EMPLOYMENT TRIBUNALS

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Claimant **Respondent**

v

Ms C Farley **Health Management Ltd**

Heard at: **London South Employment Tribunal**

On: **24-26 April 2019**
7 June 2019 (In chambers)

Before: **EJ Webster**
Ms C Bonner
Mr G Mann

Appearances
For the Claimant: **Mr G Hales (Father of the claimant)**
For the Respondent: **Mr T Adkin (Counsel)**

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is not upheld.
2. The claimant's claims for disability discrimination are not upheld.

REASONS

1. By an ET1 dated 19 February 2018 the claimant brought claims for disability discrimination and unfair dismissal. By an ET3 dated 4 May 2018 the respondent refuted all claims.

2. At a preliminary hearing on 21 May 2018 the parties agreed the list of issues and it was these issues that we considered at the hearing. At the outset of the hearing the claimant made an application to amend the claim to include that the dismissal was an act of harassment under s26 Equality Act 2010. This

application was allowed with oral reasons given at the time so not repeated here. Permission was granted solely in relation to the dismissal and not the behaviour after the dismissal in respect of the claimant being asked to leave the premises immediately after her dismissal meeting.

3. The claimant's representative made another application to amend the claim during submissions after we had heard 3 days of evidence. This application was rejected. The claimant's representative wanted to include a claim for indirect discrimination. This was rejected on the basis that this application was made after all the evidence had been heard and despite the claimant being given ample opportunity at the outset of the hearing when the list of issues was being discussed and agreed. This is confirmed by the fact that the tribunal allowed the claimant to add a claim of harassment at the outset of the hearing following a similar application. Whilst the claimant submitted that she was not legally represented (she was represented by her father), we had heard in evidence from the claimant that her father had worked as an employment representative in the tribunals for several years and therefore whilst nominally a lay representative he did know how the proceedings worked. We therefore found that it was not in the interests of the overriding objective to allow this amendment to the claim at such a late stage. All the witnesses had given evidence, the respondent was not in a position to be able to defend the claim and the claimant had been given opportunity to raise this issue at the outset of the hearing but had failed to do so.

4. The tribunal heard evidence from 4 witnesses; Ms Farley (the claimant) and 3 witnesses for the respondent – Mr J McMeckan, Ms C Herne and Ms K Whittaker. All witnesses provided a written witness statement and gave oral evidence.

The Issues

Disability Discrimination

Failure to make reasonable adjustments – s20 Equality Act 2010 (EqA)

5. Did the application of the respondent's absence policy amount to a PCP (provision criteria or practice)?

6. Was the claimant put at a substantial disadvantage compared to non-disabled persons by the application of the PCP. The claimant contends that she was at a disadvantage because her absences were disability related.

7. Would it have been reasonable for the respondent to make the adjustments identified at paragraph 2.33 (1-5) of the particulars of claim, namely:
   (i) Removal of the trigger points which would have avoided the substantial disadvantage that the company's absence policy put on the claimant's situation.

(ii) Disregarding all the claimant's direct disability related absences including those indirectly related in connection with the effects of her medication on her immune system resulting in the removal of her disciplinary warnings and dismissal

(iii) Redeployment to another role in the company where there were 3 suitable vacancies consistent with her transferable skills result in the avoidance of the claimant's dismissal and the continuation of her employment

(iv) Providing a safe and healthy place of work providing for the removal of the physical features that affected her absences which included safe access to work, adjustments to her work station, the provision of colleague support.

(v) A proactive approach to the design and application of reasonable adjustments including the utilization of specialist advice e.g. the company's partner Remploy, the provision of consultation with her on her disability and the application of effective reasonable adjustments including the serious consideration of her requests to make effective reasonable adjustments.

Harassment – s26 Equality Act 2010

8. Did any or all of the events at paragraph 2.3.1 of the particulars of claim occur out of time within the limitation provisions of the Equality Act 2010 as extended by the ACAS Early Conciliation provisions i.e. before 4 October 2017?
9. If not is it just and equitable to extend time?
10. Was the claimant subjected to the unwanted conduct alleged at paragraph 2.3.1 of the particulars of claim and if so;
    (i) Were they related to disability? And;
    (ii) Did they amount to harassment?
11. Broadly summarised (and agreed at the outset of the hearing) the incidents of harassment outlined at paragraph 2.3.1 were as follows:
    (i) J saying "Let me guess – you are going home, what a surprise. I'm used to picking up your slack and as for the last six months you have hardly been here."
    (ii) A saying "with the sickness you have, there is no way you can develop your role"
    (iii) A saying, in September 2016, that she was fed up with comments being made about the claimant's absence and health problems.
    (iv) Karen Whittaker telling a colleague that the claimant "cornered me in the stationery room yesterday and told me her husband had walked out on her."
    (v) In July 2017 the claimant was told she could not have a pay review as they were not undertaken until December.
12. In addition, the claimant added that the fact of her dismissal was an act of harassment.

Discrimination arising from the claimant's disability – s15 Equality Act 2010

13. Did the respondent subject the claimant to unfavourable treatment namely dismissing her?
14. Was the treatment because of something arising in consequence of disability – the something arising is said to be the sickness absence
15. Was the treatment a proportionate means of achieving a legitimate aim of the respondent?

Unfair dismissal

16. What was the reason for the dismissal? The respondent says capability but this is not accepted by the claimant. The claimant says that there is a possibility that she was redundant as her role was not replaced.
17. Was dismissal, in all the circumstances fair taking into account equity and the substantial merits of the case?

Background

18. The claimant was employed as a senior receptionist by the respondent. The respondent was an occupational health management provider. The claimant was employed from 23 May 2015 until 27 October 2018.

19. The hearing provided the tribunal with a lot of evidence. We have only made factual conclusions where it has been relevant to our decision making and conclusions.

20. As this claim covered many issues over the course of the claimant's employment, we have made our findings under the following headings:

(i) Claimant's sickness absence and sickness absence review meetings.
(ii) Reasonable adjustments
(iii) Incidents of alleged harassment
(iv) Specialist medical evidence

General observations

21. We make an overall observation at this stage regarding the claimant's challenge to the accuracy of all the notes of all the absence review meetings with the respondent regarding her absences. Whilst we accept that notes of meetings can be inaccurate, we were provided with no evidence that the notes that we were taken to were inaccurate. No challenge was made to the notes by the claimant at the time and it is only at this hearing that the accuracy is being challenged.

22. We have not been told the exact nature of the inaccuracies – for example that comments the claimant made were not included in the notes. Instead there have simply been sweeping statements regarding the fact that they were inaccurate. The claimant says that her ability to challenge the notes has been removed because her notebook with her contemporaneous notes was removed from her desk drawer after she left. Whilst this may be true, and we have no reason doubt her in this

regard, it is not clear, if she had such accurate notes at the time, why she did not challenge the meeting notes at the time. She has given us no explanation as to why she did not challenge the notes at the time nor in what way the notes are inaccurate. We have therefore been able to give little weight to her assertions that the notes are, in the round, completely unreliable.

23. The procedural fairness of the sickness absence process was not challenged before the tribunal. The claimant was invited in writing and attended all of the absence review meetings set out below. At all stages she was informed of the possible outcome of those meetings. She was entitled to be accompanied at the relevant meetings and she was entitled to appeal all the formal outcomes as well. She appealed against the final written warning and her dismissal and both appeals were considered and responded to.

24. The claimant was sent to four independent health assessment meetings and reports were provided and shared with the claimant and reasonable adjustments suggested. Where relevant they are referred to below.

Claimant's sickness absence and sickness absence review meetings

25. It was accepted by the respondent that the claimant was disabled for the purposes of the Equality Act 2010 by reason of her chronic back condition. On 16 July 2015 whilst at work, the claimant had a back seizure whilst bending to pick up a box of soap. She then had spinal surgery to correct two herniated discs, which has left her with a chronic back condition with numbness in her left leg and lower body.

26. This surgery was followed by a second operation on 29 July 2015. This did not fix the problem however the claimant has been advised that no further surgical intervention is possible. She left hospital on 2 August 2015.

27. The claimant was visited at home by Ms Parsons on 25 August. This was an absence review meeting which is recorded in a letter dated 25 August from Ms Parsons at pages 152-153 of the bundle. At this meeting it was agreed that when the claimant was ready, she would have a phased return to work but that there would be an Occupational Health (OH) assessment beforehand to assess whether any adjustments were necessary. Ms Parsons also confirmed at this meeting that the respondent would exercise its discretion and would pay her an additional 3 weeks at full pay but did confirm that she would be receiving SSP from that point onwards.

28. The claimant says that she did not agree to this meeting because she was under very strong painkillers. We note however that the effect of her pain and medication was noted by Ms Parsons and we accept that this was taken into account by the respondent at that time. Given that no decisions as to when she would return or what adjustments would be made and no sanctions were applied we do not believe the claimant was disadvantaged by this meeting which took place after 6 weeks

absence. We find no evidence that she objected to the meeting at the time or afterwards.

Absence review meeting 23 November 2015

29. The claimant was hospitalised again on 25 October 2015 with back pain and sciatica until she left on 9 November 2015. She was signed off until 14 December by her GP. The claimant had an absence review meeting on 18 November with A and Ms Parsons. The claimant states she felt pressurised to return to work and did so on 30 November though she was paid from 23rd November in a phased return to work. We find no evidence from the notes of that meeting that she was pressurised and it is clear that adjustments were made to her working hours. The letter at page 164-165 details why the respondent felt the need to get an OH report that specifically commented on adjustments relevant to the role and dealt with the fact that she had returned to work too soon on the last occasion which they wanted to make sure was not happening again. The OH report and return to work were also delayed so that they could gain accurate information from her surgeon regarding the fusion of the cage around her spine. We make no criticism of the respondent regarding this meeting or letter.

Absence review meeting 7 December 2015

30. There is another Absence Review Meeting (ARM) on 7 December 2015 which resulted in an informal warning regarding the claimant's sickness absence which would remain on her file for 6 months. In the letter confirming this they state that she had had 75 days off. The claimant says that they have failed to disregard her 12 days in hospital as per the policy. We conclude that whilst this may be the case, had she had 63 days' absence the respondent would still have given her an informal warning at this point. Therefore, whilst there may have been a breach to the policy, we find that there was no detrimental affect to the claimant at that time.

31. The letter also confirms that the trigger points to her absence levels would be adjusted so that she would only trigger the review system if she had 12 days or 6 occasions of absence. The normal policy states that the trigger levels would have been 8 days or 4 occasions. There is no evidence as to why they adjusted the trigger points to these levels. It is not clear on what basis they felt that this particular level of adjustment was reasonable or necessary in light of the claimant's condition. None of the respondent witnesses gave evidence as to why they had been set at this level. Ms Parsons states that this particular level was set because the OH had said the condition was long term and left room for revisiting it if the surgeon's report gave further information in this regard. However, it appears that these triggers were not revisited and it is not clear from the OH report why this level is used or deemed appropriate.

32. What is also relevant about the operation of the respondent's absence review policy is that each time an absence review meeting was held the absence records were 'reset' or wiped clean. This means that it was not operated with the claimant on a rolling 12 months or set period basis as is sometimes the case with absence

policies and as appeared to be the case with the respondent's paper absence policy. Each time the claimant triggered an absence review she was, in effect, given her whole 'entitlement' of absence again before she triggered another review meeting. This happened regardless of what period of time the previous absences had covered or how soon they occurred after the previous absences. This is important because it means that the respondent in fact allowed the claimant to be absent far more over her period of employment than the trigger points perhaps imply.

33. On 10 June 2016 the claimant had a meeting with A and it was confirmed that the informal absence warning had been lifted as she had not had significant absence during this period. Therefore the entirety of the claimant's absence up until this date and her hospitalisation period were not counted in any way to the subsequent dismissal proceedings.

Absence review meeting 8 November 2016

34. On 8 November 2016 the claimant was summoned to another ARM. This was triggered by 7 episodes of absence totalling 8.5 days – this level of absence therefore triggers the respondent's adjusted trigger point policy that they were applying to the claimant's absence levels. The claimant met with Mr Ainsworth on 5 December 2016. The letter reporting the outcome was sent on 6 December 2016. It confirms that the claimant was given a first written warning regarding her absence levels. The claimant did not appeal against this decision.

35. We find that the list of absences on pages 311-312 is accurate however, we accept the claimant's submission that the absence when she was in hospital ought not to have been counted as hospital admissions are stated in the policy to not be counted. Nonetheless we find that even if those 2 days were discounted, she would still have triggered the policy because she would still have been absent on more than 6 occasions. It was the number of absences on this occasion that triggered the review, not the number of days. We accept that of these absences, they were all, save for 2.5 days across 2 occasions, related to her back condition.

36. On 30 December she slipped and fell on the ice in the car park. This resulted in her having 4.5 days off work. Initially these absences were unpaid but after the claimant appealed to the respondent's MD, they were paid retrospectively.

Absence review meeting 12 January 2017

37. On 12 January the claimant attended another absence review meeting. The record showed that she had 6 episodes and 9.5 days' absence since the last review meeting. At the meeting the claimant explained that one of the absences was simply her leaving 45 minutes early and ought not to be counted as a ½ day absence. Further she explained that two of her absences were directly as a result of her workplace accident. In the outcome letter (page 355-358) Mr McMeckan confirmed that as a result of the claimant pointing out these concerns the relevant

absences would be disregarded, the adjusted trigger points had been met and so no written warning was given.

38. However, Mr McMeckan also went on to discuss in detail the issue of her driving to work. The OH report had indicated that the doctor was concerned about her ability to drive given the level of pain medication she was taking. The claimant strongly disputed that it had any effect on her ability to drive and before the tribunal was stating that she could not see the relevance of her journey to work on her performance at work. We agree. We believe that the apparent concern from the respondent regarding this matter was misplaced and we believe that it was inappropriate for Mr McMeckan to make such an issue of it when it was not something that was affecting her attendance levels. The claimant's GP subsequently confirmed that she was safe to drive. Although we find the level of interest in this matter surprising we also find that once the respondent had the GP's confirmation of safety this matter was not a factor in any subsequent decisions regarding the claimant's ability to attend work and perform her role and the matter was not raised again. Nonetheless we conclude that it ought not to have been something raised with the claimant at the time in the circumstances.

Absence review meeting 20 April 2017

39. The next ARM was on 20 April 2017. This was again chaired by Mr McMeckan. The meeting was called because the claimant had been absent from work for a total of 6 occasions and 12 days. Of those absences, 2 occasions totalling 6.5 days were relating to her disability.

40. None of these absences were disregarded and Mr McMeckan gave the claimant a final written warning. The claimant disputes that the record of the absences was accurate for the following reasons (paragraph 102 of her witness statement):

102. On 18 April 2017 I received another notification of an ARM on 20 April 2017 and details of my recorded absences between 12 December 2016 and 29 March 2017. (p413). This showed 6 episodes and 12 days. The records show that on 15 December 2016 I was absence of 1.5 days. However I was in a grievance appeal meeting on 15 December which commenced at 1.30pm so I couldn't have been absence of half day. I was absent on 16 December for 1 day. Therefore as the policy says absences of less than half day will not be recorded this record was inaccurate. The record shows that on 29 December I was absent for half day. My leaving time on that day was 12.30 but my lunch period was 12.30-1.30 so again it was not a half day absence. The record shows that on 1 March I was absent for 1.5 days. In fact I left in the afternoon of 1 March and returned to work on 3 March. Therefore the record was inaccurate. This meant I had 5 episodes of absence not 6 which is the trigger and I had 10.5 days absence not 12 days. In all of these absences a return to work form was completed and signed by JM confirming its accuracy.

41. Mr McMeckan was questioned extensively by the tribunal about the way in which absences were recorded. He admitted that the system was imperfect and a somewhat blunt instrument. It could only record full or half days but management were told to record all absences of whatever time period on the system. He said that all absences were recorded and that it would only be as a result of a review process, that corrections could be made or absences disregarded because they were in fact for less than half a day or for hospital attendance etc. He said however that this was the point of the return to work records that were signed by the employee and manager and the review process where he actually met with the employee. He pointed to the second ARM he had with the claimant on 12 January as evidence of this. In that meeting when the claimant questioned some of the absences he disregarded them. He stated that at those review meetings he would conclude whether or not triggers had been hit by speaking to the individual and considering the return to work/absence records signed as well as looking at the imperfect digital record. We accept that he did this in each of his ARM meetings with the claimant and looked at all the evidence regarding her absences, not just the digital record.

42. On 15 December the claimant is recorded as absent for 1.5 days when it ought to have been 1 day as she left early on 15 December but not a whole half day early which is proven by the fact that she attended her grievance appeal meeting that day at 13.30. We accept that she did not have a half day's absence on this occasion. The sickness absence policy states that any absence less than a ½ day ought not to be counted.

43. However, at the time of her actual absence, in her return to work form signed on 19 December (p 324), she confirms that she had taken 1.5 days' leave. On other occasions where she had only left early she made a point of ensuring that this was recorded in those return to work meetings and this was not done on this occasion. We find that where the accurate time of leaving was recorded then the absence was disregarded e.g. 23 August 2017 (pg 466). Further, the claimant did not raise her concerns at the meeting on 20 April with Mr McMeckan. We find that had the claimant raised this fact either on her return to work or at the absence review meeting, it could have been discounted. Whilst we accept that it is not necessarily for an employee to check the accuracy of a digital absence recording mechanism we do believe that it was for her to make any such observations at her return to work meeting on 19 December only a few days after the absence and it was reasonable for the respondent to rely on her to this extent. We also find that she knew she could raise such inaccuracies with Mr McMeckan and he would listen, as she had done in the past. Further, the claimant did not raise this as an issue at her appeal hearing against the Final Written Warning either so the respondent did not have an opportunity to review it then.

44. With regard to the claimant's absence on 29 December, the claimant states that as she left work at 12.30 this was not in fact a ½ day absence because her

lunch hour was 12.30 -13.30 and she worked amended hours meaning that her day finished at 4pm. She therefore stated that she had less than ½ day's absence because she was in effect only not working for 2.5 hours. Again this was not raised at the meeting on 20 April or at the appeal. In her return to work form at page 335 she clearly records it as a ½ day absence and signs it as such. Also recorded on this form is a 45 minutes absence on 28 December which was not counted, again confirming that the claimant knew that shorter absences could be recorded as such and would be disregarded. For the same reasons as above we find that the fact at the time the claimant clearly agreed that she had taken a ½ day off it was not unreasonable for the respondent to factor this into their calculations even if, in retrospect this is now incorrect.

45. We reach the same conclusion regarding her absence on 1-2 March where she has signed a sheet saying that she was absent for 1.5 days and does not raise this as an issue until the tribunal hearing.

46. Therefore, we conclude that it was reasonable that the respondent concluded that the claimant had been absent on 6 occasions over 12 days that therefore triggered a final written warning. The claimant did not challenge the respondent's records at the time she was actually absent in her return to work forms, she did not raise it at the meeting with Mr McMeckan when she knew she could and she did not raise it at the appeal hearing against her final written warning.

Appeal against final written warning

47. The claimant appealed against her final written warning on 11 May 2017 raising various issues which we will consider fully below. However, she does not at any point in the appeal raise the fact that the recording of her absences was materially inaccurate.

48. The claimant appealed (p429) on the basis that the respondent had not paid due regard to the OH report, that that the respondent had not properly considered redeployment, that they ought to adjust their absence recording policy so that all disability related absences were disregarded and that several of her absences ought to be considered as extenuating circumstances and therefore also disregarded. She also stated that the stress of the fall in the car park ought to be taken into account and her stress related absence of 1 day be disregarded.

49. The appeal was considered by Mr Saunders and a response sent on 7 June 2017.

50. The claimant stated that one way that the respondent ought to have due regard to the OH report was that, given that she was in a customer/client facing position without a team, they ought to consider redeploying the claimant to a back office position to lessen the impact on the business of her absences. Mr Saunders

concluded that the OH report had been properly considered and the possibility of redeployment considered too in that other teams came forward to help or had phones diverted to them if the claimant was unavailable. He does not dismiss the possibility of long-term redeployment and recommended that the discussion between the claimant and her manager continue but only if such a change in role was going to reduce her absence levels.

51. The respondent witnesses were also questioned on this matter at the tribunal. Although not covered in the appeal outcome letter from Mr Saunders, we address their evidence here. They stated that it was considered but that there were several issues which prevented it from being a realistic option. Firstly, they stated that they applied the same absence triggers to everyone regardless of whether they worked in small or large teams and so unless a change in role would reduce sickness absence levels it would not have led to a different outcome. We accept the respondent's evidence that they treated everyone in accordance with the policy regardless of whether they worked in a team. No evidence was provided to suggest otherwise. Secondly, they stated that the claimant had been clear that it was unlikely a change in role would have reduced her sickness absence because her disability was not going to change. She made it clear that with a newish, permanent colleague (M) in position, it was not her role in of itself that made her attendance poor; it was her disability. Therefore, the respondent concluded that a role change would not have reduced her absence levels. In light of the claimant confirming this to us herself (that she could not say that a new role would reduce her absence but her aim was to reduce the impact on the business), we find that this conclusion was reasonable in the circumstances. We find that the respondent did put in short term adjustments when the claimant was unable to do parts of her role that ameliorated the fact that she was either one of two in a team or at times had been on her own.

52. Finally the respondent stated in evidence that the back office roles were challenging in different ways and would have posed other problems for the claimant namely that she would have had to speak on the phone for much of the day (which the claimant found difficult as she frequently lost her voice), that the typing roles used a foot operated system which could have proved challenging with the claimant's back condition and that there was not the same amount of getting up and moving around in the back office roles as with the receptionist role which they had understood helped the claimant.

53. Mr Saunders also considered the issue of whether disability-related absences ought to have been disregarded in their totality and whether the application of the absence policy in respect of extenuating circumstances had been properly applied. He concluded that the respondent could not disregard all disability-related absences on the basis that it would enable a disabled person to effectively be off work forever without being able to take their absence into account if their ill health was disability-related. We conclude that it is reasonable

that there must be some limits on a person's absence levels so that performance can be managed. It is not reasonable to say that all disability related absences, for all people ought to be disregarded as a blanket rule given that the possible outcome for this would be someone remaining absent entirely from work and the respondent unable to manage that situation. We find that the respondent did disregard some absences and had a flexible approach to the claimant's absence management which meant that each and every absence was properly considered before any sanction was imposed. This was evidenced by the return to work absence meetings and signed records and the notes of the meetings with Mr McMeckan. The increase to the trigger points was put at 50%. As stated above we do not know how that was determined nor how the impact on the business was assessed. We address this in our conclusions below.

Absence review and dismissal meeting 25 October 2017

54. The claimant was called to another absence review meeting by letter dated 25 October 2017. It was called because the respondent believed the claimant had had 8 occasions of absence totalling 10.5 days of absence between 2 May 2017 and 24 October 2017. The claimant stated that she again, disagreed with the number of absences recorded before us but did not raise that at the hearing on 27 October nor at her appeal hearing.

55. She states that the 24 October was a Tuesday not a Wednesday and so she only had 2.5 days as opposed to 3.5 days. Mr McMeckan accepted this in cross examination. She also stated that the 19 October ought not to have been counted as she was admitted to hospital on that day. We accept that this is correct. However, we also accept Mr Adkin's submission that even with those two days deducted this would have counted as one occasion of absence and so the trigger would still have been met.

56. She also challenged before us the absence on 2 May which was recorded as a half day when she had left early but not taken a whole day off. This may again be correct however she did not challenge it at the time and she signed her return to work form to say she had been off for ½ a day on this occasion. Further we accept that even if this absence was entirely disregarded it was the 8th absence and her trigger point was 6 absences therefore she had already exceeded her allowance before this date.

57. At page 497 the claimant confirms that the absence record was accurate in the meeting. In her witness statement she says she has no recollection of saying this but in the absence of any notes or evidence to the contrary and given that she does not contest it in her appeal letter, and on the basis, as stated above, that before us she has challenged every set of notes of every meeting, which means that we are less inclined to believe her, we conclude that she did confirm the accuracy of the absence records at the meeting. We find that the

respondent's decision to base their decision on this absence record was reasonable.

58. We also find based on the notes of that meeting (p497-502) that the following topics were discussed and considered with the claimant:

    (i) Whether the claimant felt that there were any adjustments which would have impacted on her attendance to which the claimant responded that an adjustment ought to be made so that disability related absences were disregarded as it *"was her disability that was causing the potential for her to lose her job"* (p498)
    (ii) Whether reducing the claimant's hours further might be a way to improve her attendance levels to which the claimant said that she did not think that it would because "*her disability is what it is and that she feels she is able to fulfil her current working hours*" p498
    (iii) Whether the claimant working in a different role would make a difference to her attendance levels. To which the claimant responded that she couldn't say if it would make a difference and that things in her current role in reception were much better now that she had M working with her and they made a great team.

59. We find that the claimant was being given an opportunity to consider part time work but would not accept it. We accept that the respondent was not in a position to impose this possibility on the claimant but it was clearly discussed with her as an option which she refused. We understand that she may have had good reason to want to continue working her current hours, nonetheless we do not find that the respondent failed to properly consider this option.

60. We accept that the claimant had no way of telling whether her absence levels would be better in a different role and that she was not in a position to be able to answer this question having not done any of the other roles. We also accept however that Mr McMeckan had considered the possibility of moving her to another role and assessed the likelihood of it helping the claimant. This is addressed in his witness statement at paragraph 47 and that this possibility had been discussed and considered with the claimant at the final written warning meeting and at the dismissal meeting.

61. Mr McMeckan concluded that given that the claimant's absence levels had not improved despite various reasonable adjustments being put in place, and that the claimant would therefore be dismissed. This was communicated to the claimant verbally at the meeting. She was very upset and was escorted from the building without being allowed to go back to her desk. This way of escorting her from the building added to her upset and she states that she was made to feel like she had been dismissed for gross misconduct as she was not allowed to say goodbye to her colleagues nor collect her belongings. We conclude that it was unfortunate that this approach was taken. Whilst the claimant may well

have been upset, it seems unreasonable that she was not allowed to say goodbye or collect her belongings given the circumstances.

62. The claimant appealed against the decision by letter dated 14 November 2017. A meeting was convened on 23 November 2017. At the appeal the claimant stated that the trigger points ought to have been extended and that disability related absence ought not to be recorded

Reasonable Adjustments

63. We have made factual findings in relation to the adjustment of amending the trigger points of the respondent's absence policy and disregarding the claimant's disability sickness absence already. We will not repeat them here. However, it is appropriate that we deal with the claimant's evidence regarding her sickness absence and her assertions that her coughs and colds were also related to her disability here.

64. The absence policy (pg 618 bundle) confirms that trigger points for absence reviews can be amended where someone is disabled for the purposes of the Equality Act 2010. It confirms that normal trigger points where absences are considered short term were 4 occasions or 8 days in a row over a rolling 12 month period.

65. We find that this was formally adjusted for the claimant from 7 December 2015 by Helen Parsons when she was told that it would be adjusted and although she was told it could be reviewed it was not reviewed again after this date.

66. We find that it was appropriate that the claimant's absence be dealt with under the short term absence policy given that all of her absences were 5 days or less apart from her initial hospitalisation in 2015. It is noted that this long period of absence in 2015 was not counted towards any sanction against her save for an informal warning which was wiped from her record before any decision was made about formal sanctions and ultimately her dismissal.

67. The policy allows for 'Extenuating Circumstances' (pg 620) which allows them to disregard all or any absences relating to certain issues including: Recurring/ongoing serious medical conditions including conditions covered by the Equality Act and Hospitalisation with an overnight stay and any operation.

68. The claimant argued that her disability related absences ought to be disregarded in their entirety given that the respondent had this flexibility within the policy. We note that the respondent did exercise its discretion to discount the hospital stays as extenuating circumstances and the absences related to her accidents at work were also discounted.

69. We were not provided with any evidence about disabled people needing more access to GP appointments and in particular that those with bad backs would need increased GP appointments. Whilst we accept that anyone with a chronic health

condition may require increased support from medical professionals we were not taken to any evidence that substantiated this for the claimant or disabled people generally. The claimant relied upon a Canadian study (p726) but this study's abstract clearly shows that it was in relation to Canada which as far we are aware has a different primary care system from the UK and more importantly the abstract for the study was to consider the perception of physicians of disabled people on the disabled people's ability to access care. With no proper contextual analysis given by the claimant we did not feel that this evidence was relevant to these proceedings or could assist us with providing us with evidence that was relevant to the claimant's case.

70. The other assertion made was that the claimant's medication impacted her immune system and that the respondent ought to have known this and that her colds and coughs also ought to be considered disability related absences. The claimant relied upon a report at page 90-103 of the bundle which was an Austrian report on the impact of diazepam and benzodiazephines on immune systems. There were also several other print outs from the internet about studies into the effects of these drugs on immune systems in different circumstances. The claimant and her representative did not attempt to explain the substance or basis for these reports but simply stated that as they had been prepared by somebody with a PHD they ought to be preferred over the evidence of the respondent's expert. They also provided no medical evidence supporting that the claimant's immune system had been compromised. The claimant gave anecdotal evidence that prior to her back condition worsening significantly in 2015, her overall health had been very good and she rarely suffered from colds/coughs etc. However, from the point at which she started taking this type of medication she succumbed more often to this type of ailment. We have no reason to disbelieve the claimant's account of her health. Nonetheless, we do not have any medical evidence specific to the claimant to suggest that her colds and coughs were related to her back condition or the medication she was taking.

71. As a result of the claimant's intention to rely on this evidence the respondent obtained an expert report on the subject (p131A). We prefer the respondent's expert evidence regarding current knowledge of the effect of opioids on the immune system. We do not accept the claimant's assertion that because the expert does not have a PHD his evidence should be disregarded. His report was tailored to the situation of the claimant and looking at the effect of opioids in this type of situation. He states that at present the side effects the claimant is relying upon are not listed in the BNF which guides doctors on side effects for the purposes of prescribing medication. We believe that this is a reasonable, objective indicator for our purposes as it will have been the basis on which the claimant was prescribed the medication in the first place.

72. We also find that the claimant did not, at any time during her employment or the absence review meetings, raise the fact that her coughs and colds were

disability related. When she was requesting that her disability-related absences were discounted from the respondent's tally, she did not, at the time, refer to her coughs and colds.

Alternative employment

73. We find that alternative employment was considered by the claimant and the respondent at the final written warning meeting and the dismissal meeting. Details of the outcome of the dismissal meeting are set out at pg 505 of the bundle. That document states that with regard to an alternative role this was considered but the claimant had said that her absence levels would be unlikely to be affected by a different role. We accept that this was likely. The Claimant stated that now that M was in place the role of receptionist it was not difficult for her to sustain her role as receptionist and that this was not causing her absence levels. There was clearly a two-way conversation about the matter and there had been at earlier meetings too.

74. Firstly, it was considered whether the actual tasks involved were impacting on attendance and the claimant said that was not the case and there was nothing to counter that situation. This meant that moving her to a different role was not a solution. For example, at pg 544 it is discussed that if she had been doing the transcription role, the system was managed by a foot pedal under the desk thus rendering it unlikely to be a suitable alternative role.

75. It was reasonable in all the circumstances for the respondent to conclude that a change in role would not ameliorate her absences and subject to our conclusions below, we do not think that an employer's decision that a particular level of absence cannot be sustained by a business even in a different role is necessarily discriminatory or unreasonable.

Amended hours

76. The claimant put in a flexible working request requesting that her working hours be changed to 8.30 until 4pm. This allowed the claimant to travel outside rush hour and meant that she was home earlier for the purposes of taking her medication and because she found it more difficult to manage her pain in the afternoon and wanted to get home to take her medication earlier. This was granted. The claimant and her representative suggested that this was not a reasonable adjustment because the claimant had had to ask for the change to her working hours. We disagree, who asked for the adjustment is, in our view irrelevant – the outcome and the fact that her working hours were amended without any problem is what is relevant.

Lone working

77. Great weight was placed by the claimant at the hearing on the fact that she had spent a lot of time lone-working on reception when it was at least a 2 person job. Mr Adkin took her to a time line which appeared to show that her actual

period of lone working was minimal and that it did not coincide with high levels of sickness absence.

78. The claimant stated in evidence that it was not just the fact that she was on her own but also that for a large period of time she had had new starters or agency staff working with her, all of whom she had to train and none of whom could necessarily be trusted to be left when she needed to take breaks. She said that this placed her under severe stress because she felt that she could not take proper breaks or even go to the bathroom without it being difficult.

79. The claimant's evidence in her witness statement at para 148 is that she was lone working from January - March 2016. We accept however that her absence levels during this period were not particularly high and it did not appear to exacerbate her sickness levels. She did not raise the fact that new starters were difficult to train in the appeal meeting but we address it here as it was put to us as an issue.

80. Whilst we accept that there may have been issues with individual members of staff and their turnover, we do not accept that it was within the respondent's power to do anything other than attempt to recruit to fill the position of second receptionist. Given that other than the period of January to March 2016 there were not lengthy periods of lone working by the claimant, we do not believe that the respondent could have done more than they did in this respect. They recognised that it was not a role suitable for one person and that the claimant needed support. To support her they put in place systems so that members of other teams would answer the phones either during her breaks or at other times of need, that they did try to recruit a permanent member of staff and eventually managed to do this and that they encouraged the claimant to take whatever breaks she needed and told her the systems that were in place to support her in doing this. We therefore conclude that to the best of the respondent's abilities they adjusted the role so that the claimant was supported though it was not always perfect.

<u>Car parking space</u>

81. We find that the claimant was provided with a parking space that was initially not helpful because it required the claimant to enter through a heavy door with a step. We accept the claimant's evidence that this made it difficult for her to use and was not a helpful adjustment.

82. The claimant resolved this situation herself and chose to park at the front of the building in the visitor's car park. She did not seek permission to do this and she just started doing it of her own accord. She used a space right next to the door and agreed that this was a useful place for her to park and alleviated her difficulties in getting into the building. There were no objections to her doing this and we accept Mr Mcmeckan's statement that as far he was concerned this

was her parking space as she had used it for as long as he had been her manager.

83. We accept the claimant's evidence that on occasion when she left at lunch time she may come back to her space being occupied by a visitor however she was not able to provide any dates when she raised this as a concern with the respondent nor any evidence to show that it happened so often as to cause her disadvantage.

84. The claimant made the point that this was not a reasonable adjustment because she had taken the steps to make it happen as opposed to the respondent. She states that the respondent's steps were inadequate because they provided her with a spot that was close to a difficult door and had a difficult route into the building. We are not persuaded by this argument. We accept that the initial adjustment made was insufficient however this was changed and the respondent never objected to the change. In our opinion as it is clear that the respondent acknowledged her difficulties and allowed her to park in the most convenient spot for her.

Work station

85. The claimant's computer tower was originally on the floor. It was leaning down to push the button on the tower that triggered her coming off her chair after J had changed its settings. After this incident the tower was put on the desktop. This was then changed again and it was put in a lower place but with the button at the top making it easier to reach. The claimant accepted that having it on the desktop and being on the floor with the button at the top were arrangements that were safe for her. We accept that the tower being in a position where she had to lean far down to turn it on was not acceptable. However, we also find that this was changed in a way that the claimant accepted. We accept that the accident with the chair was awful and caused the claimant pain and anxiety and that there should not have needed to be an accident to prompt her work station to be at a suitable height. Nonetheless we also find that the claimant had never raised the position of her work station as a concern before this and so the respondent had been unaware that it was an issue for her.

86. An assessment of the claimant's work station was made by Posturite on 18 September 2015 and the recommendations were put in place. The claimant was provided with a chair for her use only. We accept that it ought not to have been tampered with by staff and we address J's behaviour below. Nonetheless the claimant accepted that the chair was suitable and did help.

87. We find that a Personal Emergency Evacuation Plan (PEEP) was put in place. This was in the bundle pages 442A-F. It was signed by the claimant on 22 June 2017. The claimant states in her witness statement that no PEEP was done for her. We find this to be untrue. It was done collaboratively between the claimant and Mr McMeckan. It sets out clearly what has been agreed as being the

claimant's duties in the event of an emergency and what she needed to be able to leave the building safely. We accept that this was done collaboratively and accurately reflected what the claimant agreed at the time in terms of her mobility needs.

Fire Warden

88. The claimant stated that the retention of the role of fire warden in her job description amounted to failure to make a reasonable adjustment. Whilst we accept that this did remain in her job description we also conclude that any requirement had been adjusted to suit her abilities and that the claimant was fully aware of this.

89. Her role was to exit the building through the front door which was 3-5 metres from her seat, passing the fire panel and monitoring the situation and recording people leaving the building from the reception area. This was also recorded in the PEEP plan at pages 442A-F of the bundle. We accept the respondent's evidence that she was not expected to clear the floor she was on, or to clear people out of the building at all. She did not have to do anything physical other than exit the building through her normal door and wait there. We accept that this part of her job description had therefore been adequately adjusted and there was no requirement to remove it entirely.

Remploy

90. The claimant stated that the respondent ought to have sought the advice and support of Remploy to advise it in relation to enabling the claimant to remain at work through reasonable adjustments. It is not clear from her witness evidence or her pleadings as to why she felt that this was necessary nor what it would have achieved. We recognise that Remploy are experts in this field nonetheless there is no absolute requirement for it to be them as an organisation which assesses an individual's work or work-station and makes recommendations. The respondent referred the claimant to its OH specialists on 4 occasions, it sought medical evidence or confirmation of various points from the claimant's GP and hospital doctors and it instructed another workstation assessment by Posturite to assess the claimant's work station. Further the respondent undertook and recorded a written risk assessment and a PEEP with the claimant. It is not clear what the claimant says would have been achieved by the instruction of Remploy.

91. Overall with regard to this area of the claimant's case, we found Mr McMeckan's evidence in person to be very helpful and credible. He was able to give clear and detailed answers to all questions and did not shy away from admitting that there were difficulties with the absence records and was able to explain how they were managed. His witness statement unfortunately was less full but orally he confirmed that the following adjustments were made and we accept that they were made particularly given that they were not challenged by the claimant other than already addressed above:

    (i) The claimant was allowed to work amended hours at her request

(ii) The claimant was provided with a parking space at the front of the building
(iii) A PEEP assessed her access requirements in the event of a fire
(iv) A Posturite assessment was carried out which resulted in the claimant being provided with a new chair and adjustments to the computer and desk
(v) A review of every task that the claimant did was carried out at a meeting with the claimant with a flip chart and feedback encouraged
(vi) Other team members answered the phone if the claimant lost her voice
(vii) J was given the task of distributing fruit
(viii) The claimant was not required to unpack the stationery deliveries
(ix) Phones were diverted and other day to day on the spot adjustments were made if the claimant expressed particular difficulties

Harassment

Pay review

92. The claimant stated that she ought to have been given a pay review in July 2017 and that failure to do so amounted to harassment because they had allowed one of her colleagues a pay review out of the normal cycle and that they refused to allow her one because she was disabled.

93. We find that they did consider the pay review application but did not award her one because she would need to wait until December when pay reviews were carried out across the business. The respondent clearly did award J a pay increase and this was not during the normal cycle they outline (p371). However they state that this was in line with him taking on additional responsibilities as opposed to being a pay review in his current role. We also accept that it was possible that M, the then temporary receptionist was being paid more than the claimant, although we had no evidence of this.

94. We were taken to no evidence by the claimant that the decision to refuse her a pay rise was related to her disability. The refusal is at page 454. Both M and J were in materially different circumstances to her in that M was, at the time, an agency member of staff and J was being given a pay rise after being given a new role. Nonetheless in the context of there being non-disabled comparators who were paid more, we can see that on the face of it the claimant may be able to show that her pay rate and the refusal to change it could be linked to her absence levels or her disability. However we also conclude that this was a one off incident and the claimant did not continue to request a pay rise after this.

J's Behaviour

95. The claimant gave very few details of the alleged harassment by J. She stated that he had been rude to her about her absence levels but gave no specific dates for that and it appeared to have been mainly on one occasion. She stated however that she felt bullied and intimidated by J and that his behaviour had

been difficult to manage over a considerable period of time only stopping when he left. She also concluded that it was J who had deliberately altered her chair settings.

96. We were given little or no evidence about J's behaviour other than the claimant's grievance about the matter and a conclusion by Mr Ainsworth that J and the claimant had a difficult working relationship.

97. However we do conclude that it all occurred before October 2016 and the outcome of her grievance was given on 2 December 2016. The claimant's claim was brought on 3 January 2018 and there were no intervening acts of alleged bullying behaviour that we were provided evidence about between December 2016 and the claimant's dismissal that could amount to a continuing act.

Statement by Karen Whitaker

98. Ms Whitaker was overheard by the claimant discussing the claimant during a phone conversation with her colleague who was also in HR. We can understand why the claimant was upset at hearing this conversation and we believe that the tone of the conversation would be entirely determinative of whether this amounted to harassment. Ms Whitaker was obviously worried that the claimant had heard it. She said in evidence she felt that the claimant would have taken it out of context and that is why she was anxious to speak to the claimant about it. We suspect that the matter fell somewhere between the two accounts of the conversation given to us and that Ms Whitaker's tone was not particularly sympathetic or kind, but that she was relaying the information for professional purposes as opposed to simply gossip.

99. It was a one-off incident that occurred on 8 February 2017.

Statements by A

100. The claimant alleged that A made two separate unkind comments to her. Firstly she said that the claimant could not develop her role given her levels of sickness absence and secondly that A was fed up with people making comments in reception about the claimant's health and absences.

101. A no longer works for the respondent and did not attend to give evidence. We accept the claimant's evidence with regard to both these incidents. The claimant accepted that she raised the possibility of increasing her role and that A said this would not be possible. We find that she may well have made reference to the claimant's sickness absence levels as a reason not to consider a promotion however we also accept that the role that the claimant was suggesting did not exist at that time and that what the claimant was suggesting was the creation of an entirely new role.

102. We also accept that A asked the claimant to stop discussing her health with visitors to the respondent. On the face of it this may not have been an unreasonable request. However the claimant stated that she was answering questions from visitors as opposed to her actively raising it. We therefore accept that it may have been difficult for her to entirely refrain from discussing her health without being rude.

103. We find though that this was a one off conversation and that A stopped being the claimant's manager in 2016.

The Law

104. S 6 Equality Act 2010

Disability

(1)A person (P) has a disability if—

(a)P has a physical or mental impairment, and

(b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2)A reference to a disabled person is a reference to a person who has a disability.

(3)In relation to the protected characteristic of disability—

(a)a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b)a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4)This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a)a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b)a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

96. s15 Equality Act - Discrimination arising from disability

S15 (1)A person (A) discriminates against a disabled person (B) if—

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

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

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

97. s 20 and s 21 Equality Act 2010 - Duty to make adjustments

(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'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.

(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 a 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.

(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9)In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a)removing the physical feature in question,

(b)altering it, or

(c)providing a reasonable means of avoiding it.

(10)A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a)a feature arising from the design or construction of a building,

(b)a feature of an approach to, exit from or access to a building,

(c)a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d)any other physical element or quality.

(11)A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

98. s 26 Equality Act 2010 - Harassment

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)A also harasses B if—

(a)A engages in unwanted conduct of a sexual nature, and

(b)the conduct has the purpose or effect referred to in subsection (1)(b).

(3)A also harasses B if—

(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b)the conduct has the purpose or effect referred to in subsection (1)(b), and

(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- race;
- religion or belief;
- sex;
- sexual orientation.

Unfair dismissal

99. S98(1) Employment Rights Act 1996 ('ERA'), an Employer must show that they have dismissed an employee for a potentially fair reason.

100. Section 98(2)(a) ERA

> *"A dismissal is potentially fair if it "relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do".*

101. Capability should be assessed by reference to an employee's *"skill, aptitude, health or any other physical or mental quality"* (section 98(3)(a)*, ERA).*

102. Where the employer has fulfilled the requirements of s98(1), whether the dismissal is fair or unfair must consider the following factors.

(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.

(b) Shall be determined in accordance with equity and the substantial merits of the case.

Conclusions

S 20 and s 21 Equality Act 2010 - Failure to make reasonable adjustments

103. We find that the respondent's absence policy did amount to a provision criteria or practice. The respondent accepted that it did from the outset. In the case of Griffiths v Secretary of State for Work and Pensions [2017] I.C.R. 160 the Court of Appeal considered a very similar situation and found, clearly, that the existence of such a policy amounted to a PCP but that the correct construction was that it was the requirement to comply with the policy that was the PCP as opposed to the existence of the policy itself. We apply this same construction of the situation to this case.

104. We also find that this PCP put the claimant at a substantial disadvantage compared to non-disabled people. Many of her absences were related to her disability and triggered the respondent's absence review process.

105. In Griffiths, Elias LJ sets out that the essential purpose of section 20 is to require an employer to take reasonable steps to prevent a disabled person being disadvantaged by a rule that applies equally to non-disabled persons. The duty to make reasonable adjustments would be frustrated if it were necessary to compare the disabled person with able–bodied persons who are also disadvantaged by the relevant rule.

106. Where, therefore, an employee's disability leads to a level of absence which a non–disabled employee is unlikely to have, which it does in the case of this claimant, then the rules of an attendance management policy will put the disabled employee at a substantial disadvantage.

107. The subsequent question then for the tribunal is whether it is reasonable for the employer to adjust the rules of the policy in the particular circumstances of the case.

108. The adjustments that the claimant relied upon for the purposes of this case were:

(i) Removal of the trigger points which would have avoided the substantial disadvantage that the company's absence policy put on the claimant's situation.

(ii) Disregarding all the claimant's direct disability related absences including those indirectly related in connection with the effects of her medication on her immune system resulting in the removal of her disciplinary warnings and dismissal

(iii) Redeployment to another role in the company where there were 3 suitable vacancies consistent with her transferable skills result in the avoidance of the claimant's dismissal and the continuation of her employment.

(iv) Providing a safe and healthy place of work providing for the removal of the physical features that affected her absences which included safe access to work, adjustments to her work statement, the provision of colleague support.

(v) A proactive approach to the design and application of reasonable adjustments including the utilization of specialist advice e.g. the company's

partner Remploy, the provision of consultation with her on her disability and the application of effective reasonable adjustments including the serious consideration of her requests to make effective reasonable adjustments.

109. We have struggled with the question of whether the respondent's decision to simply add 50% on to their normal trigger points amounts to a reasonable adjustment. The respondent could give no evidence as to why the adjustment was made to this level either from a medical or an operational point of view.

110. However we have found that in fact they made a far greater adjustment than this because each time there was an absence review meeting and a sanction imposed, the claimant's absence levels were in effect reset. This means that as opposed to having her absence levels measured over a rolling 12 month period as the policy states, Mr McMeckan in effect allowed the claimant a far greater level of absence because she was allowed the adjusted levels of absence after each absence review meeting if a sanction had been imposed at the last one.

111. Even if the respondent had applied a fairly arbitrary extension of trigger points and applied them throughout, we have considered whether the operation of the absence policy was a reasonable adjustment. It is a balancing act between the disadvantage suffered by the employee and the operational needs of the employer. (Chief Constable of Lincolnshire Police v Weaver EAT 0622/07).

112. We find that the respondent did adjust the trigger points by 50% both formally and through the reset process they informally operated. As well as those adjustments we find that the claimant's shorter absences (i.e. leaving an hour early to go to a GP appointment or similar) were disregarded where they were properly recorded in the return to work meetings. Further adjustments were made when absences were caused due to the two accidents at work and we find that Mr McMeckan carefully assessed whether each absence ought to be counted at each absence review meeting and that it was discussed with the claimant.

113. We find that the claimant's high levels of short term persistent absenteeism are objectively capable of causing disruption to the performance of any role and that had the respondent not operated a trigger point absence policy they would nonetheless have had to manage the claimant's absence levels given her level of absence.

114. The claimant's absence levels did impact on the respondent's ability to provide a professional reception service. They had to use people from other teams on a regular basis to cover the claimant, employ agency staff or allow

someone to 'lone' work in the role which the claimant herself has pointed out was unsatisfactory and difficult to manage.

115. We find that it cannot be reasonable to state that all absences regarding an individual's disability must be discounted as otherwise it could render the effective management of a disabled employee's attendance impossible depending on the condition and the reason for the absences. Bray v London Borough of Camden EAT 1162/01

116. We do not accept the claimant's submissions to this tribunal that her coughs and colds ought also to be disregarded. We do not conclude that they were disability related based on the evidence we had before us.

117. We find that the respondent could not disregard all the claimant's disability related absences as a reasonable adjustment. Although Griffiths clearly concludes that consideration of this possibility ought to be made, it is not the case that all absences must be disregarded in this context. In the case of Bray it was clearly found that such a requirement on an employer in circumstances of high levels of absence would be unsustainable. We find that although the claimant's levels of absence in this case are not as high as those in Bray – they were substantial and had an impact on the respondent.

118. We find that the respondent did consider redeployment. The claimant had been allowed to carry out one back office role on one occasion when she had suffered from a cold. However we find that the claimant said clearly that she did not want to be redeployed as she felt that she could make her receptionist role work. We also find that she herself accepted that it was unlikely that the move would have changed her absence levels as her absences were not caused by her work but by her disability and the type of work she did would not change this. We therefore conclude that it is unlikely that this adjustment would have alleviated the disadvantage which she was placed at by the operation of their sickness absence policy as she accepted that she would have been likely to have had similar levels of absence in a different role.

119. We conclude that the respondent did make physical adjustments to the claimant's place of work in the form of allowing her to park in the space at the front of the building, moving her computer tower to a position that she accepted in evidence was sufficient to not disadvantage her, getting her a special chair, reducing the physical obligations in her role such as not making her unpack stationary, not to lift anything over a certain weight and not making her distribute the fruit. No other adjustments were recommended by either Posturite or the OH specialists.

120. We do not accept that allowing her to take an hour for her lunch break was an adjustment as all employees were entitled to a one-hour lunch break.

121. The claimant has stated that not asking the claimant to lone work is a reasonable adjustment to the PCP of requiring her to attend work to certain levels of attendance. We do not believe that this is the correct construction. We believe that requiring somebody to work alone in a two-person role amounts in of itself to a PCP. We accept that she was lone working during the period January to March 2016. We also accept that lone working could have put the claimant at a substantial disadvantage because of her ill health making it a far harder prospect to fulfil two people's roles when experiencing the mobility and pain difficulties that the claimant has. However we do not accept that claimant was asked to lone work as the norm. We find that this situation was rectified and the claimant was always supported by other members of staff on other occasions and therefore that the claimant was not subjected to this PCP beyond March 2016. We find that any claim regarding that period is out of time and that it is not just and equitable to extend time in all the circumstances.

122. If we are wrong and ensuring that the claimant was not lone working could also be adjustment to the operation of the respondent's attendance policy, we also find that the adjustment was in effect made apart from between January and March 2016.

123. Finally we do not accept that the respondent was obliged to instruct Remploy to advise it in relation to the claimant's situation. The respondent sought advice from OH experts on 4 occasions and obtained a work station assessment from Posturite. The claimant has not been able to say what disadvantage would have been ameliorated by the use of Remploy as advisers as opposed to the specialist advice the respondent did rely upon. We therefore do not find that this would have been a reasonable adjustment in the circumstances.

124. The claimant's claims that the respondent failed to make reasonable adjustments are not upheld.

<u>Harassment – s26 Equality Act 2010</u>

125. We find that all of the incidents set out in paragraph 2.3.1 of the claimant's particulars of claim happened before 4 October 2017 and are therefore out of time. s123 Equality Act 2010 requires claims to be brought within 3 months less a day of the date of the act of discrimination.

126. We have considered whether it is just and equitable to extend time for any of the incidents relied upon and conclude that it is not. The claimant knew how to raise her concerns both internally and externally. Whilst it was played down at the hearing it is clear that her father was an employment

representative for several years and she therefore had access to advice about time limits.

127. The comments from A and J all occurred in 2016 over a year before the claimant brought a claim in the tribunal. All of the incidents were one off comments or episodes as opposed to a series of incidents or an ongoing situation. Both A and J left the respondent's employment a considerable period of time before the claimant. The claimant gave no reason as to why she did not bring a claim at the time nor why we ought to extend time.

128. With regard to Karen Whittaker's comments on 8 February 2017, although it is more recent, we also find that this was also a one-off incident that is out of time. Again the claimant gave no information to the tribunal as to why time ought to be extended nor why she failed to bring a claim at the time. These comments do not relate to the operation of the sickness absence policy and we find that it is not just and equitable to extend time.

129. Finally we turn to the refusal of the pay review. This was in July 2017. This was also a one-off incident and it was out of time. For the same reasons given above we find it is not just and equitable to extend time to consider this claim.

130. Turning then to the claimant's dismissal. This is in time and the act of dismissal can be an act of harassment. We conclude that the decision to dismiss the claimant was related to her absence levels. This was distinct from her disability itself. The meeting was professional and the claimant has not raised concerns with the manner of the meeting itself though she states that the decision to dismiss her came as a great shock. Given that we find it was not expressly related to her disability we do not find that this was an act of harassment.

131. However if we are wrong in that and in fact the dismissal was inextricably related to her disability because she was dismissed for her absences many of which were disability-related then we have therefore gone on to consider whether it had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment.

132. This test is both objective and subjective. When considering whether conduct has the proscribed effect, a tribunal must take account of B's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect (*section 26(4), EqA 2010*).

133. We accept that the claimant found the dismissal shocking and upsetting. Being dismissed is unlikely to feel anything other than hostile. However were that to be all that was needed to satisfy the definition of harassment then all

dismissals that arose out of an absence management process that occurred because all or some of the absences were disability related – would have to amount to harassment.

134. We find that Mr McMeckan was calm and polite throughout the meeting. It was not the purpose of the meeting to create an intimidating, hostile, degrading, humiliating or offensive environment. The reasons for the dismissal were limited to her absence levels not the nature of or the existence of her disability. We find that the claimant had been given proper notice in advance that the meeting might result in her dismissal. She knew that she had a final written warning on her record and objectively we find that it was clear that dismissal was a likely outcome. We therefore conclude that it was not objectively reasonable for the claimant to experience it as intimidating, hostile, degrading, humiliating or offensive albeit we have huge sympathy for the claimant that this is how she felt.

135. The claimant's claim that she was subjected to harassment related to her disability is not upheld.

Discrimination arising from the claimant's disability – s15 Equality Act 2010

136. It is not disputed by the respondent that dismissing the claimant could amount to unfavourable treatment. The dismissal did arise because of something arising out of her disability, namely her sickness absence. Although not all of her sickness absence was disability related, enough of it was that it can be said that the dismissal was for a reason arising out of the claimant's disability.

137. We must therefore consider whether her dismissal was a proportionate means of achieving a legitimate aim of the respondent? The respondent maintains that achieving a good attendance level for employees and/or managing the levels of absence must be a legitimate aim which we accept. We must therefore consider whether their approach and ultimately the dismissal was proportionate.

138. We conclude that it was. The respondent had made significant adjustments to its sickness absence policy which we detail above at paragraph 112. It then made several individual discounts for the claimant at the various meetings. These are detailed in the findings of fact but they included resetting the amount of absences counted each time a sanction was applied, discounting short periods of time off that were less than ½ a day, discounting absences that arose as a result of incidents/accidents at work. Whilst some of these applied to all staff (e.g. not counting any absences of less than ½ a day) we still find that the respondent's application of its absence policy and how it counted absences was measured and reasonable. The respondent operated its absence policy in conjunction with making adjustments to the claimant's work and work station and at every stage discussions were had with

her about how her absence levels could be improved. As well as discussions with her, medical evidence was sought to see if and how her attendance could be improved and where recommendations were made they were implemented.

139. We therefore conclude that given the significant levels of absence that the claimant had, the fact that the respondent made adjustments to its policies and applied it reasonably, means that this was a proportionate means of achieving a legitimate aim.

140. The claimant's claim that she was discriminated against for a reason arising out of her disability is not upheld.

Unfair dismissal

141. What was the reason for the dismissal? The respondent says capability but this is not accepted by the claimant. The claimant says that there is a possibility that she was dismissed by reason of redundancy as her role was not replaced. The claimant provided no evidence that he role was redundant and that this was in fact a redundancy dismissal. We find that there is a lot of evidence to show that the respondent chose to dismiss the claimant because of her levels of absence. This is supported by the documentary evidence regarding the monitoring of the claimant's attendance and the meetings about it and each staged warning regarding her attendance levels.

142. We have considered the case of International Sports Co Ltd v Thomson [1980] IRLR 340 as put forward by the respondent in their submissions. It states that an employer should:
(i) Carry out a fair review of the attendance record and the reasons for absence
(ii) Give the employee an opportunity to make representations and
(iii) Give appropriate warnings of dismissal if things do not improve.

143. We conclude that there were many fair reviews of the claimant's absence. Her original lengthy absences around the time of her operations in 2015 were not counted at all towards her dismissal. At each trigger stage her absences were reviewed, she was given a fair and proper opportunity to discuss the absences and on occasion they were discounted or disregarded entirely. The claimant has stated that her absence levels were incorrectly recorded but we have found that to the extent that she is correct, it did not impact the overall situation that she had hit a trigger point. She was in a position to make representations at every meeting and did so with some success.

144. At each stage she was informed in writing that if her attendance levels hit the next trigger then a further sanction could be applied. She was given the right to appeal against the sanctions and did appeal the final written warning and the dismissal.

145. There was no procedural unfairness. The levels of the claimant's absences were high and triggered an adjusted absence policy that had reasonable levels of attendance required.

146. We therefore find that the dismissal was reasonable in all the circumstances and the claimant's claim for unfair dismissal is not upheld.

Employment Judge Webster

Date: 12 July 2019