EMPLOYMENT TRIBUNALS

Claimant: Ms L Hall

Respondent: Astrazeneca UK Limited

Heard at: Manchester **On:** 12-15 March 2019
8 April 2019
(in Chambers)

Before: Employment Judge Langridge
Ms C S Jammeh
Mr C S Williams

REPRESENTATION:

Claimant: Mr D Bunting, Counsel
Respondent: Mrs S Skeaping, Solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The respondent did not breach its duty to make reasonable adjustments and the claims under sections 20 and 21 Equality Act 2010 therefore fail.

2. The claimant's dismissal was not discriminatory under section 15 Equality Act 2010.

3. The claimant was fairly dismissed by the respondent and her claim under the Employment Rights Act 1996 fails.

4. All claims are dismissed.

REASONS

Introduction

1. The claimant's claims arose from her dismissal on the grounds of capability following a series of sickness absence reviews. She claimed that the respondent's decision to dismiss was unfair in that it did not carry out a fair procedure and failed to consider alternatives to dismissal. The claimant also alleged that her dismissal was discriminatory in that the reasons arose from her disability, chronic anxiety and depression. She further alleged that the respondent failed in its duty to make reasonable adjustments both to the way it recorded sickness absences and to the dismissal procedure itself, in order to accommodate her disability. A claim of indirect discrimination based on the respondent's Attendance Management Policy was not pursued.

2. In defending the claims the respondent acknowledged the claimant's disability, about which it had knowledge at the time, but said the dismissal was fair as it followed repeated periods of sickness absence. The respondent said it had made reasonable adjustments which allowed for the claimant's disability, and asserted that even after making adjustments, her attendance record was significantly higher than other employees'. It denied that the dismissal arose from the disability and said that alternatively, dismissal was a proportionate means of achieving its legitimate aim of improving attendance.

3. The hearing took place over four days when evidence was heard from the claimant and her union representative, Ian Brocklehurst. The witnesses who gave evidence on behalf of the respondent were Steve Richmond, the dismissing manager, Andy Evans, the appeal manager, and Julie Jones, HR adviser. The parties produced a comprehensive agreed bundle for the Tribunal and written submissions. They also provided, at the Tribunal's request, their respective analyses of the effect that the requested reasonable adjustments would have had, if the claimant's arguments were accepted.

Issues and relevant law

4. The main claims were brought under the Equality Act 2010 ('Equality Act'). The claimant alleged that the respondent failed to make reasonable adjustments under sections 20 and 21 Equality Act. The relevant parts of section 20 state:

> *(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.*

5. Section 21 provides that a failure to comply with such a duty amounts to discrimination. In order for the claim to succeed, the claimant must show that she was subjected to a provision, criterion or practice ('PCP') which put her as a disabled person at a substantial disadvantage by comparison with non-disabled people. The question of the PCP was not straightforward. At the outset of the hearing Mr Bunting identified it as being the respondent's Attendance Management Policy and/or its application. This was discussed during the course of the hearing and by the time of submissions it was modified, as noted below. In summary, the claimant argued that the respondent should have:

(1) changed its method of measuring sickness absences so as to record separately those absences which related to disability (although using the same scoring criteria);

(2) modified its Attendance Management Policy by introducing a further, fourth stage as it had done up until 2012;

(3) exercised its discretion to delay the dismissal, or extended the period of the final written warning, to allow the claimant more time to demonstrate a good attendance record.

6. The other discrimination claim was that the dismissal was discriminatory by virtue of section 15 Equality Act, which protects against dismissals arising from disability unless they can be justified. The relevant parts of section 15 provide that:

(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.

7. The Tribunal took into consideration the claimant's arguments as outlined below in the summary of Mr Bunting's submissions, in which he relied on the dismissal as the unfavourable treatment. The Tribunal had to decide whether that was because of something arising in consequence of the claimant's disability, which on the facts of this case required a detailed analysis of the absence record and the extent to which the claimant's depression affected the way she was treated. It was open to the respondent to justify any unfavourable treatment under section 15(1)(b). Although its witness statements did not deal with the point, the questions were addressed through oral evidence.

8. The unfair dismissal claim was brought under the Employment Rights Act 1996 ('ERA'). The respondent's reason for dismissal was conceded by the claimant to be capability, a potentially fair reason under section 98(2) ERA. This left the Tribunal to determine whether the dismissal was fair or unfair in all the circumstances of the case, having regard to the provisions of section 98(4) ERA. The Tribunal took into account the size and administrative resources of the employer, as well as equity and the substantial merits of the case. Following a fair procedure formed part of that consideration, as did the question whether the respondent complied with its own policies and procedures.

9. The Tribunal had to avoid bringing its own view of the dismissal decision into consideration, but instead had to decide whether this respondent's decision to dismiss fell within the range of reasonable responses which an employer might apply when considering an absence record like the claimant's, and when considering whether dismissal was the appropriate sanction. In short, the Tribunal had to decide whether the respondent acted reasonably in reaching its conclusions about the history of the claimant's absence and whether it was reasonable not to give the her a further chance to demonstrate sustained improvement in her attendance.

Claimant's submissions

10. The claimant argued that the respondent applied PCPs which put her at a substantial disadvantage by comparison with non-disabled employees. The three PCPs identified in Mr Bunting's submissions (having been clarified during the course of the hearing) were as follows:

> (1) The fact that disability-related and non-disability related absence was considered cumulatively under the respondent's Persistent Intermittent Absence Procedure, rather than two separate absence records;
>
> (2) The fact that the respondent's Persistent Intermittent Absence Procedure had three stages (first improvement letter, final improvement letter and dismissal) rather than the four stages it had operated before 2012;
>
> (3) The fact that failure to meet the terms of a final improvement letter would usually be met with dismissal.

11. It was said that the claimant was subjected to two substantial disadvantages as a result of these PCPs, namely the administering of the final improvement letter dated 12 August 2016, arising from PCPs (1) and (2), and with it the threat of dismissal; then the dismissal itself on 12 April 2017.

12. Mr Bunting acknowledged the burden on the claimant to provide evidence of a reasonable adjustment which could have been made, citing Project Management Institute v Latif [2007] IRLR 579 EAT. The suggested adjustments were as set out in paragraph 5 above. He argued that the first of these adjustments would have been reasonable because the claimant was not asking for all disability-related absences to be discounted, only that they be recorded separately. Referring to Beart v HM Prison Service [2003] IRLR 238 CA, he submitted that the test of reasonableness is directed to 'the steps to be taken to prevent the employment from having a detrimental effect on the disabled employee'. He submitted that separate recording of absences would have eased the psychological pressure on the claimant and facilitated a sustained return to work. It was enough that there would have been a real prospect of the disadvantage being removed: Redcar & Cleveland Primary Care Trust v Lonsdale [2013] UKEAT 0090/12/RN.

13. The second adjustment, applying a four-stage sanctions procedure, was reasonable because it would have included one or two informal attempts to resolve attendance issues, stages which Mr Bunting argued were missing before the

claimant was issued with the first improvement letter on 3 August 2015. It would have prevented the claimant being dismissed when she was.

14. Another way of giving the claimant another chance, he submitted, was to make the third adjustment by extending the period of the final improvement notice. This would have delayed or eliminated the disadvantage of dismissal. He relied on Fareham College Corporation v Walters [2009] IRLR 991, EAT in support of this contention.

15. So far as the section 15 claim was concerned, Mr Bunting submitted that the claimant was treated unfavourably in that her dismissal was because of something arising in consequence of her disability, here, her disability-related absence. Relying on Paisner v NHS England [2016] IRLR 170 EAT, he said that the causal threshold is met if this type of absence had at least a significant or more than trivial influence on the dismissal. He argued that the claimant's disability-related absence influenced her later dismissal because it was one of the stepping stones leading to that outcome. The chain of events started with a first improvement notice on 3 August 2015, followed by a final improvement notice dated 12 August 2016 and then dismissal. He conceded that none of the absences leading to the first improvement notice were related to the claimant's disability, but maintained that this did not make disability irrelevant or trivial. This is because the first improvement notice was given for an extended period of 12 months, for reasons connected with the claimant's past absences including for depression in 2010, 2012 and 2013. He pointed out that Mr Richmond's decision to dismiss did take into account the historical picture including absences for depression. The final improvement notice was issued on the strength of three periods of sickness, one being a lengthy absence with depression.

16. Mr Bunting pointed out that the final period of absence exceeded (only just) the relaxed trigger point for an absence review under the respondent's procedure, and fairly conceded that even if past disability-related absences had been counted separately, this would not have brought the claimant under that threshold. The crux of his argument was that the respondent should have looked at this case on an individual basis and exercised the flexibility available to it under its own policy, prior to reaching the final dismissal stage.

17. The claimant accepted that the respondent had a legitimate aim in operating its Attendance Management Policy, but took issue with whether the dismissal was proportionate, citing Griffiths v Secretary of State for Work and Pensions [2016] IRLR 2016 CA. Factors making the dismissal disproportionate included the fact that the final absence arose from an accident, the respondent had not taken informal steps before issuing the first improvement notice on 3 August 2015, and the decision to dismiss was pre-ordained when the claimant went off sick after her accident. No new advice was sought from Occupational Health, and nothing the claimant could have said would have made any difference to the outcome.

18. In support of the unfair dismissal claim Mr Bunting argued that a fair procedure was a vital component, acknowledging that the respondent did consult with the claimant and took steps to establish the nature of the illness, but it did not see fresh advice from Occupational Health before dismissing. The main submission on fairness was that the respondent did not consider options other than dismissal,

including holding off on the decision. He relied on his arguments in the discrimination claims for saying the dismissal was unfair, including the lack of informal steps prior to the first improvement notice dated 3 August 2015, the refusal to separately record disability-related absence, and the decision to dismiss not being put off to some future date because it was pre-ordained.

Respondent's submissions

19. Referring to Newham Sixth Form College v Sanders [2014] EWCA Civ 734, Mrs Skeaping submitted that the reasonableness of a proposed adjustment cannot be objectively assessed unless the employer appreciates the nature and extent of the substantial disadvantage imposed by the PCP. She argued that the claimant had not provided clear evidence as to what the PCP was in her case, other than a generic argument that she was more likely than a non-disabled person to hit the trigger points. She pointed out that in any event, the main reason the claimant progressed through the Attendance Management Policy was for absences not related to disability.

20. The respondent relied on the tests in Griffiths as to the meaning of 'substantial disadvantage' and submitted that the respondent discharged its duty by making reasonable adjustments, there being no further steps which would have ameliorated any disadvantage to the claimant. She pointed out that the claimant provided no medical or other evidence that any further adjustments would have benefitted her, and notes that the Occupational Health advice to the respondent was that the claimant could be expected to attend work on the same basis as her colleagues.

21. Turning to the particular adjustments for which the claimant argued, Mrs Skeaping said the claimant had not provided any evidence that separating her disability-related absences would have put her in any better position. She argued that the 'one last chance' adjustment was not a reasonable one, and the history of poor attendance demonstrated that it would not necessarily have resulted in a sustained improvement in attendance in the future.

22. As for the claim under section 15 Equality Act, the respondent submitted that the claimant was not dismissed because of her disability but because of her unacceptable level of attendance. She had benefitted from the advantages of some reasonable adjustments such as more generous trigger points under the respondent's policy. Even if the disability-related absence had been disregarded, the claimant would still have been dismissed. The final improvement notice would have resulted from the non-disability-related absences in November 2015 and February 2016 which were in excess of the threshold for such absences.

23. In the alternative Mrs Skeaping argued that the respondent had a legitimate aim of maintaining good attendance levels among its employees, and the claimant's dismissal was a proportionate means of achieving this aim.

24. The respondent submitted that the dismissal was fair and reasonable in all the circumstances, and fell within the band of reasonable responses. Mrs Skeaping referred to the claimant's concession during cross-examination that the overall process followed by the respondent had been fair, including as it did a number of

formal meetings where she was represented by her trade union, as well as appeals at each stage. The sanctions were all clearly worded and the claimant was aware of the risk of dismissal as the stages progressed. The lack of one further chance before dismissal did not make the dismissal unfair, and there was no evidence to suggest that a better level of future attendance could have been sustained.

25. It was argued that the claimant was aware of the change in the respondent's Attendance Management Policy and had benefitted from informal discussions in the past before moving into the formal absence review stages. An informal stage did not have to be repeated each time the procedure was followed. Overall, the respondent was entitled to dismiss in light of the poor history of attendance and the detrimental effect on the team in which the claimant worked.

Findings of fact

26. The respondent is a multinational pharmaceutical company and at the time of the claimant's employment it employed around 1,000 people on the site in Macclesfield where she worked. The claimant joined the respondent on 6 October 1997 and worked latterly as a Process Operator in a team which manufactured Zoladex. Steve Richmond was the Head of the Zoladex team. The claimant worked in the sterile part of the plant and the particular team in which she worked comprised around eight or ten people. The claimant's line management changed in the last few years of her employment and she reported to Ben Broadbent then Steve Heathcote (Plant Manager) then Mr Richmond.

27. Throughout her employment the claimant experienced problems with her health and her ability to attend work on a sustained basis, particularly after suffering an episode of depression and anxiety in 2002. She attended periodic Occupational Health referrals after this time and the respondent routinely conducted return to work interviews to review the absences.

28. The respondent operated an Attendance Management Policy ('the Policy') which included a Persistent Intermittent Absence Procedure which was applicable in the claimant's case. Under a previous version of the Policy the claimant received formal improvement letters at stages one and two in the years between 2004 and 2009. Although the claimant was by this time experiencing depression, which the respondent accepted amounted to a disability, the reasons for these absences were various (different physical injuries, migraine and sickness) and none related to her disability. A review in November 2009 led to a discussion and agreement with the claimant that she would be given two annual 'trigger days' which she could take to help manage her depression. This was recorded in a second level improvement letter issued on 27 November 2009.

29. The previous Policy involved four stages in managing persistent intermittent absence. On 1 March 2012 the Policy was amended so as to reduce the stages to three. These comprised a first improvement notice, a final improvement notice and a final stage at which consideration would be given to the possibility of dismissal. This shift in the Policy was the subject of discussions with the trade union about the need to have one or two informal stages to ensure everyone was aware of the Policy and

fully understood the consequences of their attendance falling below acceptable levels.

30. The primary aim of the Policy was "to support and assist the employee in maintaining an acceptable level of attendance." It also stated that:

> "Before a formal sanction is issued, the Company will consider the amount of absence, available medical information and whether reasonable adjustments are appropriate and possible."

31. Example of absence triggers were identified, any one of which "should trigger consideration of informal or formal action as appropriate." The five particular triggers in the Policy comprised:

- A 'Bradford score' of 200 (based on the number of occasions x number of occasions x total number of days)
- 3 occasions in 12 weeks
- 4 occasions in 12 months
- Where a pattern is emerging
- Repeated long-term absences or long-term absence preceded or followed by periods of short-term absence

32. Once informal guidance or an improvement letter had been issued, the Policy allowed for formal steps to be taken on any of the five trigger points being reached, or in the event of "absence greater than 3% of annual contracted hours". Any single trigger would suffice to engage the review process and (contrary to the argument later put forward by the claimants union at her appeal), it was not necessary for all triggers to be present.

33. Under the relevant procedure managers could address concerns through informal guidance and then formal review meetings. The line manager could then issue an improvement letter up to and including dismissal. Such letters:

> "will be kept on the employee's file and be valid for a period determined by the appropriate manager […] and the period will depend upon a number of factors e.g. previous attendance history."

34. A first improvement letter would usually be kept on file for six months, and for 12 months in the case of a final improvement letter. In either case, the letter would explain the company's expectations and any support needed. The employee would also be told the potential consequences of not meeting the required standards. Any dismissal would take effect immediately with pay in lieu of notice.

35. The respondent also operated a system of allowing employees to take time off for reasons other than sickness, including up to four weeks' personal leave each year, which the claimant regularly took. That was unpaid leave and did not count towards the time off recorded for the purpose of managing absences. Under the Policy, once an informal or formal review or guidance note was issued, the number of days' absence which had led to the review was reset at zero for the purpose of counting further absences.

36. The claimant's first period of absence for depression lasted 185 days between 12 March 2010 and 13 September 2010. Two years later she had time off for a 'bereavement reaction', amounting to 69 days between 29 May and 6 August 2012. On 25 October 2012 the claimant received a first improvement letter under stage one of the Policy. At the discussion which led to this letter she asked for split Bradford scores and more trigger days. This was not agreed.

37. On 15 July 2013 the claimant began a two month absence for stress and anxiety, which ended on 17 September. On her return to work an informal review took place. After this, the claimant did not take any time off for mental health reasons for around two and a half years. On 13 December 2013 further informal guidance was given to the claimant under the Policy.

38. On 18 March 2014 a first improvement letter was issued, relating to concerns about the claimant's recent absence for virus and flu symptoms. However, this letter failed to take into account that after the informal guidance in December 2013 the absence record should have been reset to zero. The letter was therefore sent in error because in the intervening period there had been only one absence representing 1.9% of working time. The letter recorded a commitment made by management not to apply the usual trigger of 3% absence before conducting absence reviews for disability-related absences, but instead to allow the claimant a threshold of 5.5% by reference to the average for her team. This average was calculated so as to include the claimant's absences. Although this first improvement letter was sent in error, it did not lead to any final improvement letter being produced at a later date and the clock was again reset.

39. On 7 April 2014 Occupational Health wrote to the respondent expressing the view that the claimant should be able to achieve normal levels of attendance, meaning the 5.5% target. They said that the two additional trigger days (which had not been offered to others) were helping the claimant manage her mental health.

40. In 2014 the claimant raised a grievance with the support of her union which was heard by the team manager, Mr Richmond. The grievance discussed her request to split the Bradford scores so that her disability-related absence was counted separately from her general absence, with different trigger points for each. Mr Richmond took the view that such differences were already factored into any decision-making. He noted that the two trigger days were helping the claimant and that the usual trigger for an absence review had been increased from 3% absence to the team average of 5.5%. The claimant confirmed that she was getting enough support from work. After taking all this into account, Mr Richmond concluded that:

(1) It was not appropriate for the respondent to split the claimant's absences into two types and apply different triggers for each, because under the Policy all the reasons for absence would be taken into account on an individual basis.

(2) Reasonable adjustments had been made for the claimant's disability, including the two additional 'trigger days', informal guidance being given, and the adjustment of the 3% trigger to 5.5%.

(3) Medical advice had been taken which concluded it was reasonable to expect attendance at a similar level to the claimant's peers.

41. The grievance outcome letter referred to the importance of maximising attendance at work and identified the support the respondent would provide to help achieve this.

42. On 3 August 2015 the respondent issued a first improvement notice for absences relating to a variety of symptoms, none relating to disability. The claimant had not had a repeat of the prior informal guidance prior to this stage. The Policy permitted the respondent, taking into account the history of the claimant's attendance and her knowledge and understanding of the way the Policy worked, to go to that stage. The letter recorded the fact that the 3% absence trigger was being relaxed in the claimant's case. It noted the four absences which had led to the letter, including a stomach bug, flu symptoms and a stubbed toe. The letter was to remain on the claimant's file for a 12 month duration rather than the six months as suggested under the Policy. This was a permissible option as the procedure allowed the manager to determine the period depending upon "a number of factors" including "previous attendance history". The claimant did not appeal against this first improvement letter.

43. In 2016 the level of the claimant's sickness absence began to give the respondent further cause for concern. On 25 February 2016 she began a lengthy period of absence (150 days) due to depression and anxiety, representing 41.2% of her working time. On 6 May Occupational Health emailed the respondent to express the view that the claimant was improving and recommending a phased return to work. The respondent implemented that recommendation and the claimant's absence ended on 24 July.

44. On 2 August the claimant attended a return to work meeting with her line manager where there was again a discussion about splitting her scores to distinguish disability-related absence from other absences, and raising again the question whether the respondent would consider adding further trigger days. The respondent did not agree to either of these suggestions. On 12 August the respondent issued a final improvement letter setting out its concerns about the ongoing absence record, which by then was extensive. In the overall period since July 2005 the claimant had had 25 separate periods of absence totalling over 750 days. The vast majority of these 25 absences were not related to her depression and anxiety, though those episodes did account for the lengthiest absences. The claimant had a total of four absences relating to her mental health, comprising the 185 days in 2010, the 69 days in 2012, the 64 days in 2013 and finally the 150 days in 2016 just before the final improvement letter was issued.

45. The claimant appealed against the final improvement letter on the ground that she felt it was unfair for the respondent to reduce its procedural stages from four to three. The appeal was heard by Steve Heathcote, the Plant Manager, on 23 November 2016 and a decision given verbally on the day to turn down the appeal. For reasons which were not entirely clear to the Tribunal, Mr Heathcote's written confirmation of the outcome of the appeal was not delivered until 29 March 2017. He rejected the claimant's arguments and referred to the change to the Policy on 1

March 2012, which employees and union representatives were made aware of at the time. Following a collective grievance raised by the union, the amended Policy had remained in place. Mr Heathcote did not consider it appropriate to go behind that outcome. The final improvement letter therefore remained live on the claimant's file, and the clock was reset to zero for the purpose of counting further absences.

46. After this the claimant was able to attend work consistently for more than six months, and was able to manage her mental health well in that time, but then she had an unfortunate accident on 6 February 2017. She fell down the stairs at home and broke a rib, which led to a further absence of 32 days representing 9.6% of working time. She was immediately anxious about the consequences of this as she knew she was vulnerable to being invited to a final absence review meeting, and that this could lead to her dismissal given the final improvement letter still live on her file.

47. The claimant returned to work from this absence for one day on 10 March and was not then rostered to work again until 20 March. The following day Occupational Health emailed a memo to the respondent with a short report identifying the issue with the claimant's broken rib and recommending a phased return to work, which the respondent implemented. A further return to work meeting took place.

48. As the claimant had already been waiting to find out how the respondent would react to her absence, she was increasingly anxious about the possibility of dismissal. She saw Occupational Health again and they produced a short report on 6 April noting the anxiety she was experiencing about getting notification of a final attendance review meeting. On 10 April the respondent sent the claimant a formal invitation to an absence review meeting to take place on 12 April.

49. The formal meeting with Mr Richmond took place on 12 April. Mr Richmond was accompanied by Julie Jones, an HR adviser. The claimant was represented by her trade union. The meeting was also attended by the claimant's then line manager, Ben Broadbent, who set out his concerns about her attendance, focussing on the period from 2012 onwards. He pointed out that the claimant had been in formal or informal sanction every year since then, without any sustained improvement. The claimant's absence record overall showed that she typically sustained unbroken attendance at work for a few months at a time – generally three, four or five months.

50. At the 12 April meeting Mr Richmond acknowledged the claimant's disability and the fact that adjustments had been made, as well as the fact that a final improvement notice had been issued on 12 August 2016. The claimant felt by this time that she had been managing her mental health quite well and had simply had a freak accident but for which she would not have been at the final review meeting. The concern from management was that this single absence represented 9.6% of working time, well over the team average trigger of 5.5%. The claimant's union put forward arguments on her behalf and the claimant explicitly appealed to Mr Richmond's "better nature". Both she and her union appreciated that the respondent's Policy was being correctly applied and acknowledged the potential consequences. The claimant was asking for another chance and identified a period of six months to give her an opportunity to prove that she could maintain her attendance.

51. Ms Jones provided advice from an HR perspective but the decision was made by Mr Richmond alone. This followed a 45 minute adjournment after which the decision to dismiss was notified to the claimant in person. She was given notice to terminate her employment in three months' time, on 12 July 2017, and was not required to work her notice.

52. In coming to this decision Mr Richmond had followed the procedural requirements of the Policy in that the review was triggered by a non-disability-related absence exceeding 3%. This, coupled with the final improvement notice, meant that dismissal was an option as an outcome from the meeting. Mr Richmond then considered whether there was any reason to exercise leniency, taking into account the claimant's historical attendance record. He took the view that this did not justify leniency, taking account of all the absences, whether related to disability or not.

53. The dismissal letter dated 13 April 2017 was drafted by Julie Jones on Mr Richmond's behalf but checked by him to ensure it reflected his reasoning. The letter referred to the fact that he had "sought medical advice". In fact, no new medical advice had been obtained in order to help make the decision, but this was a case of persistent intermittent absence and not long-term absence for a single cause. What Mr Richmond was referring to was a number of Occupational Health reports including the one dated 7 April 2014 and the report dated 6 May 2016. The most recent reports from 2017 had dealt with the separate issues of broken ribs and the anxiety about the potential dismissal, but they did not make any particular recommendations. Neither Occupational Health nor anyone else suggested that the claimant's GP be contacted to provide records or an opinion.

54. Factors which Mr Richmond took into account in making his decision were the claimant's absence since August 2016 exceeding 10%, nearly twice the team average. He noted the 'trigger days' which did not count towards recorded absence, and the fact that the claimant felt she had been in better mental health since the final improvement letter dated 12 August 2016. She had told him her last absence was not connected to her disability but the result of a freak accident, and asked for another chance. In reaching his decision Mr Richmond examined whether there were reasons not to dismiss the claimant and took account of the Policy's aim to maintain employment rather than be quick to terminate. He was aware of the claimant's long service but he also took account of the broader picture across the organisation. He was aware that unsatisfactory levels of attendance like the claimant's had an impact on her team as others would have to pick up the work. He felt her overall attendance had not improved despite many opportunities to achieve a sustained improvement.

55. The claimant was offered a right of appeal and exercised this, sending the respondent her grounds of appeal on 9 May. After receipt of this Ms Jones created a document with her thoughts in response to the grounds. She did not provide that document either to Mr Richmond or to Mr Evans, the manager who heard the appeal, though she shared her thinking with Mr Evans. That said, the Tribunal was satisfied that Ms Jones participated in the appeal in an advisory capacity only.

56. The claimant's grounds of appeal included the fact that Mr Richmond had made his decision partly based on her history, including absences for disability-

related reasons. It was alleged that the decision was discriminatory because it was not a proportionate means of achieving a legitimate aim.

57. The arrangements for the appeal hearing were changed to accommodate the claimant's availability and the hearing then took place on 19 May. The claimant was again represented by her trade union. Lengthy representations were made on the claimant's behalf, which included the fact that she had shown a substantial improvement in her attendance record with only one absence since the final improvement notice. She said she had not hit the Bradford score under the Policy. She acknowledged that the respondent had made some adjustments but asked that it treat the episode in February 2017 as a freak accident, in effect asking that it be discounted.

58. Mr Richmond attended the appeal meeting and was invited by Mr Evans to explain his decision. At the end of the meeting Mr Evans adjourned for two reasons. The first was to follow up some enquiries about the amount of contact and support the claimant had had from line management during her absences. At his request Ms Jones made enquiries by phone and email of Mr Broadbent and Mr Heathcote, from which Mr Evans was satisfied that sufficient contact had been attempted and sufficient support provided.

59. The second reason for adjourning the hearing was to give Mr Evans time to deliberate his decision carefully. It was set out in a letter to the claimant dated 26 May. In his reasoning Mr Evans went methodically through the grounds of appeal and individually addressed the following points raised on the claimant's behalf:

(1) She was not aware of the impact her absence could have on her continued employment.

(2) There was insufficient contact during her absence, especially verbal contact.

(3) Since the final sanction, the absence had not been persistent or intermittent, as it was a single occasion arising from a freak accident.

(4) The wording of the final improvement letter suggested that the claimant should hit all five triggers under the Policy and it did not state only one trigger was necessary.

(5) The time lapse between returning to work and the respondent conducting a return to work interview and sending out the invitation to the formal attendance review was unreasonable.

60. In response to these five points, Mr Evans concluded that the claimant had understood, not least from the final improvement letter, that her dismissal could be an outcome if her attendance did not improve. Having enquired of line managers, he outlined the level of contact and said he was satisfied that it was reasonable. He agreed that since the final improvement letter there had been only one absence but felt that it should be dealt with under the Policy given that a 3% trigger had been hit since the final warning. Mr Evans rejected the argument about all five triggers not

being hit, which was put forward by the union in an attempt to support the claimant but which Mr Brocklehurst conceded at the Tribunal hearing was incorrect. His view about the length of time to deal with matters after the claimant's return to work was that it was reasonable when the claimant's rostered week off was taken into account.

61. Overall, Mr Evans asked himself whether it would be right to ignore the final absence but took the view that this would amount to more favourable treatment than others, which was not the intent or spirit of the Policy. Having reviewed Mr Richmond's decision, Mr Evans came to the view that it was a reasonable conclusion to reach. He endorsed Mr Richmond's view that there was not enough evidence that the pattern of absence would not be repeated if the decision to dismiss the claimant had been delayed to some future date. Her dismissal was therefore upheld.

Conclusions

62. The claimant's depression and anxiety began in 2002 and by the time of the events relevant to these claims she was a disabled person within the meaning of section 6 Equality Act. This was not in dispute and the respondent had knowledge of the claimant's disability by 2008 at the latest following her lengthy absence of 112 working days which included a period of depression.

63. In November 2009 the respondent made an accommodation which it considered to be a reasonable adjustment under the Equality Act, by allowing the claimant to take an additional two days a year described as 'trigger days'. The purpose was to allow the claimant to manage her mental health by taking time off as a way of fending off a period of depression. In March 2014 the respondent agreed to a further adjustment, which was to relax its usual trigger point of 3% absence whenever the claimant's absence was disability-related. Instead a higher trigger point was set at 5.5%, the average for her team which included the claimant's own (much higher) average absence. The 3% trigger continued to apply for non-disability-related absences. A third adjustment was made in July 2016 after the claimant had been off for five months due to depression and anxiety, in that the respondent implemented an Occupational Health recommendation to arrange a phased return to work. This was successful in that the claimant was able to maintain good mental health following this return to work.

64. At the Tribunal hearing the claimant acknowledged these adjustments and agreed they were reasonable, but argued that further adjustments should have been made and were not. The claimant submitted that the respondent failed in its duty to carry out three further adjustments, saying that the respondent should have:

(1) Recorded her absences for disability-related reasons separately;

(2) Departed from its Attendance Management Policy by extending the three stage procedure to a four stage one;

(3) Delayed consideration of dismissal by extending the final improvement notice by four months, or adding six months to the employment.

65. For the respondent to be under a duty to consider making reasonable adjustments, the claimant first had to establish what PCP was applied to her and how that PCP put her at a substantial disadvantage by comparison with her non-disabled colleagues. At the outset of the hearing Mr Bunting identified the PCP as the Attendance Management Policy and/or its application to the claimant. By this he was referring to the respondent's method of recording disability-related absences alongside other absences, and the fact that the Policy was limited to three rather than four stages. In his skeleton argument in closing submissions Mr Bunting modified the description of the PCP as being the following features of the Policy:

- The fact that disability-related and non-disability-related absence was considered, cumulatively, under the Persistent Intermittent Absence Procedure, rather than two separate absence records (one for disability-related absence and the other for non-disability-related absence);

- The fact that the Persistent Intermittent Absence Procedure had three stages, namely first improvement letter, final improvement letter and dismissal, rather than four stages as it had before 2012;

- The fact that failure to meet the terms of a final improvement letter would usually be met with dismissal.

66. In relation to the third point Mr Bunting cited the Policy which states that the improvement letter "will clarify the potential consequences" of not meeting the required standards, though it does not explicitly refer to dismissal as a potential outcome from a final improvement notice. In this case, the final improvement letter dated 3 August 2016 did notify the claimant that the "likely outcome is dismissal" if she failed to maintain the required standards of attendance from that point.

67. The Tribunal's conclusion is that the respondent did apply a PCP to the claimant but considers that a better way to formulate this is:

> *a requirement for the claimant to attend work in accordance with its Attendance Management Policy in order to avoid sanctions under that Policy, including dismissal*

68. The next question is whether that PCP put the claimant at a substantial disadvantage by comparison with her non-disabled colleagues. Again it is not difficult to see that a person with the claimant's disability of depression is more likely to need time off sick and consequently is more likely to receive sanctions under the Policy. In particular such a person is more likely to reach the third and final stage at which dismissal is considered at an earlier point in time than someone whose disability does not require them to take frequent or lengthy absences from work. In principle, therefore, the claimant might have been subjected to a substantial disadvantage in that she experienced anxiety about her position as she progressed through the review stages. That said, the claimant's apprehension may have been unfounded because the Tribunal concludes that she would still have suffered sanctions even if disability-related absences were removed from the reckoning.

69. Before going on to consider the application of the legal principles to the facts in this case, the Tribunal does accept in principle that the respondent was under a duty under section 20 to make reasonable adjustments for the claimant's disability. The existence of this duty was not disputed by the respondent and was indeed compatible with its stated aim of improving attendance.

70. Turning to the question of the first proposed adjustment, namely the separate consideration of disability-related and other absences, the claimant did not seek to argue that the respondent should have ignored disability-related absences and treat them as invisible when applying its Policy. In her evidence the claimant struggled to identify a level at which it was reasonable to trigger a review, conceding by reference to the treatment of another employee that 12% might be reasonable. She accepted that the usual 3% trigger was appropriate for non-disability absences. She said that if her absences had been counted separately, the final improvement notice would not have been issued because she would have had a lower Bradford score on that occasion, based on the two absences not connected to disability. This ignores the fact that those two absences would have led to a review following another trigger, on the grounds that they exceeded the 3% threshold.

71. The Tribunal accepted the respondent's evidence that the triggers which would normally lead to a review and potential improvement action operated simply as a mechanism to engage the attention of a manager. Once the manager was involved it was a question of exercising discretion as to what, if any, sanction to apply. Each of the triggers could lead to consideration of informal or formal action as appropriate. If, as happened in the claimant's case, informal guidance or an improvement letter was issued then any trigger could lead to formal consideration.

72. Despite Mr Bunting's efforts to persuade us that separating the absence records might have saved the claimant from dismissal, this was not borne out by the evidence. The first improvement letter of 3 August 2015 was properly issued on the strength of four spells of illness, none of which related at all to the claimant's disability. Mr Bunting fairly made the point that the duration of the first improvement letter was extended to 12 months from the usual six, by reference to past absences including time off for depression. A review of the claimant's history from 2012 up to August 2015 showed eleven absences of which two related to stress or depression. The Tribunal was satisfied that Mr Richmond and Mr Evans demonstrated in their evidence that the disability-related absences formed only a small part of the overall picture when they looked back at the history in order to take a view about the future. While their evidence was addressing the dismissal question rather than the issuing of the first improvement letter, the Tribunal accepted that their views reflected the way that previous stages of the procedure were handled. In other words, the respondent operated its Policy in such a way as to balance disability-related reasons as part of the overall approach to deciding on the appropriate way to manage attendance problems.

73. Accepting therefore that the first improvement letter was validly issued, and noting also that the claimant did not appeal against it, the Tribunal went on to consider the position at the following stages, and whether removing the past disability-related absence would have avoided dismissal. We concluded it would not.

74. The next stage procedurally was the final improvement letter issued on 12 August 2016 after a review meeting on 2 August. This took account of absences for both disability and non-disability reasons, with the claimant's long absence for depression between February and July 2016 being counted. However, the Tribunal concludes that even if this had been ignored (which is to go beyond what the claimant was requesting) then the final notice would still have been the result. Ignoring the absence of 150 days with depression (41.2% of working time), this left two other periods of sick leave – for a swollen knee and viral infection – together totalling 3.4% and therefore above the applicable 3% trigger. As such, the final improvement letter was correctly issued under the Policy, and counting the disability-related absence separately or even discounting it completely, the result would have been the same for the claimant.

75. During cross-examination the claimant accepted that any reasonable adjustment to the threshold, even as high as 12%, would not have helped her. She conceded it would not have been reasonable to make an adjustment exceeding 41.2%. Even on her own case, therefore, no adjustment could reasonably have been made to avoid this absence being counted in some way when issuing the final improvement letter.

76. The claimant did appeal the final improvement letter, but on the grounds that the Policy had reduced from four to three stages. She was not seeking any further adjustments at that stage.

77. By the time the final review meeting took place in April 2017, dismissal was a legitimate outcome under the Policy. It took place within 12 months of the final improvement letter and the final review was correctly triggered by the absence of 9.6% as a result of the accident. Therefore the respondent was entitled to have dismissal in contemplation, and treating the claimant's disability differently would not have changed this.

78. The point at which the claimant's disability did become important was when Mr Richmond and Mr Evans made their respective decisions. In their evidence both the claimant and Mr Brocklehurst agreed that no adjustment could have been implemented other than extending the employment, either by seeing out the remaining four months of the final improvement notice, or by simply adding a further six months before any final review took place. The respondent's witnesses pointed out that the claimant's attendance of around six months since July 2016 was the longest sustained period since the first improvement notice of 3 August 2015. There was a pattern of improvement letters then a decline in attendance. This is borne out by the absence records.

79. To adopt the reasoning of Lord Justice Elias in Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 (paragraph 76):

> "But an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision. As I mention below, the fact that some of the

absence is disability related is still highly relevant to the question whether disciplinary action is appropriate."

80. In the present case the Tribunal accepts that the respondent was entitled to record all types of absence together and to consider disability-related absence as part of the picture before taking any decisions. In any case, the respondent's application of its Policy meant that disability-related causes for absence were taken into consideration in practice, making a formal adjustment of this kind unnecessary and without purpose given that it was not an option to treat that as invisible. This was not therefore a reasonable adjustment and merely separating the records would have done nothing to ameliorate any disadvantage to the claimant.

81. The second proposed adjustment was to reinstate a four stage procedure rather than apply the three stages introduced in 2012. The Tribunal does not accept that it was reasonable for the respondent to make an exception for the claimant. In 2013 she was given informal guidance on two occasions, on 17 September and 13 December. She was very familiar with the Policy and no fourth informal stage was necessary by 2017. As stated already, once a review was triggered under the Policy it was a question for management whether and how to apply discretion as to the next steps. The Policy contained within its scope the right to exercise such discretion, describing examples of triggers for action as being matters which "should trigger consideration of informal or formal action as appropriate". It is consideration that is triggered, not necessarily action. The Tribunal believes it was legitimate for the respondent to operate the broad principles of its Policy consistently across the workforce rather than make an exception for the claimant in such a distinct procedural way. Her particular circumstances could easily be accommodated within the management discretion allowed for. If the respondent had acceded to the suggestion that four stages be implemented, this would have undermined the deliberate change in the Policy which was implemented following discussion with the trade union in 2012.

82. The Tribunal does not accept that the third proposed adjustment was reasonable either. The claimant contended that she should have an extended warning period in relation to the previous final improvement notice, giving her a further four or six months from April 2017 to show that she could maintain good attendance. The question whether any such adjustment would have been effective so as to remove the disadvantage was far from clear from the evidence, because there was so much uncertainty about the claimant's ability to maintain good attendance in light of her past record. This showed that she had consistently been in sanction from November 2006 onwards, with only a few months of sustained attendance between absences. The Tribunal accepts that the respondent was entitled to conclude that the likelihood of absences recurring was high, and concludes that this degree of uncertainty about the effectiveness of such an adjustment weighs against it being reasonable. It is important to note that the likelihood of further absences occurring was not necessarily related to disability at all. In a report dates 7 April 2014 Occupational Health expressed the view that notwithstanding her recent lengthy absence for stress and anxiety (47 working days or 18.1% of working time), the claimant should be able to achieve normal levels of attendance and manage her mental health within the 5.5% tolerance level, and with the help of the trigger days which she was finding beneficial. Nothing in the later

input from Occupational Health suggested that the claimant would be unable to manage her disability reasonably well in the future. The claimant had managed her mental health well since returning to work in July 2016, and at the point of her dismissal she was dismissed for absences unrelated to her disability.

83. Turning to the claim under section 15 Equality Act, this requires the claimant to establish that she was treated unfavourably because of something arising in consequence of her disability. The unfavourable treatment relied on was the dismissal and it is not difficult to accept that this was the case. However, the Tribunal had to consider whether that treatment was because of something arising in consequence of the disability, and examine the cause of the unfavourable treatment. The immediate answer to that question is that the unfavourable treatment was because of the claimant's absence in February 2017 due to broken ribs, and it was therefore not due to something arising in consequence of disability.

84. It is however fair to say that when deciding on the outcome of that final review Mr Richmond did take into account the claimant's entire absence record which included disability-related absences. The respondent's position was that after the final improvement notice, the decision to dismiss was not written in stone. The Policy required a review meeting to take place and then to see what came out of it. Mr Richmond felt he had some discretion in making his decision. He reviewed the case and reflected on the outcome. Having heard the 2014 grievance about splitting scores, he still did not believe that was appropriate. It was also not appropriate in his view simply to add six months to the review period. He took into account that the review was triggered by the absence due to the accident and although he was aware he could show leniency, he opted not to do so because of the long-term picture. He felt that further leniency was not consistent with the work environment because the claimant worked in a team of less than ten people who would have to accommodate her absences, putting them under additional pressure.

85. Amongst other things Mr Richmond took account of what he felt was a pattern of improvement letters then a decline in attendance, when considering whether to exercise leniency. He concluded there were no good reasons to do so after taking account of the long-term picture which showed unsatisfactory attendance over a lengthy period of time. Although the disability-related absences tended to be longer in duration, the number of episodes of absence were in the great majority of cases caused by miscellaneous other issues. Another factor considered by Mr Richmond was that the team in which the claimant worked, comprising less than ten people, was having to manage her absences and cover the work, which was another reason not to depart from the anticipated outcome of dismissal.

86. At the appeal stage Mr Evans had no concerns about Mr Richmond's decision. He felt he was trying to be fair by looking both at the trigger for the review and the longer absence history. He endorsed Mr Richmond's view that there was not enough evidence that the pattern would not be repeated if the decision was put back into the future.

87. The Tribunal accepted the evidence from the respondent's witnesses and that they carried out a conscientious review of all the evidence and came to a balanced decision. In reaching this conclusion, we noted also the claimant's concession in

oral evidence that although she had been able to maintain good mental health since September 2013, there was no guarantee that her mental health problems would not recur because they were unpredictable.

88. The claimant's disability therefore did play a part in Mr Richmond's decision to dismiss. It played no part at all in the trigger for the review, but it did indirectly fall to be considered as part of the exercise of Mr Richmond's discretion. Balancing the number of occasions when the claimant was off sick for non-disability reasons, the Tribunal is not satisfied that the effect of the disability was significant or more than minor or trivial. If we are wrong about that, the Tribunal's conclusion is that the decision to dismiss was justified. The respondent had the legitimate aim of ensuring satisfactory levels of attendance among its workforce. In the Tribunal's view it was proportionate for the respondent to dismiss because it was entitled to draw a line after a period of many years of unsatisfactory attendance. Allowing for the fact that an employer can be expected to make allowances for a disabled person when deciding whether or not to dismiss, the Tribunal has weighed up the fact that the absence which led to the final review was not in any way disability-related and it was not the claimant's disability which was likely to present problems with her attendance in the future. As stated in Griffiths:

> "But even where there are no relevant reasonable adjustments of this nature to be made, the question would still arise, at the time of disability, whether the dismissal was a proportionate response to the pattern of absences having regard to all the circumstances, including the important fact that they may be wholly or in part disability related."

89. The Tribunal agrees in this case that the respondent was entitled not to exercise its discretion against dismissal and that it was proportionate to bring the claimant's employment to an end after many years of being unable to maintain any sustained attendance beyond a few months at a time.

90. The final claim brought by the claimant was for unfair dismissal under section 98(4) ERA. The claimant conceded that the respondent's reason for dismissal was capability and therefore a potentially fair reason under section 98(2) of the Act. The Tribunal considered the question of fairness under section 98(4) having regard to the reason relied on by the respondent, the reasonableness of the procedures it adopted in carrying out the dismissal, and taking into account the band of reasonable responses which a reasonable employer might adopt in the circumstances.

91. The claimant added little to the unfair dismissal claim that had not been addressed through the discrimination claims. She relied on the fact that the final improvement notice was issued after a spell of depression, her absence record had then been reset to zero until the accident, and the respondent should have considered the fact that it was a freak accident by discounting this.

92. No real challenge was put forward as to the fairness of the procedure followed, and indeed it was clear to the Tribunal that the respondent followed a fair procedure throughout. It complied with its own Policy, it involved the claimant in discussions at every stage, it allowed her to be accompanied at meetings by a trade union representative, and at all times the claimant was aware of and understood the

Policy and the implications for her of failing to improve her attendance. Although the claimant argued that a four stage procedure should have been followed, she did accept in evidence that informal reviews had taken place on 17 September 2013 and in December 2013. There was one short delay between the claimant's return to work in March 2017 and the invitation to the final review meeting which caused her some anxiety, but this delay was not untoward and was caused partly by the claimant not being rostered to work for part of the period.

93. On the claimant's behalf Mr Bunting raised some particular issues about fairness which the Tribunal considered. He said the respondent failed to obtain more recent Occupational Health advice before reaching the decision to dismiss. The Tribunal does not accept that such advice was necessary or that the respondent acted unreasonably in failing to obtain it. In an email report from Occupational Health on 6 May 2016 it was noted that the claimant's health had been relatively good in the nearly two years since she had last been seen there. It was said that there was no clear cause for her condition and that the treatment she was getting was helping. Occupational Health expected the claimant to return to work on the same basis as previously, with the same adjustments in place.

94. This was not a case where the claimant was dismissed for long-term incapacity where a reasonable employer might be expected to make an informed decision with the benefit of medical advice about the condition and its prognosis. This was a dismissal for persistent intermittent absences and in the Tribunal's view no purpose would have been served by any further medical evidence at the time. Furthermore, this was not a point raised by the claimant during the process.

95. It was said that the claimant was dismissed unfairly because she had not had the benefit of informal stages prior to the formal steps under the Policy. The Tribunal does not agree with this view of it. The claimant had had the benefit of informal reviews in late 2013, and on the occasion of each return to work interview. The Policy allowed the respondent to consider the matter at whatever stage it felt was appropriate. The Tribunal accepts the respondent's evidence that numerous informal stages would be applicable more in the case of employees who were new to the procedure or did not fully understand their position under the Policy. That was not the case here. There was no requirement to renew the informal stages each time and the respondent acted reasonably in moving to a more formal stage in 2017.

96. It was alleged that the decision to dismiss was predetermined, not in the sense that the respondent acted in bad faith but rather because nothing the claimant could have said would have avoided her dismissal. It is not difficult to see that dismissal was a likely outcome in a case which followed the sequence of stages and escalating consequences under the Policy. The final improvement notice was issued with a duration of 12 months on 12 August 2016, and the recurrence of an absence within that 12 months was liable to trigger the further review. This in turn was predictably likely to lead to dismissal, but there was no evidence that Mr Richmond made up his mind in advance.

97. It was also argued (for the first time here in the Tribunal) that Ms Jones had intervened inappropriately by involving herself in the decision-making rather than confining herself to the role of an adviser. The Tribunal does not accept this and

accepts her evidence that she prepared written notes on the issues for her own benefit, albeit she did discuss her thoughts with both Mr Richmond and Mr Evans at the appeal.

98. Another ground of unfairness was that the respondent did not record disability-related absences separately, but the fact remains that the claimant was not dismissed for disability-related reasons. It would have served no purpose for the respondent to have separated the records nor made any difference to the outcome. No unfairness to the claimant resulted from the way the absences were recorded.

99. It was alleged that the respondent did not consider other options or wait longer before reaching the decision to dismiss the claimant, reflecting the argument about the third proposed adjustment under the Equality Act. The Tribunal's conclusions about the decision not to delay the dismissal have already been set out above in the context of disability discrimination. So far as fairness is concerned, the Tribunal found that the respondent's decision-makers did consider the options open to them and concludes that both demonstrated that they gave the matter thoughtful consideration. In neither case was the decision taken lightly and Mr Richmond felt that dismissal was an unfortunate consequence of a longstanding poor attendance record. As for waiting longer, the respondent's decision to implement its Policy, which anticipates dismissal after a final improvement notice, is one which fell well within the band of reasonable responses and with which the Tribunal sees no reason to interfere. It might be said that another employer would have taken pity on the claimant and agreed to her request to discount the 'freak accident' in February 2017. However, the fact that this employer did not choose to delay the decision to dismiss does not render it unreasonable or unfair.

100. In conclusion, the pattern of the claimant's absence meant that it was reasonable for the respondent to reach the view that there had been no meaningful improvement, and there was no reason to be confident that the attendance record would improve in the future. The dismissal was fair.

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Employment Judge Langridge

Date 9 August 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
20 August 2019

FOR THE TRIBUNAL OFFICE

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