provides for an application

for a career break to be made if there is a possibility of the loss of the position but equally that policy makes it plain that there is no automatic entitlement to a career break. We take account of the fact that the claimant had sought a career break of up to 3 years and had candidly accepted that his previous request of 6 to 9 months was not long enough for him. We have taken account of the rationale of the respondent in refusing the second and longer career break requested by the claimant and conclude that the respondent took account of all relevant matters in reaching the decision it did on that point. The career break might have resulted in the claimant returning to work after a long period of time but equally it might not. There was no guarantee that the career break would achieve anything in this matter other than delay the eventual departure on a permanent basis of the claimant from the workplace. We conclude that the refusal of a career break was proportionate to the legitimate aims which the respondent was seeking to implement and in particular the aim of providing for the young people in its care a stable environment. The claimant could offer no explanation as to what he would do during his career break. The claimant indicated that he had financial difficulties but a career break would not have allowed the claimant to work elsewhere. The rationale for a break was to investigate other potential careers or take a period of extended leave but not simply to work elsewhere. The question was rightly posed by Mr Crammond on behalf of the respondent as to how the claimant would have provided for himself and his family during the career break.

10.19 We have taken account of the effect of the claimant's long absence on his colleagues and of the potential disruption to the staffing complement at Airey Terrace if the claimant was allowed a career break. We accept the concerns of the managers of the respondent that it would be difficult to recruit to a fixed term position in the environment in which the claimant worked. We accept that granting a career break was likely to cause staffing difficulties in a very sensitive area of the business of the respondent where the interests of the young people in the respondent's care were a very significant factor and rightly so.

10.20 We remind ourselves that in carrying out this exercise it is for us to consider whether the respondent acted proportionately and we are not restricted to answering that question from the viewpoint of the reasonable employer. We have assessed all relevant matters and conclude that the respondent acted proportionately to its legitimate aim in moving to dismiss the claimant in December 2017 after an absence from the workplace of over 13 months with no prospect at that time of return.

10.21 The claim of discrimination arising from disability therefore fails and is dismissed.

Unfair dismissal

10.22 We have first considered whether the respondent has proved on the balance of probabilities that the reason for the dismissal of the claimant was related to his capability and so fell within the provisions of section 98(2)(a) of the 1996 Act. There was no serious suggestion from the claimant that there was any other reason for his dismissal. We are satisfied on the balance of probabilities that the dismissing officer moved to dismiss the claimant for reasons related to his absence from work and thus his capability to do the job for which he was employed and no other

reason. The respondent has therefore discharged the burden to establish that the reason for the claimant's dismissal was related to his capability and was potentially fair.

10.23 We have considered whether there were reasonable grounds for the belief of the dismissing officer that the claimant lacked capability to carry out his duties by reason of his ill-health. We conclude that there were reasonable grounds for that belief. There was ample medical evidence before the respondent which indicated that the claimant could not offer any prospect of a return to work after an absence from work of over 13 months.

10.24 We are satisfied that the respondent had carried out a reasonable procedure and indeed investigation into the question of the health of the claimant before moving to dismiss. There was no real suggestion from the claimant that the procedure followed was anything other than fair and reasonable. The steps taken by the respondent to aid the claimant back to work were clear. The claimant had been allowed by his line manager to drop shifts, had been allowed considerable latitude in the time afforded to him to effect a recovery and the respondent had taken the exceptional step at some expense of obtaining a report from Doctor Vincenti which had given detail in respect of the claimant's condition but which did not suggest any further review and which could not offer any suggestion to achieve a return to work other than the possibility that a career break might achieve that objective. We note the contents of the respondent's sickness absence policy but also note that a career break is not a guaranteed right. We conclude that in deciding not to afford a career break in the circumstances of this case, the respondent was acting within the band of a reasonable response of a reasonable employer given all the other factors it had to balance in considering that question.

10.25 We have considered whether there was a reasonable procedure carried out by the respondent and conclude that there was. The claimant had been managed under the terms of the sickness absence management policy and there was no meaningful challenge to that procedure from the claimant. We had some concerns about the final hearing proceeding in the absence of the claimant but conclude that the respondent had afforded the claimant every opportunity to attend and there comes a point where it is reasonable to proceed in the absence of the claimant and we conclude that that point had been reached on 5 December 2017. We were particularly struck by the thorough and conscientious way in which KW approached her task and the conspicuously fair and thorough manner in which she approached the conduct of the final hearing – as it turned out to be.

10.26 We conclude that in moving to dismiss the claimant when it did the respondent acted within the band of a reasonable response to the situation in which it found itself and bearing in mind its size and administrative resources and the necessity to ensure that it was able effectively to carry out its statutory obligations not least to those young people placed in its care. The respondent is a public authority in charge of public funds and we conclude that the decision to dismiss fell within the band of a reasonable response of a reasonable employer in all the circumstances of this case.

10.27 In those circumstances, the decision to dismiss the claimant was a fair decision and the claim of unfair dismissal fails and is dismissed.

Final comments

11.1 There was a suggestion in the papers that the claimant advanced claims of discrimination on the basis of marriage/civil partnership. It was confirmed at the outset that no such claims were advanced.

11.2 The delay in being able to promulgate these reasons is much regretted.

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Employment Judge A M Buchanan

Date: 24 April 2019