EMPLOYMENT TRIBUNALS

Claimant: Miss Lydia Mawema

Respondent: Hertfordshire Partnership NHS Foundation Trust

Heard at: Amersham **On:** 28, 29 May 2019 and 30 May 2019 (in chambers)

Before: Employment Judge McNeill QC
Ms S. Cheetham
Mrs A. Brosnan

Representation
Claimant: In person
Respondent: Mrs J. Smeaton (Counsel)

JUDGMENT

(1) It is declared that, in dismissing the Claimant, the Respondent discriminated against her contrary to s15 of the Equality Act 2010.
(2) The Respondent is ordered to pay to the Claimant compensation in the sum of £19,267, inclusive of interest.

REASONS

1. The Claimant brings claims for disability discrimination against the Respondent under ss15 and 20 of the Equality Act 2010 (EqA).

Issues

2. The liability issues between the parties were set out in a List of Issues produced by the Respondent. By the conclusion of the hearing, the key issues outstanding were (1) whether it was proportionate for the Respondent to dismiss the Claimant rather than acceding to her request for a one-year career break; and (2) whether it would have been a reasonable adjustment for the Respondent to accede to the Claimant's request for a one-year career break as an alternative to dismissal.

3. Disability, including the requisite knowledge of disability, was admitted only on the first day of the hearing. The Claimant attended the hearing having focused her preparations on proving that she was a disabled person within the meaning of s6 of the EqA. Case management orders had made it clear that the hearing was to consider and determine all issues between the party, including remedy if she were successful but the Claimant had not fully understood this. She was given an opportunity to apply to postpone the hearing but did not wish to make such an application.

4. In relation to the Claimant's s15 claim, the Respondent accepted that the Claimant's dismissal was unfavourable treatment which arose as a consequence of her disability. The issue between the parties was whether such dismissal was justified. The Respondent relied on the efficient running of the NHS and, in particular, the Infection Control Service in which the Claimant was employed, as its legitimate aim. The Claimant did not dispute the legitimate aim. The issue was whether dismissal was a proportionate means of achieving that aim in the light of all the circumstances including the Claimant's request for a one year career break.

5. There was an issue in relation to the s20 claim as to the appropriate provision, criterion or practice (PCP) but the fundamental issue concerned whether the grant of a one-year career break would have been a reasonable adjustment.

Findings of Fact

6. The Claimant was employed by the Respondent as a nurse from 1 October 1999 until her dismissal on 17 October 2017. From February 2007, she worked as an infection control nurse specialist, which was a specialist post requiring a degree level qualification.

7. On 25 November 2014, the Claimant commenced what proved to be a long-term sickness absence. Apart from a return to work for less than a day on 1 August 2016, she was absent until the date of her dismissal. She suffered from large uterine fibroids which caused her severe and disabling symptoms. She underwent two fibroid embolisation procedures in June 2015 and January 2017 but these procedures had little if any positive impact on her symptoms.

8. The Respondent had an Absence Management Policy which included provisions as to long-term sickness absence. Long-term sickness absence was defined as "a continuous period of four weeks or more sickness absence relating to a single medical condition or recurrent periods of time with a serious health problem, or a disability". The procedure included provisions for occupational health (OH) referral, formal review meetings and a final stage meeting at which the employee might be dismissed. Dismissal was described as the possible ultimate outcome where there was "an unacceptable attendance record" which continued following any reasonable adjustment under the EqA.

9. On 20 May 2016, when the Claimant had already been absent for nearly 18 months, there was a first informal absence management meeting between the Claimant and Jane Padmore, then Deputy Director of Nursing and Quality at the Respondent and Pam Glover, Head of HR Business Partnering. That meeting followed two planned occupational health (OH) assessments which the Claimant had not attended because of some confusion around booking arrangements.

10. On 1 June 2016, the Claimant said in an email that she was keen to come off the long-term sick list by taking the coming year as a career break. Although this was not stated in the email, it was common ground between the parties that the Claimant sought a career break for a period of one year. That would look better than two years off sick. The Claimant discussed this suggestion with Ms Padmore and Ms Glover who were positive about the idea, noting that the Claimant would not need to be paid if she was on a career break.

11. On 16 June 2016, there was a meeting to follow up the Claimant's request for a career break. The Claimant was advised that the Respondent would not accede to her request for a career break as the career break scheme was not intended as an alternative to sick leave and the Respondent did not wish to set a precedent in using the policy in this way. At that meeting, the Claimant was told that if she remained on sick leave, the Respondent would go into the formal process by having a formal review meeting.

12. The Respondent had a Leave Policy which included provisions as to the taking of career breaks. It was stated that the Respondent aimed to provide access to career breaks to all staff to enable them to take longer periods away from work than were provided by other leave arrangements. Where a career break was 12 months or less, where possible staff would return to their contracted employment if reasonably practicable: otherwise the Respondent would endeavor to find suitable alternative employment. With the exception of continuity of service, all terms of the contract between the employee and the Respondent would be suspended during a career break.

13. The Claimant very much wished to remain in the Respondent's employment and made this clear to the Respondent. She had worked as a nurse throughout her professional life, first as a mental health nurse and then as an infection control nurse and was dedicated to her profession. The Claimant had a good employment record.

14. There was a discussion about dismissal and the Respondent reassured the Claimant that before taking a decision about dismissal it would consider all options, including workplace adjustments and whether redeployment was possible.

15. On 26 July 2016, the Claimant had an OH assessment at which she was assessed as having made good enough progress to return to work gradually. On the same day, she was injured in a car accident. She was due to return to work and did so on 1 August 2016. However, she was in severe pain and had to go home.

16. A formal review meeting under the Absence Management Policy was planned for 4 August 2016 but the Claimant was unable to attend the meeting because of severe pain following the car accident. The meeting was rescheduled for 12 August 2016. It was chaired by the Head of Nursing, Bina Jumnoodoo, and was attend by Ms Glover and Paul Meaton, RCN Regional Officer, who was supporting the Claimant. The Claimant was at that stage suffering both from gynaecological symptoms and symptoms caused by the accident. She mentioned that surgery was an option for her gynaecological condition and that she was seeing her consultant on 19 August 2016. It was agreed that the Respondent would meet with her again after 19 August and after a further OH assessment. She was advised that, at the second formal meeting, options such as redeployment would be considered if she was unable to continue in her present role. She was also advised that if, ultimately, she was unable to return to work due to her sickness absence, her employment could be terminated.

17. On 31 August 2016, the Claimant attended a telephone consultation with OH. The OH nurse advised that the Claimant was not currently fit for work but was awaiting a second surgical procedure (fibroid embolisation) which was expected to reduce or resolve her gynaecological problems so that she could return to a normal life and work. The OH nurse advised a referral back to OH after the date for fibroid surgery was confirmed (this was expected to be in November) so that post-operative advice could be given.

18. On 6 September 2016, the Claimant confirmed the date of her operation as 26 November 2016.

19. On 9 September 2016, Ms Padmore sent the Claimant an email in which she said that the Respondent was arranging for some interim cover for the Claimant's role and asked the Claimant to return her laptop and mobile phone. It was stated that as soon as the Claimant was well enough to work, the Respondent would arrange for these items to be returned to her or for a replacement to be identified.

20. On 8 November 2016, there was a further OH assessment based on the Claimant's GP records only. The OH assessor referred to the severity of the Claimant's symptoms which might mean that the recovery period from the operation might be longer than the normal 2-3 weeks and recommended a phased return to work.

21. On 22 November 2016, the Claimant's surgery was postponed to 9 January 2017 and on 1 December 2016 Ms Jackie Vincent, Interim Director Nursing and Quality, took over the management of the Claimant's sickness absence.

22. On 9 December 2016, the Claimant was invited to an informal meeting with Ms Vincent following a planned OH assessment on 13 December 2016, which was cancelled as the Claimant was in Zimbabwe. Although there were telephone conversations between the Claimant or members of

her family and the Respondent, there was no further meeting between the Claimant and the Respondent for some time.

23. On 24 January 2017, following her second fibroid embolisation procedure on 9 January 2017, the Claimant had a fourth OH assessment. At that assessment, she made it clear that she was feeling very stressed by her situation. She also expressed concerns over how her "perceived disability" was affecting her sister and extended family. The OH adviser stated that undue delay in dealing with stressors could lead to an exacerbation of symptoms.

24. On the same day, the Claimant put in a formal letter of grievance. She referred to her request for a career break in June 2016. She then stated that she believed that because of her condition and its impact on her everyday life this could be a disability under the EqA. She referred to the duty to make reasonable adjustments and said that the adjustment which the Respondent had failed to make was failing to allow her to take a career break. She said that she should have been classified as a disabled employee from May 2016.

25. The Claimant said that there had been no attempt to replace her until September 2016 and therefore she believed that the requirement for her role had reduced and that there may be a redundancy situation.

26. On 2 February 2017, Ms Vincent responded to the Claimant's grievance. She noted that the Claimant was aggrieved that she had not been granted a career break when requested in June 2016 and considered that she had a disability at that time and that reasonable adjustments had not been made. She further noted that the Claimant considered that she had been discriminated against on the grounds of disability. In relation to the request for a career break, Ms Vincent confirmed that "arrangements for career breaks are not intended as an alternative to sick leave". She went on to say that at no point during this history did the OH advice indicate that the Claimant had a disability, nor was this alleged by her Trade Union representative. She said that whether or not the Claimant had a disability was a legal question on which she would not comment further.

27. She went on to say that she did not consider that the Claimant had been discriminated against and that career breaks were not an appropriate way of dealing with sickness absence. The Absence Management process applied to all staff whether they were disabled or otherwise. The Claimant had been given time to recover and had not suffered any disadvantage in the Respondent declining to use its career break policy. There was therefore no discrimination. Ms Vincent further stated that Infection Control was a small team and that Debbie Pinkney had largely covered the Claimant's work in her absence

28. None of the OH reports before (or even after) 2 February 2017 addressed the question of whether the Claimant was or was likely to be a person who came within the protections afforded to disabled persons by the EqA. The tribunal could only assume that this was because the OH advisers were never asked for their opinion on this matter. This was very unusual in the

experience of all three members of the tribunal in circumstances where an employee had been off sick for such a long period and had themselves raised the matter of disability.

29. The Claimant notified the Respondent on 15 February 2017 that she would not be able to return to work before 16 April 2017, as confirmed by her GP. She also said that she would be in Zimbabwe with her sister who was acting as her carer. The Claimant updated the Respondent in relation to her position from time to time and was, on one occasion, late in submitting a fit note.

30. A further OH assessment was fixed for 9 May 2017 but the Claimant was still in Zimbabwe. She informed the Respondent she would be back in the country on 1 June.

31. On 9 June 2017, the Claimant was invited to a second formal review meeting on 30 June 2017. Ms Vincent stated that the Claimant had informed her that a likely return date in the near future did not seem possible. The meeting was to formally review the Claimant's absence, her health and the available options, which would include dismissal on grounds of capability due to ill-health if the Claimant was unable to return to work.

32. On 19 June 2017, a report was obtained from an OH Physician, Dr William Edwards. He stated that excision of the fibroids was now advised. This was to take place in around January 2018. The Claimant remained unfit for work but might be able to return to work in February or March 2018. He said that no adjustments would assist at that time. With surgical excision, it was hoped that the condition would not recur. He suggested a further OH review after the next operative procedure.

33. No instructions, questions or letters of referral to the OH assessor were provided to the tribunal in relation to this or any other OH report. The tribunal inferred from this absence of evidence that the possibility of a career break was never put to any OH adviser as something which might assist the Claimant in her recovery.

34. On 28 June 2017, the second formal absence review meeting took place. This was followed up by a short letter setting out what had been discussed at the meeting. It was noted that Dr Edwards had confirmed that the Claimant was unable to undertake her duties and that no adjustments would assist and that he said that she may be able to return in February or March 2018. The Claimant could not be redeployed at that stage or undertake alternative duties and the possibility of ill-health retirement was discussed with her. She was told that the matter would now progress to the Final Stage and that her employment might be terminated if she could not return to work.

35. The Final meeting took place on 17 October 2017. The Claimant attended by videoconferencing. A management statement of case (report) was prepared. The Terms of Reference for the report were "to consider if it [was] right and appropriate for [the Claimant] to be dismissed from her

current employment with [the Respondent] on the grounds of capability due to ill-health, under the Trust's Absence Management Policy". In the report, Ms Vincent set out the nature of service provided by the Claimant and one other, Consultant Infection and Prevention Control Nurse, Debbie Pinkney, who worked term-times only. She said that Ms Pinkney had largely carried out the workload since the Claimant's absence and that some aspects of the work had been delayed or impacted. Ms Vincent gave some details of these matters. She also said that Heads of Nursing had been required to cover roles and responsibilities which had had an impact on their own workload. It was stated that it had not been possible to cover for the Claimant with bank or agency workers and was explained that this was because of the specialist nature of the Claimant's role. A secondment had been provided for a Health Care Assistant to support Debbie Pinkney with some of the infection control requirements as an interim measure.

36. In the report, which was detailed in many respects and did make reference to OH confirming that no reasonable adjustments could be made to support the Claimant's return to work, there was no mention of the possibility that the Claimant was a disabled person within the meaning of the EqA and whether that possibility should be further investigated or might have any implications for the Respondent in approaching its decision as to how to deal with the Claimant's case. There was also no reference to the Claimant asking for a career break, save as part of a chronological table setting out the Claimant's attendance record.

37. The meeting of 17 October 2017 was chaired by Karen Drabble, Managing Director SBU West. The other members of the panel were Jaya Hopkings (Head of Nursing (LD&F)) and Anthony Gotts (HR Business Partner). The notes of that meeting (and the appeal meeting) were only provided to the tribunal after it requested to see them: they were not included in the bundle although they contained important evidence as to how the Claimant had put her case before both panels. Ms Vincent presented the management case. She said that the Claimant's long-term sickness was impacting on the team. Ms Pinkney had taken on a wider role and there were aspects of the role that were not fully covered. She referred to the interim cover and the fact that this was not sufficient as the Claimant's role was a specialist role. Ms Vincent also referred to the most recent OH report.

38. When the Claimant was given the opportunity to state her case, the first matter she referred to was that she had raised a career break. She had raised a grievance which was not in the pack provided by the Respondent for the purposes of the meeting. The Respondent said that this was because the grievance had not been taken further after the Respondent responded to it.

39. The Claimant said her situation had worsened. She had developed high blood pressure as she found the sickness management and review process stressful. She said her fibroids had got bigger. It was not known how long it would take to remove them. If she had a career break she could focus on her health. She felt that the Respondent had let her down.

40. Ms Drabble asked for the correspondence relating to the request for a career break and there was discussion about the process and the outcome. Just before the panel retired, the Claimant stated that her illness meant that she fell within the EqA. The following entry records that Ms Drabble thanked everyone for their time and contributions. The Claimant's reference to falling within the EqA was apparently ignored or brushed aside.

41. By a letter dated 24 October 2017, Ms Drabble set out the decision of the panel. In relation to the requested career break, Ms Drabble recorded that the Claimant had said that a career break would be a reasonable adjustment. She said that this was considered at the final stage meeting. She referred to the grievance process in January 2017 and the fact that the Claimant did not pursue the grievance to a formal stage.

42. The conclusion of the panel was that the Claimant had been given a significant period of time to recover and demonstrate her ability to be able to return to work with reasonable adjustments applied as required. It referred to the OH advice and the lack of certainty as to when the Claimant might be fit to return to work. It decided that in the light of all the evidence, including the operational strain on the Infection Control Team and in the absence of any definitive date for a return to work the Claimant's employment should be terminated. The panel did not give any consideration to whether a career break might offer an alternative to dismissal.

43. The Claimant exercised her right of appeal. The appeal was heard on 2 February 2018 and on 9 February 2018 was dismissed. Mr Loveman, who chaired the appeal panel and gave evidence before the tribunal, stated that he did not have the report for the final stage management Absence meeting when he was considering the appeal. He had a management statement of case from Ms Drabble. She identified that the Claimant in her appeal letter referred to the EqA but did not consider that matter further in the statement of case. In relation to the career break, she simply repeated what had been said in the letter of termination without engaging further with the alleged disability and the question of whether a career break might have been a reasonable alternative to dismissal.

44. The appeal panel questioned the Claimant about the proposed career break and the purpose of it. The Claimant said that a career break would give her significant time to recover. She had not followed the usual recovery road for fibroid surgery and was planning ahead to allow for length of recovery. The Claimant could not give a precise date for a return to work.

45. The Panel considered that the Claimant's condition could constitute a disability but it did not investigate the matter further. It gave little detailed consideration to whether it might be reasonable to allow the Claimant to take the 12 month career break which she was requesting but concluded, without further investigation, that the Claimant's circumstances would be unchanged with a career break.

46. The dismissal was upheld.

47. The Claimant underwent the operation that had originally been planned for January 2018 in May 2018. She chose to have that operation in Zimbabwe where members of her family are based and where she felt confident that she would have people to care for her. She told the tribunal that she would have had the operation at that time in Zimbabwe if she had been granted a career break. The refusal to grant her a career break did not affect the timing and location of the operation.

48. The Claimant took some considerable time to recover from the operation but was fully physically fit by February 2019, even though emotionally she described herself as unfit to work at that time.

49. In a medical report from the Claimant's treating doctor, Dr Allan Dimingo, obtained by the Claimant in December 2018, the doctor reported that it was after the Claimant's endoscopic procedure in 2015 that her blood pressure was noted to be elevated. The Claimant had had debilitating pain since that procedure, treated with opioid analgesics. The pain had had a negative impact on the Claimant's blood pressure control leading to three hypertensive urgencies. Continuing bleeding and chronic pain had led to the Claimant developing symptoms of depression. The Claimant believes that her high blood pressure has been caused by the Respondent's treatment of her but the medical evidence does not support this.

50. The Claimant remained physically unfit to work until February 2019. She has not now worked since November 2014 and is pessimistic about her employment prospects. She has found the litigation surrounding her dismissal very stressful and has not yet started to look for alternative work.

Law

51. S15 of the EqA provides as follows:

> (1) A person (A) discriminates against another (B) if –
> (a) A treats B unfavourably because of something arising in consequence of B's disability; and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim…

52. The Respondent accepted that the Claimant's dismissal because of long-term sickness absence amounted to unfavourable treatment and that such unfavourable treatment arose as a consequence of her disability. The issue was whether the Claimant's dismissal was justified: was it a proportionate means of achieving a legitimate aim? The Claimant's specific request to take a career break was a key element in assessing the proportionality of the decision to dismiss as the granting of a career break would have been an alternative to dismissal. The aim relied on by the Respondent was "the efficient running of the NHS" which was plainly a legitimate aim.

53. The Respondent submitted that the question of proportionality should be judged objectively. Reliance was placed on **HM Prison Service v Johnson** [2007] IRLR 951, in which the Employment Appeal Tribunal (EAT) (Underhill J and members) followed the decision of the EAT (Elias P and members) in **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664 that, in deciding whether an employer had failed to make reasonable adjustments, an objective approach should be taken and the employer's state of mind was irrelevant.

54. While the objective approach endorsed in **HM Prison Service v Johnson** must be applied in claims for a failure to make adjustments, it is not of any great assistance when looking at whether s15 discrimination is justified.

55. The wording of S15(1)(b) mirrors other provisions in the EqA relating to the justification of discrimination, in particular indirect discrimination but also direct age discrimination. The employer bears the burden of proving justification. The proper approach to justification was most recently examined by the Supreme Court in **Chief Constable of West Yorkshire Police and another v Homer** [2012] ICR 704. It was held that the aim of the measure which the employer seeks to justify must correspond to a real need on the part of the employer and the means used to achieve that end must be appropriate and reasonably necessary. In s15 cases, it is the unfavourable treatment which falls to be justified.

56. It has been well-established since **Allonby v Accrington and Rossendale College** [2001] ICR 1189 that the tribunal must undertake a critical evaluation of the of the employer's reasons for its decision and whether those reasons demonstrated a real need to dismiss the claimant. If so, the tribunal should consider whether the employer's need outweighed the discriminatory impact of the dismissal on the claimant.

57. The tribunal noted that the appellate authorities on justification generally relate to the justification of a provision, criterion or practice applying to a group of employees, while in s15 cases it is the unfavourable treatment of a particular individual in consequence of their disability which falls to be justified.

58. While the approach to be taken is an objective one, in that it does not depend upon the employer's subjective belief but should be viewed from the perspective of a reasonable observer, the tribunal is required to undertake a close evaluation of why the employer acted as it did. Where an employer has not applied its mind to the question of whether there might be a way of achieving its aim which would avoid treating a disabled employee unfavourably in consequence of their disability, justification will be more difficult to prove. It is not enough that a reasonable employer might consider dismissal to be justified in the circumstances of the case. The question is whether it was appropriate and reasonably necessary for the particular employer to dismiss the particular employee in order to achieve its aim. The tribunal must weigh the needs of the undertaking against the discriminatory effects of the treatment.

59. S20 of the EqA sets out the duty to make adjustments, which the

Respondent accepted applied in this case. The particular duty relied on was that comprising the first requirement:

> (3) ….where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage….

60. Pursuant to s21 of the EqA, a failure to comply with the first requirement is a failure to comply with the duty to make reasonable adjustments.

61. There was some discussion before the tribunal about the relevant provision, criterion or practice (PCP). It can be impossible in practice for unrepresented claimants to formulate a PCP and a number of different formulations were proposed in this case by the Respondent and Employment Judge Hyams following a case management hearing. The tribunal concluded that the appropriate PCP here was "not permitting employees absent on long-term sick leave, who were being managed under the Respondent's Absence Management Policy, to take a career break". This formulation best seemed to reflect the Respondent's statements when the Claimant requested a career break, in particular that career breaks were not an alternative to sick leave and that the Respondent did not wish to set a precedent, and its actions in not considering a career break for the Claimant but simply proceeding under the Absence Management Policy.

62. In relation to the s20 claim, the Respondent relied on **Salford NHS Primary Care Trust v Mrs A.F. Smith** UKEAT/0507/10/JOJ, an unreported decision of the EAT. The claimant in that case brought a claim for unfair dismissal and a claim under the then applicable Disability Discrimination Act 1995 for a failure to make reasonable adjustments. In circumstances similar to the current case, Mrs Smith was dismissed after a period of long-term sick leave. One of the reasonable adjustments which she said should have been made was to permit her to take a career break, a step recommended by an occupational health physician. The EAT held that adjustments were primarily concerned with enabling a disabled person to remain in or return to work with the employer. It relied on the decisions of the EAT in **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664 and **Environment Agency v Rowan** [2008] IRLR 20 as authority that reasonable adjustments should have some "practical consequences of preventing or mitigating the difficulties faced by a disabled person at work". The EAT held that permitting the claimant to take a career break was not a reasonable adjustment for the reasons given in **Tarbuck** and **Rowan**. On the facts of **Salford v Smith**, the EAT held that a career break was incapable of amounting to a reasonable adjustment and a career break would be contrary to the terms of the respondent's career break policy, which was in materially different terms from the career break policy in the current case.

63. The Respondent did not seek to suggest that **Salford v Smith** was binding authority in relation to either the s15 or s20 claims. It was accepted that granting a career break could, in principle, amount to a reasonable adjustment. It was, however, submitted by the Respondent

that the tribunal should follow the approach in **Salford v Smith**.

64. Since **Salford v Smith**, the Court of Appeal in **Griffiths v Work and Pensions Secretary** [2017] ICR 160 has considered the s20 duty to make reasonable adjustments in the context of the operation of an attendance management policy. The Court of Appeal held that a failure to disregard disability-related absences or to extend trigger points under an absence management policy did place the disabled employee under a substantial disadvantage when compared with non-disabled employees so as to give rise to a s20 duty. Adjustments to the policy could alleviate that disadvantage. An employer is, however, entitled to say after a pattern of illness absence that it should not be expected to have to accommodate the employee's absences any longer. On the facts of **Griffiths**, the employment tribunal was entitled to find that the employer did not fail to make reasonable adjustments when it took into account the whole of the employee's absence record including disability-related absences.

65. The Court nevertheless found that any modification or qualification to a PCP which might remove the substantial disadvantage caused by the PCP could constitute "a step" within the meaning of s20(3) of the EqA. The "step" did not have to enable the disabled employee to return to work or carry on working, although it would not normally be reasonable to expect employers to take steps to alleviate disadvantages which were not directly related to integration into employment (paragraphs 64-68). **Salford v Smith** was not cited in **Griffiths**.

66. Although no claim was brought under s15 in **Griffiths**, the Court of Appeal (Elias LJ with whom the other members of the Court agreed) considered the relationship of s20 to other forms of disability discrimination in paragraphs 25-27. At paragraph 79, it was stated that the positive duty to make reasonable adjustments was "only part of the protection afforded to disabled employees". An employee could succeed in a claim under s15 where dismissal was not proportionate.

67. Although the parties did not refer the tribunal to the 2011 Code of Practice on Employment, the tribunal took into account paragraphs 4.25 and 4.26 of the Code. Paragraph 4.25 indicates that the ordinary objective justification test applies in s15 cases. Paragraph 4.26 states that it is "for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified". The reference to the employer producing evidence to support their assertion would apply equally in s15 justification case.

Analysis and Conclusions

68. The logical starting place in our considerations was s15 of the EqA and whether dismissal was proportionate in the circumstances of this case in the sense that it was appropriate and reasonably necessary. The tribunal accepted the Respondent's general proposition that an employer may lawfully dismiss an employee who is on long-term sick leave, even if that employee is disabled. The Respondent's Absence Management Policy applied to disabled employees as well as to employees who were not

disabled.

69. The Claimant did not bring a claim for unfair dismissal. In general, and subject to questions of procedural fairness, an employee could normally be fairly dismissed after nearly three years' sickness absence.

70. S15 claims, however, require a different approach. The question is not whether a reasonable employer could fairly have dismissed the Claimant in the circumstances of the case. The EqA affords special protections to persons who are disabled. Where a dismissal is in consequence of disability, the dismissal must be a proportionate means of achieving a legitimate aim. A dismissal which might meet the standards of a fair dismissal under the Employment Rights Act 1996 does not necessarily satisfy the requirement of proportionality under s15 of the EqA.

71. The Respondent advanced a number of reasons as to why it was proportionate to refuse to grant the Claimant a career break. It relied on the following facts and matters:

    (i) The Absence Management Policy itself and the fact that it applied to all employees;
    (ii) The length of the Claimant's absence from work and the fact that, as at October 2017, there was no firm medical opinion as to when she would be able to return to work;
    (iii) The Respondent's reasonable wish for certainty in relation to filling the Claimant role;
    (iv) The difficulty in filling the Claimant's role because it was a specialist role, so that it was more difficult to cover the role with agency and bank staff than if the Claimant had had a non-specialist role;
    (v) The fact that if the Claimant went on a career break and the position were filled in her absence, the Claimant would go back to a redundancy situation at the end of the 12 months;
    (vi) The fact that a career break would not facilitate a return to work and would remove managerial oversight which might facilitate a return to work;
    (vii) The Respondent is a public body charged with a public service which must forward plan for the delivery of an effective service;
    (viii) The Respondent must report on sickness absences;
    (ix) If the Claimant was on a career break when in fact she was off sick, that could have an impact on published statistics and hospital ratings;
    (x) The Claimant's absence on a career break might impact on what could be said about her in a written reference.

72. While all these reasons were, to a greater or lesser extent, cogent, the tribunal's task was to undertake a critical evaluation of whether dismissal was proportionate, in the sense of whether it was appropriate and reasonably necessary, on the facts of the case.

73. The contemporaneous documentation demonstrated, as a matter of fact, that the Respondent's reasons for refusing to grant a career break to the Claimant were not those advanced in argument. Rather, in June 2016,

they were that (1) the career break scheme was not intended as an alternative to sick leave; and (2) the Respondent did not wish to set a precedent in using the policy in this way. When the Claimant raised the matter again in early 2017 by way of a grievance, specifically referring to her alleged disability, she was met with a similar response, that career breaks were "not intended as an alternative to sick leave". Ms Vincent, who dealt with the grievance, said that she did not consider that the Claimant had been discriminated against and that the Absence Management process applied to all staff, disabled or otherwise. The Claimant had been given time to recover and her team was small. Ms Vincent stated, without further explanation, that the Clamant had not suffered disadvantage by not being granted a career break.

74. At the Final Stage meeting, evidence was presented by management as to the difficulties in covering the Claimant's role. The Claimant renewed her request for a career break and explained why she wanted a career break. When she stated that her illness brought her within the disability protections under the EqA, Ms Drabble's immediate response was to thank everyone for their time and contributions. The Respondent demonstrated no real interest in the question of whether or not the Claimant was a disabled person within the meaning of the EqA. In the letter terminating the Claimant's employment, there was a section headed "Career Break" which focused on the Claimant's requests in 2016 and early 2017 and on the fact that the Claimant had been given a long period off work which the panel considered to be a reasonable adjustment. The tribunal did not hear evidence from Ms Drabble and was therefore entirely reliant on the contemporaneous documentation in evaluating the evidence as to the reasons for the Respondent's decision.

75. The appeal panel did consider the request for a career break in a little more detail. Its focus, however, was also on the earlier requests and the long period of time during which the Claimant had been absent. Mr Loveman, who gave evidence before us, considered that the long period of sickness absence was a reasonable adjustment. This did not engage with the question of whether a one-year career break may have been a reasonable alternative to dismissal in the Claimant's case.

76. The Respondent called as a witness Ms McEvoy, Head of Learning and Development at the Respondent. At the relevant time, she was an HR Business Partner. She had no involvement in the Claimant's case. She gave general evidence that the Respondent did not consider it appropriate to offer staff on sick leave the chance to take a career break as an alternative to sick leave. She gave three reasons why sick leave needed to be treated differently: (1) the requirement for the Respondent to keep accurate sickness records to ensure, for example, an accurate audit trail in relation to ill-health retirement and statistical data for monitoring equality and well-being; (2) a difference in pay and holiday entitlements between those on career breaks and those on sick leave, the confusion if sick leave were treated as a career break and the additional administrative burden to the Respondent in calculating and communicating entitlements; and (3) keeping in touch with staff on sick leave which would not apply in the event of career breaks.

77. Ms McEvoy confirmed in cross-examination that there was nothing in the sickness or career break policy to say that an individual could not take a career break to recover from sickness. She could not explain, when asked, what the "additional administrative burden" referred to in her witness statement was and the tribunal was not persuaded that the reasons stated by her stood up to scrutiny. Neither Ms McEvoy or Mr Loveman could assist as to how the Claimant's role had been covered during her absence or as to what difficulties there might be in recruiting to cover her role for a one-year fixed period. The only evidence was that contained in the management case presented to the Final Stage hearing, which was not made available to the appeal panel. There was no evidence as to what, if any difficulties might be involved in covering the Claimant's role for a fixed one-year period, while she took a career break.

78. In assessing justification, the tribunal is required to consider whether the Respondent's reasons for dismissing the Claimant in October 2017 demonstrated a real need to dismiss her rather than granting her the one-year career break which she sought as an alternative to dismissal. The difficulty for the Respondent is that it simply failed to engage with the question of whether or not the Claimant was a disabled person within the meaning of the EqA and therefore with whether dismissal was reasonably necessary, taking into account the proposed alternative of a career break. This was in spite of the Claimant having raised the issue of disability in January 2017, some nine months before her dismissal and in spite of the occupational health (OH) assessments, at any one of which the Respondent could have asked the OH adviser for an opinion as to whether or not the Claimant fell within the protection of the EqA. Although the words "reasonable adjustment" were used, this did not involve any acceptance that the Claimant was disabled as was clear from the fact that disability remained in dispute until the first day of the hearing.

79. The tribunal concluded that no serious consideration was given by the Respondent as to whether offering the Claimant a career break would be a reasonable and non-discriminatory alternative to dismissing her in consequence of her disability. Rather, it took a rigid position that granting a career break would set a precedent; that arrangements for career breaks were not intended as an alternative to sick leave; and that the time that the Claimant had been absent from work was sufficient of an adjustment, if the Claimant was disabled. The Respondent relied at the dismissal and appeal stages on the previous decision made in relation to the application for a career break in 2016/17 and, in the case of the appeal panel, that circumstances would be unchanged with a career break.

80. Little if any consideration was given to the fact that the Claimant was a long-standing and highly-trained specialist nurse, with a good record, who had made a genuine request for a career break to enable her to recover from a condition which constituted a disability and to continue her professional career with the Respondent. While the Respondent was able to present cogent reasons as to why a career break might have been refused, in practice, these were not its actual reasons for refusal. If the Respondent had considered all the circumstances, including the possibility

of a career break as an alternative to dismissal, as it should have done, the tribunal could not say that it was inevitable that the Claimant would have been dismissed. The Respondent may have taken the view that in view of her employment history, her particular qualifications and the real prospect of a recovery which would enable her to return to work, a career break should be granted. Unlike in the case of **Salford v Smith**, there was nothing in the Respondent's policy applying to career breaks which indicated that a career break should not be granted if an employee was on sick leave.

81. Where an employee is disabled, it is important that the employer looks at the circumstances of the employee's particular case rather than applying a blanket policy or rule. The notion of "not creating a precedent" is not apt in disability cases where each case must be considered on its own facts. Further, in the light of the most recent OH assessment available to the Respondent at the time of the dismissal and appeal, there was, at the very least, a significant chance that the Claimant would be fit to return to work well within the period of a 12 month career break.

82. The tribunal was not satisfied on the evidence that there was any real difficulty in filling the Claimant's post for a one year period or that any consideration was given to the fact that a career break would have enabled the retention of a valuable member of staff at no cost to the organisation. The tribunal noted that the career-break policy does not make any reference to career breaks being refused on the basis of difficulty in recruiting a replacement to backfill the role.

83. The discriminatory effect of dismissing the Claimant was very serious. At a point where her health was preventing her from working and where she was soon to undergo surgery which had a chance of restoring her capacity for work, she lost her job. The Respondent did not demonstrate a reasonable need to dismiss the Claimant in order to ensure the efficient running of the Infection Control Service.

84. For the above reasons, the tribunal concluded that the Respondent was not justified in dismissing the Claimant. Dismissal was not a proportionate means of achieving the Respondent's legitimate aim and her claim under s15 of the EqA was therefore upheld.

85. Given the tribunal's findings in relation to the claim under s15 of the EqA, the tribunal did not consider it necessary to go on to consider whether there was any breach of s20.

Remedy

86. In relation to the breach of s15 of the EqA, the Claimant was entitled to an award for injury feelings. The Respondent submitted that this should be in the lower **Vento** band. The tribunal did not accept this submission.

87. The Claimant was very distressed by the manner in which she was treated by the Respondent in relation to her discriminatory dismissal and by the Respondent's failure to acknowledge that she was a disabled person

within the meaning of the EqA until the first day of the tribunal hearing. At a preliminary hearing on 2 November 2018, EJ Hyams observed that it was "surprising (if not incomprehensible) that the respondent was not admitting that the Claimant was disabled…". Counsel for the Respondent stated that the Respondent had given instructions that disability should be admitted at some point not long after the disclosure of medical records in early 2019 and that unfortunately this had not happened. Whilst it was right for the Respondent's Counsel to bring this to the tribunal's attention, it did not impact on the injury to the feelings of the Claimant. The Respondent's approach to the Claimant's claim that she was disabled from early 2017 was at best blinkered. The Respondent made no attempt to obtain OH or other medical evidence which would enable it to reach an informed view as to whether the Claimant was entitled to the protections of the EqA, even after the Claimant presented her claim to the tribunal. The tribunal had no doubt that this added to the already very considerable distress caused to the Claimant by her dismissal.

88. The tribunal considered whether it should award aggravated damages but concluded that the appropriate approach was to reflect the distress caused by the Respondent's adverse treatment of her in relation to the issue of disability in the award for injury to feelings. The tribunal concluded that the appropriate award fell in the middle **Vento** band and that the appropriate award was £17,000.

89. The Claimant brought a claim for substantial financial losses, including loss of earnings and various medical and other expenses. She stated in her evidence that she did not become physically fit to work until February 2019. That was when she stopped needing 24 hour care. She chose to undergo surgery in Zimbabwe rather than in the UK after her dismissal as that was where her family was based and they could help care for her. She said that she would have chosen to undergo surgery in Zimbabwe if she had been on a career break.

90. The Claimant suffered from raised blood pressure, which led to additional and costly hospital treatment, which she alleged was as a result of the discriminatory way in which she was treated by the Respondent. Medical evidence which she adduced before the tribunal, in the form of a report from Dr Allan N. Dimingo, did not support this. Dr Dimingo stated that the Claimant's blood pressure was first noted to be raised after her first endoscopic procedure in 2015. The Claimant had had debilitating pain since that procedure and that pain had had a negative impact on the control of her blood pressure.

91. The tribunal concluded that if the Claimant had not been dismissed in October 2017 but had been granted a one-year career break, she would have remained unfit for work at the end of that one-year break. At that point, the tribunal concluded, it was virtually certain that she would have been lawfully dismissed. Further, no causative link could be established between the Claimant's high blood pressure and her discriminatory treatment by the Respondent.

92. In all the circumstances, the Claimant's claims for financial loss were dismissed.

93. The Claimant is awarded interest on her compensation for injury to feelings at the rate of 8% per annum from 17 October 2017 to date. The appropriate figure calculated to 17 June 2019 is £2,267.

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Employment Judge McNeill QC

Date 17 June 2019

JUDGMENT SENT TO THE PARTIES ON

.....16.07.19.....

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FOR THE TRIBUNAL OFFICE