# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Beirne

**Respondent:** Calderdale & Huddersfield NHS Foundation Trust

**HELD AT:** Leeds **ON:** 14 to 18 April 2018

**BEFORE:** Employment Judge Wedderspoon
Mr M Taj
Mr D Wilks

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** Mr F Sutcliffe, Solicitor

# JUDGMENT

1. The Claimant was unfairly dismissed.
2. The Claimant's dismissal was discriminatory.
3. If a different procedure had been adopted, it would have been both fair and proportionate to have dismissed the Claimant on notice on 15 August 2018.
4. The Tribunal awards the Claimant compensation of £12059.82.
5. The Respondent will pay the Claimant the compensation award within 14 days.

# REASONS

1. The Claimant brings the following claims:
2. (a)unfair dismissal; and

3. (b)disability discrimination; unfavourable treatment because of something arising in consequence of her disability contrary to section 15 of the Equality Act 2010.

4. By a case management order on 4 January 2019 Employment Judge Jones identified the following narrow issues to be determined in this case, namely:

   4.1 Disability discrimination –section 15 of the EqA

   It being accepted that the Claimant was a disabled person with ME, that the termination of her employment was unfavourable treatment and that the Claimant's employment was terminated because of an inability to perform her duties or all of her duties, in the past and potentially in the future that arose in consequence of her disability and it being agreed by the Claimant that it is a legitimate aim for Respondent's employees to maintain regular attendance at work so as to provide cost efficient services to the community, the Respondent serves and prevent any adverse effect on colleagues, was dismissal of the Claimant a proportionate means of achieving (that is reasonably necessary to achieve) that legitimate aim?

   4.2 Unfair dismissal

   It being agreed by the Claimant that the reason for the dismissal was on grounds of capability, was dismissal for that reason reasonable in all the circumstances of the case, including consideration of whether the Respondent had obtained appropriate medical opinion and undertaken a reasonable and fair procedure?

   4.2.1 If the dismissal was unfair for procedural reasons would or might the Claimant have been dismissed in any event such that any compensation should be reduced or extinguished.

**Hearing**

5. The Tribunal heard evidence from the Respondent's witnesses Pauline North, medical HR manager, the Claimant's direct manager, also Diane Marshall, HR business partner, Charlotte North, assistant director of workforce and Dr Hindle, registered GP and OH physician at the Respondent Trust.

6. The Claimant's evidence was interposed between Miss North and Dr Hindle due to the unavailability of Dr Hindle and to efficiently use court time. An agreed bundle of documents of 249 pages was provided. Further, the Respondent added in two further documents, R1 a properties document of a telephone note of 4 July and R2 a medical consultation note prepared by Dr Hindle.

**Facts**

7. The Claimant is a disabled person within the meaning of section 6 of the Equality Act by virtue of her condition of ME. The Claimant was employed by the Respondent Trust from 2 June 2014 at Huddersfield Royal Infirmary. From 30 August 2017 the Claimant was working on a new project alongside a colleague Miss Laura Miles to develop e-rostering for medical and dental staff at the Trust. This was a fixed term post due to end on 29 May 2018 but was extended in June 2018 to 31 March 2019 (page 41).

8. The Trust is under considerable financial pressure. It has a forecast of 43 million deficit which relies on a full delivery of 18 million CIP savings. They forecast 13 million on agency expenditure to cover vacancies and sickness. Sickness absence is a significant cost to the Trust. The Trust requires consistent and reliable service from its staff.

9. The work undertaken by the Claimant and her colleague was challenging due to a general resistance of staff to welcome changes that she and her colleague sought to introduce. However, in her team, she was generally supported by other colleagues, including her manager Pauline North.

10. The Claimant's contract was subject to the policy of attendance management including sickness absence. The policy deals with both short-term and long-term absence. Long-term absence is defined in the policy as "any certified absence from work due to sickness for more than four consecutive weeks" (paragraph 15.1). The policy makes provision to meet with sick employees including meeting an employee at their home or rescheduling a meeting at a later date when the employee can attend. A manager should take into account for example the circumstances of a member of staff being an in-patient (at paragraph 15.2) when making these decisions. Generally formal attendance meetings should be conducted to discuss an employee's absence. The policy states an employee should be advised in writing of the date and of the time of the meeting and the issues to be discussed. A minimum of five working days' notice must be given except by mutual agreement (pursuant to paragraph 13.5 of the policy).

11. The Policy also states employees must be informed in writing of their right to representation at formal meetings. They may choose to be accompanied by an official or lay representative from the Trade Union and Professional Association, another colleague, friend, partner or spouse and it is the responsibility of the employee to arrange their representation. Under the policy at paragraph 15.8, the decision to terminate an employee's employment on the grounds of ill-health or capacity will be made after all other options have been considered. This will involve consultation with the employee, obtaining medical evidence and receiving information as to whether or not there any other jobs the employee could reasonably undertake. The policy also details that a meeting should be chaired by a manager of the appropriate seniority assisted by a human resources representative. The meeting is also said to be arranged at a mutually convenient time with the details confirmed in writing and the employer will also be advised of their right to be represented.

12. A meeting may proceed in the employee's absence if the nature of the sickness is likely to postpone the meeting indefinitely or for a long period of time or the employee chooses not to attend the meeting without good reason. Further the policy dictates the role of the occupational health in the process is as set out at paragraph 16 to advise and inform the Respondent and OH is not a decision maker in the process.

13. The Claimant's sick record was poor. At page 96 of the bundle it indicates there were five relevant absences from 9 October 2017 to 13 October 2017, 1 November to 15 November 2017, 4 January 2018 to 3 April 2018 and from 9 April 2018 the Claimant did not return to work. The medical picture is in fact that the Claimant's condition has not been sufficiently stable for her to resume any work including part-time work. The report from Dr. P. M. Wood dated 11 December 2018 (page 98) states "I am of the opinion that your condition is likely to be lifelong, and that you may well continue to suffer with many of the symptoms that you are currently experiencing. However, since you are otherwise well with no other long-term medical conditions, the evidence suggests that you are in a group of people with CFS/ME who can respond well to therapy and can make quite a significant improvement in their health and wellbeing. It is therefore possible that you could substantially improve, although still experience symptoms. In that situation it may

be possible and beneficial for you to try to work part time as people who are able to work often experience a better quality of life."

14. The Claimant was competent at her work and enjoyed her role. Contrary to the Claimant's evidence, the Tribunal finds that the Respondent's manager was supportive of the Claimant. The Claimant and her manager, Pauline North engaged in text and WhatsApp messaging. When the Claimant was cross-examined to identify a single message which demonstrated her contention that her manager was unsupportive, she was unable to do so but in fact said it was the number of messages which she found to be unhelpful. The Tribunal rejected that evidence having perused the totality of the messages. The contact between the Claimant and her manager provides evidence to establish a good working relationship between the Claimant and her manager. Pauline North regularly enquired about the Claimant's health in a supportive and friendly manner which was appreciated by the Claimant at the time. Furthermore, the Tribunal do not find any sinister motive by the Respondent by its actions of giving the Claimant's desk to another member of staff to use during the Claimant's sickness absence or ensuring that a computer was used by another colleague whilst the Claimant was on long-term sick. The Tribunal finds that the Respondent was merely using the resources it had available for its staff at that time.

15. In the formal paperwork of a return to work meeting, which took place on 23 October 2017, no adjustments or supports, were actually noted to be provided to the Claimant. However at page 119, a text message between Pauline North and the Claimant, indicates that an informal arrangement had been reached whereby the Claimant was to do some shorter days to assist her return to work.

16. The Claimant, was regularly referred to occupational health by the Respondent. Mrs G Gledhill the Occupational Health practitioner advised on 27 November 2017 (page 25). The Claimant had been experiencing increased generalised infections and was undergoing investigations. She was taking prescribed medications and was still under review of her GP in relation to possible treatment. The Claimant was fit for work and had returned. Although it was considered that the Claimant did not suffer from a disability at this time, it was stated that the Claimant may well have one. On the Claimant's return on 22 January 2018 it was agreed to reduce the Claimant's hours for one week. Again she was referred to occupational health. It is noted to the Claimant's credit that the Claimant had tried to continue to work without being fully fit.

17. The Claimant was referred to occupational health in February 2018. Mrs Gledhill the practitioner advised on 21 February that the Claimant was not fit for work currently. At that time, the Claimant was having several courses of treatment, undergoing investigations and had been referred to a specialist. The Claimant reported a variety of symptoms which were debilitating including extreme fatigue. The Claimant had tried to return to work in January but had only managed 10 days. The Claimant was not fit for work currently and her satisfactory level of attendance was dependant on the good medical management of her underlying medical conditions. A prolonged phased return to work over four weeks was recommended as well as temporary reduction in hours said to be beneficial and possibly home working. Re-deployment was not considered at this time. Mrs Gledhill could not suggest any measures to support the Claimant back into work at this stage.

18. By letter dated 15 March 2018 (page 34) the Claimant was invited to an attendance meeting. The letter stated the purpose of the meeting was to explore options available under the Trust's policy and that the Claimant could be represented by a trade union. The Claimant is referred to a guidance document as to what to expect at the meeting.

19. At the meeting on 23 March the Claimant attended unaccompanied. Pauline North and Diane Marshall were present. The Claimant did not feel able to return to work at this time. However, the Claimant did wish to get back into a routine. It was envisaged that the Claimant would attempt a return to work on 3 April on reduced hours and in fact an amended work pattern was agreed between 3 April and 27 April. The Claimant was to be paid for full-time hours during the first two weeks of the phased return. It was also agreed the Claimant could utilise her outstanding annual leave from 20 July for the following two weeks to maintain her full-time salary.

20. By 3 May the Claimant had received a diagnosis of chronic fatigue syndrome following an appointment with her consultant immunologist. She was referred back to Occupational Health. Mrs Gledhill provided a report dated 18 May. The Claimant was awaiting a review on 1 June. She had not commenced treatment as yet. The main symptoms she reported were pain affecting many areas of her body and extreme fatigue. The practitioner's view was that the Claimant was not currently fit for work and an ability to maintain satisfactory level of attendance would depend upon good management of her condition. The condition is characterised by intermittent flare up of symptoms. It was not possible to say when those flare ups would occur. It was said to be too early to advise about specific adjustments at this stage and re-deployment would not provide any benefit in assisting the Claimant's return to work. It was stated that the disability provisions of the Equality Act should be given consideration.

21. By a letter dated 23 May the Claimant was informed her sick pay would run out on 12 June 2018 and she would receive half pay until 11 November 2018.

22. By letter dated 7 June the Claimant was invited to attend an attendance management meeting to take place on 13 June 2018. The stated purpose was to explore the options available to the Claimant under the Trust policy and establish whether the Respondent could assist the Claimant in any way balancing the needs of the service. She was made aware of her right to be accompanied provided with a guidance document as to what to expect at the meeting and informed she could obtain the Trust policy on attendance management from the intranet or from her manager.

23. At the meeting on 13 June the Claimant was unaccompanied. Pauline North and Diane Marshall were in attendance. The Claimant explained due to the unavailability of the consultant neurologist at Leeds she hadn't received a formal diagnosis. The registrar had informed the Claimant, there would not be a speedy resolution. She described her inability on some days to get out of bed due to extreme fatigue associated with the condition. The Claimant confirmed she was unable to return to work in the short term and in the long term. The Claimant had considered the possibility of reducing her working hours.

24. A number of options were discussed with the Claimant at this meeting namely a full return to work whereby the Claimant had said she didn't think this was possible in the short or long term. A phased return to work was also discussed. The Claimant confirmed she was unable to manage her symptoms so this was not

possible. The Claimant could not consider re-deployment opportunities. An application for ill health retirement was also discussed. The Claimant did not wish to pursue this. Further, as a last resort measure, termination of the Claimant's contract of employment on grounds of medical capability was discussed. The Tribunal notes that this was the first time the issue of termination was expressly raised with the Claimant.

25. An occupational health appointment was made for 28 June. On attendance at this appointment, the Tribunal finds that the secretary of Dr Hindle entered into an ill-judged conversation with the Claimant about the Claimant's medical condition. The Claimant did not complain about this at the material time but she later raised it in an email dated 30 July. The Tribunal consider on the balance of probabilities that the comments of the secretary were of a general nature about the condition of ME. They were well intended but totally inappropriate. Dr Hindle met with the Claimant on 28 June. His report is dated the same date and it appears at page 56 of the documents. It states

*..She appears to be suffering from a chronic fatigue type picture following medical illness. She is under the care of a specialist team in Leeds. At the present time she is not responding to her treatment plan. I do not think she is fit to carry out the full duties relating to her post. Overall, I am guarded with regard to her ability to maintain a satisfactory level of attendance going forward. It is not possible in this case to determine a date for fitness to return to normal duties. At the present time her illness is such that I do not think adjustments would enable a return to work. Her problem is such that it would be generalizable to any post to which she would be deployed and therefore I do not think redeployment is a viable option. If a return to work was not possible I would support an application for ill health retirement but due to her age and the undefined nature of her condition I am guarded about the success of such an application. I think her condition is likely to fall within the remit of the Equality Act (2010). I am writing to her specialist for a condition and prognosis report. I will advise you if necessary on receipt of this report."*

26. The Claimant complains that Dr Hindle stated that there were "red flags" about the Claimant's case. Although Dr Hindle could not recall this conversation when asked about this by the Respondent in August of 2018, the Tribunal accepts his evidence that this was genuine. The Tribunal accepts the doctor's evidence that when preparing his witness statement and reviewing the documentation of the Claimant's attendance he could recall that he did make such comments. The Tribunal find that they were well intended. He had a genuine concern that this Claimant may well lose her job and that she would not be able to return to work. He informed the Tribunal in his experience that 70% of individuals diagnosed with the condition of ME were unable to return to work. He explained that his role as an occupational health practitioner was to advise the Trust. He did not make decisions but he did take steps to contact the Claimant's treating consultants as is his usual and normal practice. On sending his report of 28 June to the managers of the Respondent, no manager contacted him to discuss the Claimant's case. He received a report dated 16 July 2018 from the Claimant's treating consultant Dr Wood, clinical immunologist and he received that on 31 July 2018 (page 59). It states *"..In terms of prognosis I think she has had her illness for a number of years and I would therefore be very cautious in assuming that she will make any substantial recovery from her current condition. I have recommended in my last letter to her G.P. that she had a local referral to a therapy service that may be able to help with some of*

*her CFS ME symptoms and she may make a significant response to this approach although I suspect that many of her symptoms should be considered long term".*

27. On 8 August 2018 (page 95) Dr Hindle wrote to Pauline North stating "..I have now received a specialist condition and prognosis report. He confirms her condition he states that we should be cautious in assuming that she will make any substantial recovery from her current condition and says that I suspect that many of her symptoms should be considered long term."

28. Dr. Hindle confirmed in his oral evidence to the Tribunal, that the treating consultant's view did not change his own opinion about the Claimant's ability to return to work in the short or long term and that that this was unlikely.

29. Meanwhile the Claimant had been contacted by telephone on 4 July 2018 (prior to the receipt of this material) by Diane Marshall. The Tribunal finds that the "record of telephone conversation" (page 58) is not the accurate note of a conversation. It is prepared in the form of a witness statement. Diane Marshall told the Tribunal she had prepared this typed note from written notes of the discussion with the Claimant shortly after their discussion. From the properties document disclosed that is not correct; the "note" was first prepared on 6 August on Diane's Marshall's return from holiday and following the Claimant's email (page 73) dated 30 July 2018 which raised a number of concerns about the process adopted to dismiss her. The Tribunal treat the accuracy of Ms. Marshall's note with caution. On the balance of probabilities, a discussion took place between the Claimant and Miss Marshall whereby the Claimant enquired about the reason/purpose of being required to attend a meeting on 5 July. To telephone a sick employee at home and provide them with one day's notice of a meeting is outside of the written policy of the Trust. Five days' notice of a meeting is required. It is the practice of the Trust to send a written invitation. In the circumstances of the Claimant's ill health and terms of the policy a reasonable employer would not have given less than 5 days written notice.

30. The Tribunal rejects the Respondent's suggestion that this was a reasonable step taken due to the informality of the relationship between the Claimant and her managers or that the Claimant was willing to come in at short notice. The Tribunal find this unlikely. The Claimant can suffer flare up of symptoms and the Tribunal does not accept that the Claimant had suggested that she come in at short notice. The Tribunal finds that Diane Marshall had failed to follow the Trust's written policy and had tried to "put the wheel back on track" outside of the Trust's written of process so that the date of 5 July of the discussion between the Claimant and the director of HR could be maintained.

31. The Claimant was told over the telephone by Diane Marshall that she was likely to be dismissed on 5 July and it is in that context that the Claimant felt it was too stressful for her to attend. The Tribunal do not accept that the Claimant faced by this fully consented to the meeting going ahead on 5 July in her absence and without representation or representations being made on her behalf. The Tribunal reject the Claimant's evidence that she was actually dismissed on 4 July. The Claimant has misinterpreted this. In the Claimant's own note (page 61) the Claimant expresses she was told that she was to be invited to a meeting to be terminated the next day due to her illness.

32. On 5 July Charlotte North, Director of HR, telephoned the Claimant at home. Charlotte North was unaware that the Claimant had not received 5 days written notice of the meeting in accordance with the policy document. Diane Marshall had

merely told her that the Claimant did not want to attend. Charlotte North called the Claimant to check whether the Claimant was happy for the meeting to proceed.

33. The Tribunal finds the letter setting out what was discussed at pages 63 to 65 reasonably adequate. Save, in addition, Miss North did mention a career break specifically to the Claimant which was rejected because it was stated it would affect the Claimant's benefits. This is corroborated by the comments of the Claimant in her email at page 74.

34. The Tribunal finds that the termination of the Claimant's contract over the telephone was an unusual step to be taken by an employer and outside the Trust's policy and not in accordance good industrial practice. In particular the Tribunal finds the comments of Miss North should have led a reasonable employer to consider whether a delay to the discussion was appropriate namely "*we discussed it has been a very difficult time for you and you have not yet come to terms with the fact that you are unfit for work and the medical opinion is unclear at this stage if you will ever be fit to return to work. I explain that in my role I had to be consistent in my approach in to dealing with attendance management and given the medical advice I could see little option other than to terminate you on the grounds of medical capability*. It is then stated "*You said that you understood the rationale for my decision but found it hard to accept that you should no longer have a job through no fault of your own and I explain the decision was not of a reflection of your work ethic and neither were ever in question. However in this case you were simply not medically fit to work now or in the foreseeable future."*

35. On the basis of the factual context; the Claimant was unwell, that she had not been provided with appropriate written notice of the meeting, a reasonable employer in these circumstances would have considered applying the Trust policy and pausing the process it adopted. The Policy makes clear a visit to a sick employee at home is permissible. Dr. Hindle's evidence is that it is usual to obtain further medical material from a treating consultant as to prognosis. The medical evidence was incomplete in accordance with the Trust's own practice on 5 July.

36. Charlotte North took the decision to dismiss the Claimant over the telephone on 5 July. The Tribunal consider that a reasonable employer in the context of these circumstances would have paused for thought in this process and sought to engage and consult with the Claimant further and with the Claimant's treating consultant.

37. In the dismissal letter, Charlotte North provided a right of appeal to the Claimant. She was informed any appeal should be addressed to Suzanne Dunkley. Charlotte North's evidence to the Tribunal was that an appeal out of time would be considered for an employee who was sick. The Tribunal notes that the Claimant was admitted to hospital on 6 July 2018 with suspected meningitis.

38. The Claimant's email dated 30 July was addressed to a number of individuals within the Trust namely Pauline North, Diane Marshall, Jason Elston and Suzanne Dunkley. The Claimant raised a number of issues that she was concerned about regarding her dismissal including "..there was no 5 working days' notice or invite letter. In Dr. Hindle's letter it states I haven't responded to any treatment. Please can you clarify what treatment it is said I have had. My termination letter also states I declined coming into a meeting..no I stated not enough notice..the whole situation has been handled swiftly uncompassionately..other staff members have been absent for longer periods.." In particular, the Claimant also makes specific

comments to Suzanne Dunkley (the individual said to deal with any appeal) including "I literally was given no time to commence the care plan by my specialist."

39. The Tribunal finds on the basis of the matters raised by the Claimant in that email, a reasonable employer would have considered that this employee was taking issue with the dismissal and would have considered it to be an appeal against dismissal. Despite the fact that Suzanne Dunkley received a copy of this email it was not treated as an appeal and she did not reply to the Claimant or set up any appeal hearing. Charlotte North told the Tribunal that appeals are accepted in a number of different formats and there is no template for a notice of appeal in the policy. The Tribunal have heard no explanation as to why it was not treated as an appeal.

40. In the letter of 8 August 2018 Pauline North at page 91 seeks to respond to some of the points that the Claimant has made. We note at the start of the letter that the stance taken by the manager is this: "*I will try and address your points in turn. However I feel I need to state my position from the outset in that whilst I believe there is learning to be undertaken from your experience I do agree that some of your points are very valid. There are others that I feel I must defend. The position of Pauline North was of defence and not of looking into the concerns raised by the Claimant of the way that she had been dismissed."*

41. On 8 August 2018 (page 95) Dr Hindle wrote to Pauline North. I have already set out above the contents of his report. The Tribunal further notes in a letter dated 11 December 2018 (page 98) from Dr. P. Wood (the Claimant's treating consultant) it is stated that by December 2018 the Claimant's condition was life long, and she may well continue to suffer with many of the symptoms that she is experiencing and states that "it is therefore possible that you could substantially improve or still experience symptoms but in that situation it may be possible and beneficial for you to try to work part-time as people who are able to work off and experience a better quality of life". That point has not been reached for this Claimant and she had not been able to return to work.

**Submissions**

42. The Respondent provided a written submission and attached the copy of the case of **Monmouthshire County Council v Harris** UKEAT/033214 and pages 58 and 115 from the IRLR guide to unfair dismissal.

43. Mr Sutcliffe emphasised the case of **East Lindsey District Council v Daubney** [1977] where it was held a Tribunal should not turn themselves into some form of medical appeal tribunal to review the opinions and advice received from the medical advisors. He submitted in the circumstances of this case the Respondent made a judgment call on 5 July and considered it had adequate information to dismiss the Claimant. The Tribunal were not permitted to substitute its own view. Even if the Respondent would have waited until perhaps 8 August to obtain the final report of Dr Hindle it would have made no difference to the decision to dismiss which was a Polkey point. There was no evidence that this Claimant was fit for work even now and therefore it was justified in the circumstances of the Claimant not being able to return to work to have been dismissed at that stage.

44. The Claimant gave oral submissions. She questioned whether it was proportionate to dismiss her where the service needed to save money when she was already on half pay, the project she had been involved in had been paused and her colleague had been moved to secure another job in a different department on 7 June and started there in August. The project was not re-started until December 2018. The Respondent failed to wait to hear from her treating consultant before making a

decision to dismiss. They had therefore breached their own policy. The process that had been adopted was unfair. They had failed to consider re-deployment and in fact Charlotte North's report was that she would have taken into account any treatment plan when considering re-deployment.

**The law**

45. As already identified the issues to be determined in this case are narrow. The law is this. There is a neutral burden upon the parties to establish whether dismissal for capability is a fair one in all the circumstances pursuant to section 98(4) of the Employment Rights Act 1996. The Tribunal is not permitted to substitute its view for the employer but to assess whether the response to dismissal was at the relevant time taking account of all the circumstances and factors in 98(4) namely size and administrative resources of the Respondent a response which fell within the reasonable band of responses. The case law is clear. An essential question would be whether a reasonable employer should have waited longer to dismiss and if so for how long and that is the case of **Lynock v Cereal Packaging Ltd** [1988] ICR 670.

46. The Respondent referred us to the case of **East Lindsey District Council and Daubney** in the IRLR guide. It states "*Unless there are wholly exceptional circumstances before an employee is dismissed on grounds of ill health, it is necessary that he should be consulted and the matter discussed with him and that in one way or another steps should be taken by the employer to discover the true medical picture. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware and which will throw new light on the problem or the employer may wish to seek medical advice on his own account which brought to the notice of the employer's medical advisors will cause them to change their opinion. If the employee is not consulted and given an opportunity to state his case an injustice may be done. Though the steps that employers should take may vary if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him and to inform themselves upon the true medical position. It will be found in practice that all is necessary has been done. Only in the rarest possible circumstances can a failure to consult be justified on the grounds that discussion and consultation would have been fruitless".*

47. In accordance with **Polkey** the Tribunal have a wide discretion and are permitted to consider relevant evidence available to it as to whether a different process adopted by a Respondent would have made any difference to a decision to dismiss an employee.

48. Turning to the defence of justification under section 15(1b) of the Equality Act, it is for the employer to justify the treatment. The employer must produce evidence to support their assertion that it was justified and it not only rely on mere generalisations for its conduct. When considering the justification defence the Tribunal must weigh the discriminatory effect of the treatment against the reasonable needs of the business following the case of **Hardys and Hanson Plc and Lax** and **Allenby v Accrington and Rossendale College.** In **Hensman v Ministry of Defence** Mr Justice Singh held that when assessing proportionality while a Tribunal must reach its own judgment that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved having particular regard to the business needs of the employer. Paragraph 4.3.1 of the relevant code states considering EU law, treatment is proportionate if it is an appropriate and necessary means of achieving a legitimate

aim. Paragraph 4.3 of the code states the greater financial cost of using a less discriminatory approach cannot by itself provide a justification for applying a particular cost can only be taken into account as part of the justification if there are other good reasons for adopting it. The **City of College v Grossett** [2018] EWCA Civ 1105 at paragraph 54 Lord Justice Sales considered the inter-relationship between unfair dismissal and discrimination arising from disability. It was stated that the test in relation to unfair dismissal proceeds by reference to whether the dismissal was within the range of reasonable responses available to employer allowing a significant latitude of judgment for the employer itself but by contrast the justification defence is an objective on and the Tribunal must make its own assessment.

**Conclusions**

49. The Tribunal refers to its findings of facts which summarises the relevant context of this case. The Claimant was a competent employee and well regarded by her employer. She was genuinely ill. She had been off sick for a significant period of time with various symptoms. By 5 July 2018 the Claimant was absent from work for a total of 106 days from 9 October to 5 July. The Claimant did not receive an informal diagnosis of her ME until Spring 2018. By that stage the Respondent were on notice that the Claimant was a disabled person. Shorter hours and phased return to facilitate her return to work had been unsuccessful. The Trust was under considerable financial pressure. The progress of the e-rostering project, had in part been affected by the Claimant's absence as well as the lack of co-operation of medical staff and the posting of the Claimant's colleague to another department from June (she was moved in August). The project was in fact paused until December 2018.

50. The Tribunal finds the Respondent failed to follow its own written policy. The Claimant was not provided with five days written notice of a meeting to review her absence. A phone call on 4 July by Diane Marshall to the Claimant while she was off sick, giving her notice of a termination meeting the next day on 5 July was a breach of process and falls outside of what a reasonable employer would have done in the circumstances. The Tribunal reject the Respondent's assertion that effectively the Claimant said she would come in at short notice.

51. The factual context is that the Claimant asked Miss Marshall on the telephone what the purpose of the meeting was the next day and she was informed that she was likely to be dismissed. It is in that context that the Claimant said it would be far too stressful for her to attend. The Tribunal considers that this would have been sufficient for a reasonable employer to have paused the process. In fact Diane Marshall effectively tried to right the wrong she had committed (failing to give adequate written notice to this Claimant about the meeting) to maintain the 5 July date in the diary. By continuing with the meeting on 5 July the Respondent was acting outside its own process.

52. Furthermore the general practice of the Respondent is for the occupational health expert to seek medical evidence from a treating consultant. That is the usual step taken and in the context of the complexity of the Claimant's condition a reasonable employer would have followed the usual process by obtaining Dr Hindle's final report once he had spoken to the Claimant's treating consultant in the context of considering a dismissal of an employee who is suffering from a disability. By her

email dated 30th July the Claimant clearly had representations that she wished to make about her condition and continued employment with the Respondent.

53. Further the Tribunal finds a reasonable employer would not have proceeded to dismiss a sick employee over the telephone. A reasonable employer would have paused and again waited to hear from Dr Hindle and in fact given proper notice to the Claimant and perhaps even instigated a home visit (which is permitted under the Trust's policy). A reasonable employer would have consulted with the employee.

54. However, by 8 August the Respondent had a full expert medical picture which could at that stage reasonably and justifiably put it into a position to consider setting up a dismissal hearing with the Claimant. It is likely that the Respondent would have invited the Claimant to a meeting to further discuss her case which would have taken place on or about 15 August when it was clear that the Claimant's long term or short term return to work even with reasonable adjustments was not possible. The Tribunal finds at that stage a reasonable employer armed with the expert medical material and Claimant's representations, could have both fairly and justifiably dismissed the Claimant.

55. For completeness the Tribunal finds that there was a further procedural failure by failing to regard the Claimant's email of 30 July as a letter of appeal. A reasonable employer reading that letter of concern would have treated it as such.

56. In the circumstances we find that the Claimant was unfairly and unjustifiably dismissed for discriminatory reasons on 5 July. A fair and justified dismissal process would have likely to have taken place on 15 August 2018 when notice of termination would have been served on the Claimant.

57. The Claimant was awarded a basic award in the sum of £1,702.16 plus net pay of 5.3 weeks at half net pay at £957.66. The Tribunal awarded loss of statutory rights in the sum of £400.

58. The Tribunal has a wide discretion in making an injury to feelings award. The Tribunal takes into account the evidence that it has already heard, the medical material before it and further submissions. Awards are compensatory. They are not punitive although they may have a punitive effect. The act of dismissal should not be simply considered as a one off act as the EAT directs us; it has ongoing consequences. Taking account a fair and proportionate dismissal would have taken place on notice on 15 August balanced with the upset caused to a disabled claimant in a vulnerable state, dismissed over the telephone, with a lack of notice with no attempt made by the Respondent to alleviate that anxiety in particular by the response of Miss North and a failure to respond to her appeal, the Tribunal determines this case would fall within the mid-band but towards the lower level and £9,000 we believe is a fair award.

59. The total award is £12,059.82.

**Employment Judge Wedderspoon**

**Date 4 June 2019**

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