EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs E Smith	**v**	Govia Thameslink Railway

Heard at: Bury St Edmunds **On:** 8, 9 & 10 July 2019
7 November 2019 (in chambers)

Before: Employment Judge Laidler

Members: Mr C Davie and Mrs CA Smith

Appearances
For the Claimant: Ms A Hart, Counsel.
For the Respondent: Mr G Baker, Counsel.

RESERVED JUDGMENT

1. The claimant was not treated less favourably because of her disability and the claim of direct disability discrimination is dismissed.

2. The respondent did not treat the claimant unfavourably for something arising in consequence of the claimant's disability

3. The respondent did not fail to make reasonable adjustments

4. All claims of disability discrimination fail and are dismissed.

REASONS

1. The claim in this matter was received on 19 April 2018 by which the claimant brought claims of disability discrimination. She remains employed by the respondent. In its response received on 1 June 2018 the respondent denied all the claims.

2. There was a case management discussion before this Employment Judge on 1 August 2018 when the claims and issues were clarified. The issues before this tribunal were as set out at that hearing and now set out below. The full merits hearing was listed for the 24 & 25 January 2019 but a postponement request was granted due to the unavailability due to ill health of the claimant's trade union representative Mr John Stanford to give evidence. The hearing was relisted for 3 days commencing 8 July 2019. The tribunal only actually had 2 ½ sitting days and was unable to conclude its deliberations within that allocation. It was then not able to meet until November hence these reserved reasons.

The issues

"Disability

(i) It is not in dispute that the claimant is and was at all material times disabled as a result of a mental impairment, namely Bipolar Affective Disorder.

Direct disability discrimination: s.13 EqA

(ii) Did the respondent (Liz Mead, Karen Gregson, Ody Nwankwo and/or Angie Palmer) treat the claimant less favourably because of her disability by subjecting her to the following detriments:

a. Failing to arrange a timely OH appointment following the meeting on 24 August 2017.

b. Failing to arrange a meeting with the claimant, OH and Liz Mead as recommended in the OH report of 18 October 2017.

c. Adopting a passive and inflexible approach to OH consultation with the claimant's treating psychiatrist. In particular, did the respondent:

1. fail to make reasonable efforts to establish contact between Dr Bahrololoumi and OH.

2. refuse to contemplate the claimant returning to work without a formal report from Dr Bahrololoumi.

d. Failing to allow the claimant to return to work before 12 March 2018.

e. Proposing on 23 January 2018 to dismiss the claimant on grounds of capability.

(iii) The claimant relies on a hypothetical comparator of an employee in the same circumstances unable to work due to a physical disability or illness.

Discrimination arising from disability: s.15 EqA

(iv) Did the respondent treat the claimant unfavourably because of something arising in consequence of her disability, namely her absence from work, by:

1. Reducing her basic pay to half pay on or around 12 October 2017.

2. Stopping her basic pay on or around 1 February 2018.

3. Requiring her to take two weeks of her annual leave entitlement in December 2017.

4. Proposing on 23 January 2018 to dismiss the claimant on grounds of capability.

(v) If so, has the respondent shown that its actions were a proportionate means of achieving a legitimate aim, namely ensuring that all workers were fit and able to undertake their duties.

Failure to make reasonable adjustments: s.20 & s.21 EqA

(vi) Did the respondent have a provision, criterion or practice ("PCP") that the claimant undertake her duties according to her contract of employment?

(vii) Did this PCP place the claimant at a substantial disadvantage in comparison with persons who are not disabled?

(viii) Did the respondent take such steps as were reasonable to take in order to prevent the PCP from having such an effect? The claimant contends that it would have been reasonable for the respondent to:

1. Allow the claimant to return to alternative duties without receipt of a formal report from the claimant's treating psychiatrist (17 January 2018)

2. Allow the claimant to return to her normal role on a phased basis. (23 January 208)

3. Refrain from proposing on 23 January 2018 to dismiss the claimant on grounds of capability.

(ix) Did clause 11 of the claimant's contract of employment (capping sick pay at 16 weeks' full pay and 16 weeks' half pay) place the claimant at a substantial disadvantage in comparison with persons who are not disabled?

(x) Did the respondent take such steps as were reasonable to take in order to prevent the clause from having such an effect? The claimant contends a reasonable step in the circumstances would have been for the respondent to pay the claimant full pay for the whole period of her sick leave. It is not in dispute that the respondent reimbursed the claimant for all sums deducted on or around 22 June 2018."

3. The tribunal heard from the claimant and her Trade Union representative John Stanford and from the following on behalf of the respondent;

Angela Palmer, Customer Service Route Manager;

Elizabeth Weatherburn, Station Manager (she was Mead at the time but her married now has now been used as on her witness statement); and

Karen Gregson, Area Station Manager.

4. The tribunal had a bundle of documents running to approximately 260 pages. From the evidence heard the tribunal finds the following facts.

Findings of Fact

5. The claimant had been under the care of Mid Beds Community Mental Health Team for a personality disorder condition since 2015, she was diagnosed with bipolar effective disorder in June 2017. There is no dispute that she has a mental impairment within the meaning of s.6 of the Equality Act 2010 in relation to that condition.

6. The claimant commenced employment with the respondent as a sales assistant/train dispatcher in July 2014. This was a safety critical role.

7. In 2015 the claimant commenced a period of sickness absence due to depression. She returned to work in April 2016 on a phased return to work plan.

8. On the 22 June 2017 the claimant commenced another period of sickness. She was initially signed off with 'anxiety disorder' for 2 weeks from the 27 June to 11 July 2017. On 27 July 2017 her GP certified her fit to return on a phased basis and suggested initially part time hours for the first two weeks.

9. On the 3 August 2017, her return to work date, the claimant went missing in Biggleswade. The tribunal heard from the claimant and Liz Weatherburn in connection with this matter. The claimant has no memory of what occurred but knows that she ended up going to A&E. Liz Weatherburn was contacted late in the day and continued to take calls throughout the evening from family and colleagues concerned as to the claimant's whereabouts until being told the claimant had attended A&E.

Welfare meeting 24 August 2017

10. The claimant's line manager Liz Weatherburn arranged a welfare meeting on the 24 August 2017 which the claimant attended.

11. The notes of this meeting record that the claimant had suffered a setback in her recovery and had not been able to resume work. She had been admitted to A&E with anxiety. The claimant informed Liz Weatherburn that she was not sleeping well, only up to 4 hours at a time, she had not been able to drive and was anxious about meeting people or having visitors to her home. She appeared to have some short-term memory loss and had been forgetting to follow her medication plan. The claimant was seeking continued support from the NHS and had been referred to the Mental Health Team. In the summary it was recorded that the claimant was to keep her manager informed of her progress and it was agreed they would

have short regular catch up chats to not overwhelm the claimant or make her feel anxious. Her next psychiatric appointment was the following Monday and they would forward the report to her GP and a treatment plan.

12. There is no reference in that welfare interview form to occupational health. The tribunal accepts the claimant's evidence supported by the evidence of Karen Gregson that a referral to occupational health was indeed discussed at that meeting. The claimant also sent an email to Liz Weatherburn on 11 September 2017 (page 68) asking if she had heard anything from occupational health about an appointment. In a medical report from Dr Bahrololoumi dated 8 September 2017 he records that the claimant had told him that she had been asked to meet with occupational health which she was going to do. Karen Gregson was also clear that under normal circumstances Liz Weatherburn would have sent the referral through to occupational health.

13. Liz Weatherburn's evidence to the tribunal was rather confusing and conflicting on this point. She acknowledged that there was to be a referral to occupational health and believed that that was done in or about mid September. She stated that the referral had to ask questions of occupational health and that they did not have sufficient details to be able to make the referral. She was concerned to avoid sending the claimant to occupational health and her being sent back without anything definitive. In answer however to a question about the claimant's above email of 11 September, asking about the referral Liz Weatherburn accepted that she did not explain to the claimant that the referral had not already been made.

14. Liz Weatherburn was then taken to the notes that she kept at the time headed 'Sickness absence contact/conversation log' in relation to the claimant (page 235). These start by noting the welfare meeting on 24 August. There is no specific note stating that the referral to occupational health had been made but then on 12 September there is an entry stating:

"Psychiatrist believes she may not cope well in returning to work.

Sick note till 12 October 2017.
OH chased for referral appointment.

HR requested to chase OH date, resent, Karen Gregson informed".

Liz Weatherburn gave evidence that this referred to having a conversation with HR as to whether the full standard referral would be needed or whether it could be submitted without anything further from the primary carer. When she refers to chasing it is that conversation with HR that she is referring to. She then stated that the entry "OH date, resent" was not resending the referral but her escalating to her line manager. The 'resent' was referring it to Karen Gregson on whether they should be going to occupational health.

15. That evidence the tribunal finds was inconsistent with that of Karen Gregson who was very clear that the referral should have been made after the meeting and she would have expected Liz Weatherburn to have done that.

16. The tribunal noted in the bundle numerous references to Ody Nwankwo of HR who appears to have been taking several decisions in this matter. She did not attend to give evidence and no one else did from HR, so the tribunal does not have any direct evidence from that department.

17. On 12 September 2017 the claimant was signed off by her GP for a further month.

18. A welfare interview was conducted by Liz Weatherburn on the 27 September 2017. The notes of that meeting (page 73A) record that the claimant continued to have fluctuating moods and had gone two days without sleeping which had left her extremely fatigued.

19. Arrangements were made for an occupational health referral and this was made for the 20 October 2017 at Kings Cross. The tribunal accepts Ms Weatherburn's evidence that she would have had some involvement at this point in the referral as she always asks for the appointment to be at King's Cross and outside peak travelling time to assist the employee. The tribunal is satisfied that is not something she would have done if she had a problem dealing with mental health as a disability as has been suggested by the claimant's counsel.

20. The date for the occupational health appointment was changed to 18 October.

Sick pay 6 October 2017

21. The claimant's entitlement to contractual sick pay was set out at clause 11 of her contract which provided:

'Your rights and responsibilities when unable to work due to sickness or injury are set out in the GTR Sickness and Absence policy. Subject to this you will be entitled to Sick pay as follows:

Period of service	*maximum period of Payment Normal benefit*	*reduced benefit*
...		
1 year but less than 5 years	*16 weeks*	*16 weeks*
5 years and over	*26 weeks*	*26 weeks*

Normal Benefit means benefit that is paid at a rate equal to the rate of an employee's normal basic salary. Reduced benefit means benefit paid at a rate equal to half the employee's normal salary'.

22. Louise Hicks, Payroll Manager wrote to the claimant advising that her contractual entitlement to receive a maximum of 16 weeks full sickness pay would expire on 11 October 2017. She would then be paid a further 16 weeks at half pay which was due to end on 31 January 2018. She was advised that if her sickness continued after that she would go onto nil pay.

23. The next sick note was dated 16 October and signed the claimant off from 12 October to 13 November 2017 with bipolar disorder.

Occupational Health assessment – 18 October 2017

24. At this appointment the claimant was declared temporarily unfit her symptoms being stated to be 'not yet stable'. Dr Chapman, Consultant Occupational Physician, indicated she was writing to the claimant's treating specialist to gain a better understanding of the claimant's condition and liaise with him regarding her return to work. She then continued: -

> "Before I make contact with the specialist I would like to arrange a meeting with you and Mrs Smith so that you can have a better understanding of how her condition affects her and we can discuss her return to work. She will need support, a quiet location, supervision and reduced/regular hours, at familiar locations that are not busy and I need to know what might be available so that she stands the best chance of success."

25. In the review section of the report, it was recorded that the claimant was not stable enough for a return to work at the present time and that the occupational health admin team were to be contacted directly to make arrangements for a review appointment with Mrs Smith and Liz Weatherburn after she has discussed her medication regime with her specialist and knows what form this will take". The appointment should be for an hour to see the claimant first followed by a meeting with Liz Weatherburn and the claimant for half an hour to discuss a return to work plan.

26. This meeting was not arranged. Liz Weatherburn again gave unconvincing evidence as to why this was the case. She believed that it was requested mid September but there was no evidence of that in the tribunal bundle. On the sickness absence contact/conversation log is an entry for the 18 October "OH requested line manager/Emily review jointly". The next note is 8 November 2017, "Emily is still awaiting an OH/NHS outcome". Ms Weatherburn's evidence to this tribunal was that these notes were her speaking to and obtaining HR advice rather than taking any steps herself.

27. Liz Weatherburn was on annual leave 9-20 November 2017 as recorded on that document. Her evidence to this tribunal was that she reported back to her line manager the need for a meeting but that they were waiting for "primary care guidance" to be able to submit that to occupational health. There was she accepted nothing in the bundle where she had requested such from the claimant. She needed to seek permission and

authority from her line manager as to what she could commit to by way of reasonable adjustments. She could not respond prior to medical information. She could not facilitate that to the occupational health doctor as she did not have any more information to enable her to do that. Her understanding was that it was not appropriate to meet until she had that information. She maintained that the intention was to get the claimant back to work.

28. Karen Gregson, Ms Weatherburn's line manager told the tribunal that the welfare meeting on the 18 October was discussed between them prior to Ms Weatherburn's annual leave in November. She was unable to assist as to why the meeting recommended by the occupational health doctor did not take place.

Sick pay/annual leave

29. On 8 November 2017 the claimant wrote to Liz Weatherburn asking if there was anyway of adding her lost annual leave days that she had previously booked to her December pay. She did not want to leave it too late to ask and was concerned she might lose out. She thought she had annual leave booked in for December and would keep that in the hope that everything would be sorted by then. She confirmed she would contact her psychiatrist as soon as possible to "check he has made contact" with OH.

30. Ody Nwankwo HR advisor picked up this email and introduced herself to the claimant. She was not entirely sure of the request and asked the claimant to clarify. By email of the same date the claimant confirmed she was waiting for her specialist to contact BUPA (OH) and for then BUPA and Liz Weatherburn and she to meet but it was taking longer than expected. As it was now affecting her pay it was adding to her stress. As she had been off work long term annual leave she had booked in from June onwards had not been taken due to her being signed off sick. She asked if it would be possible to have that leave added to her December pay as opposed to taking it as she was unaware how long the meetings would take to arrange and she was aware that she could not carry annual leave over. She would leave her annual leave booked in for late December in the hope that matters were by then resolved.

31. On 13 November 2017 the claimant forwarded to HR a fit note which stated that the claimant may be fit to work on amended duties/altered hours "as discussed in conversation so far with mental health team and occupational health". It was for 3 months to expire on 13 February 2018. This was queried by Ody Nwankwo on 13 November when she emailed the claimant stating that the GP had not given any other specifics about the altered hours and amended duties. She stated that her absence therefore from 14-15 November would be unaccounted for until occupational health had been able to advise further in terms of how the claimant was to be supported back to work. She suggested that if the claimant still had annual leave left she could request those two days as annual leave.

32. She confirmed that a conference call was to take place with occupational health to try and clarify the position on 15 November 2017.

33. There was further correspondence on that day with the claimant with regard to the concerns expressed that occupational health had recommended a quiet station but that the respondent would not be able to provide the necessary supervision at such a station. It was again stated that if the claimant did not attend work the following day, the 14th that date would be treated as an absence and the type of absence would be for the claimant to elect.

34. Regarding sick pay and annual leave, Ody Nwankwo explained that where annual leave has been pre-booked and the individual has taken ill, annual leave is reimbursed back to the employee hence the reason why a holiday payment was not paid. That was because she stated the fit note the claimant had at the time covered those dates. It was possible for an employee to make a request to have a block of annual leave placed from the following date their fit note expired to run for however long they require it for and upon its end the employee can submit a follow up fit note if their GP still deemed them unfit for work. She was not sure however whether the claimant had made that request. The annual leave the claimant stated she had booked for July and August would have been reimbursed but the November block would remain as is unless the claimant informed rosters that she no longer required it.

35. In a further email on 15 November when the appointment with occupational health for 22 November was confirmed, Ody Nwankwo stated again to the claimant that the GP advice the claimant had relayed verbally was for her not to return until the initial occupational health recommendations were met. This potentially meant she would remain on sick leave and if so a fit note must be submitted for the period concerned.

Occupational Health review – 22 November 2017

36. From the evidence of Karen Gregson, it is known that she had a telephone conversation with Dr Chapman, prior to Dr Chapman meeting with the claimant on the 22 November 2017. She was concerned that the GP had stated on the fit note that the claimant may be fit to work on altered duties and altered hours. She wanted to clarify the advice that Dr Chapman had given about the claimant working in a quiet station but with supervision and support. She was concerned about the feasibility of those restrictions as at quiet locations there tends to be little or no supervision and also such a station would not be familiar to the claimant. On the other hand, familiar stations where the claimant would have supervision were the busier stations. As Miss Weatherburn was on annual leave Karen Gregson arranged the conference call with Dr Chapman. This led to the further review with the claimant for the 22 November.

37. Dr Chapman reported that the claimant had had another episode of depression since the last review and was due to see her specialist the following week. She understood the specialist was considering a medication change to try and stop her condition from cycling and therefore achieve some stability. Dr Chapman would write to the specialist to gain a better understanding of her condition and liaise with him regarding a return to work. After she received the report she would liaise with Miss Weatherburn regarding a return to work plan. She stated that the claimant's condition was 'not stable enough for a return to work at the present time'.

38. Dr Chapman wrote to Dr Bahrololoumi, Psychiatrist, that same day setting out what she required in a report from him and providing the claimant's consent form.

39. The claimant obtained a further medical certificate from her GP dated 28 November 2017 stating this time that she was not fit to work for the period 13 November 2017 to 13 February 2018.

40. The claimant forwarded this to Ody Nwankwo on 17 November 2017.

Welfare interview – 1 December 2017

41. This was a meeting between the claimant and Ms Weatherburn. It is recorded that the claimant was rested following a period of leave and spending it with her family. Intermittent medication/memory issues continued which she was addressing with NHS support. She had seen occupational health and they were in contact with the claimant's mental health care team.

42. There are a number of emails passing between the claimant and HR in the early part of December. Ody Nwankwo refers to the claimant suggesting she was able to return to work earlier than the medical advices and she was asked whether this was something she had discussed with her GP and psychiatrist as they currently had a fit note for 3 months that the claimant could <u>not</u> return until February. The claimant confirmed it was not something she had discussed with anyone yet as she was not seeing her psychiatrist for another 3 weeks. Ody Nwankwo stated that as the GP had put the claimant back on sick leave, they were awaiting further information from the occupational health and the psychiatrist. Occupational Health had reported that the consultant had not responded yet. Ody Nwankwo's advice to the claimant was to continue with her prompting to see if they could get the psychiatrist input sooner. A meeting had been set up for 7 December for the claimant to meet Liz Weatherburn and HR.

43. On 4 December Ody Nwankwo wrote to Dr Chapman in which she stated that she understood that Dr Chapman was awaiting correspondence from the psychiatrist. She reported that the claimant had tried to make contact with him but without success. If there was anything that they could do then Dr Chapman should advise.

Welfare visit – 7 December 2017

44. Liz Weatherburn and Ody Nwankwo visited the claimant at her home on the above date. The claimant's husband was present throughout, the claimant advising that due to her memory loss and also to provide her with moral support, this would be helpful. The claimant explained that she had good days and bad days due to her bipolar. She was due to be reassessed by occupational health but that was not to take place until her psychiatrist had made contact with Dr Chapman. The claimant advised that she sometimes forgot to take medication due to memory loss and was asked whether that was sometimes the case while she was at work and perhaps whilst performing sales and she said it was not severe to that extent. The claimant hoped to see her psychiatrist in 3 weeks although that was not guaranteed. She was asked to remind him at that appointment to make contact with occupational health or to issue her with a report answering occupational health's queries.

45. There were discussions about occupational health recommendations and Liz Weatherburn wanted the claimant to understand that they were struggling in terms of how they could incorporate placing her at a quiet station. The claimant stated she would prefer to work peak shifts which were mainly early morning shifts as this would enable her to keep her concentration. This was a complete opposite of what occupational health were recommending and this was discussed with the claimant. There was discussion about this and the claimant's husband suggested that they felt "shutdown" whilst at the occupational health meeting and it seemed to them that the Doctor has used typical remedies for those suffering from bipolar and applied it to the claimant instead of hearing from her directly.

46. Given that the claimant's position is customer facing she was asked how she found that, and her response was that "she may have bad incidents with customers but another customer may turn that around by being pleasant to her". The claimant was anxious to return and was ready to do so although her GP re-issued her with a fit note until 13 February 2018. She was asked how realistic she thought an early return prior to this date would be. She said she had hoped on it and mentioned more than once she was concerned with regard to her sick pay reducing to half pay. Although it could be understood that she had financial responsibilities she was advised not to rush her return.

47. Finally, they discussed with the claimant what the options would be if they were unable to implement the recommendations by occupational health and in particular placement at a quiet station and if her psychiatrist was against her return to a station that was not quiet. The claimant was asked where else she felt she could be placed and her preference was Stevenage. Liz Weatherburn said she would contact Dr Chapman to ask if the re-assessment by OH could continue if her psychiatrist failed to make the contact before the new year. The notes record this had since been done by email to Dr Chapman.

48. Ody Nwankwo wrote to Dr Chapman on 7 December 2017 stating that following the home visit she understood Dr Chapman was awaiting a call from the psychiatrist prior to re-assessing the claimant. The claimant had been advised to prompt the psychiatrist about the awaited call and she had reported he remained unresponsive. Ody Nwankwo asked Dr Chapman whether it would be possible to carry out a re-assessment with the information that Dr Chapman had to hand so that they could have a clearer sight of what they are able to accommodate for the claimant to return or consider other options. The tribunal did not see a response to that email.

Welfare interview – 2 January 2018

49. The claimant reported that Christmas had been stressful at times but she confirmed in evidence that she meant normal stresses and nothing out of the ordinary. She was looking forward to returning to work and the next psychiatrist appointment was due at the end of January/early February.

50. In an email of 4 January 2018 to Liz Weatherburn and Karen Gregson, Ody Nwankwo stated she had been in contact with occupational health and they seemed "a little confused" as to what had transpired. They would look into the claimant's file and get back to her. They replied on 4 January by email, they could not see any further update from Dr Chapman with regard to the outcome of the specialist report. She could see that the specialist had called and tried to speak to Julia Chapman but they kept missing each other. Dr Chapman had a clinic next on 8 January and a slot had been put in her diary for her to deal with this matter.

51. Dr Chapman did reply on 8 January 2018 stating she had tried to contact the specialist unsuccessfully, had spoken to his secretary that day, but unfortunately, he was unable to speak to her. He had not received a copy of her earlier letter and it was sent again. She would contact them after she had received his report.

Welfare meeting – 17 January 2018

52. This meeting was conducted by Liz Weatherburn and Ody Nwankwo, and the claimant had her trade union representative John Stanford with her. The position remained that Dr Chapman needed a comprehensive report from the psychiatrist and was unable to progress matters without that. The claimant stated he was often very hard to get hold of. She had had six sessions which is the 'norm' for sessions assigned on the NHS. Any additional sessions would only be considered if she is deemed to be at a critical stage.

53. Regarding her memory loss, this was more or less the same which the claimant deemed to be a mild short-term memory loss. She had missed some medication due to this.

54. There was discussion about the way forward whilst the report from the psychiatrist was pending. The trade union representative suggested that Stevenage station would be a better fit for the claimant than Hitchin. Currently the claimant spent more of her rostered hours at Hitchin station than at Stevenage. The claimant further added her current working pattern still worked for her which she also wanted to highlight to Dr Chapman. The claimant felt she may be able to carry out some aspects of her role. Miss Weatherburn expressed concern having known of the claimant's history that this may not work well. Mr Stanford suggested they could possibly carry out a trial. Liz Weatherburn put forward that they relay a proposal back to Dr Chapman that whilst the claimant's report was pending whether she could engage in any type of work within a safe mode if OH deemed it so. If Dr Chapman was satisfied with this then the claimant could engage within a temporary role whilst waiting for the report. John Stanford stated he felt the claimant would be better keeping busy at work and so a quiet station would not help this. The claimant agreed with this view.

55. The proposal was put to Dr Chapman following the meeting by email.

56. The meeting concluded by noting that the fit note expired on 13 February 2018 and the anticipation was that the claimant's report would be received so that she could be re-assessed with a view to her returning or that Dr Chapman may feel that the proposal was feasible while she awaited the pending report. No changes were expected with regard to the claimant's current situation. The claimant was advised that the last option that may be explored once the pending process comes to an end and if she were deemed unable to return would be ill health retirement. The claimant confirmed as she did in evidence that Mr Stanford had highlighted that possibility to her prior to that meeting.

57. On 17 January 2018 Ody Nwankwo wrote to Dr Chapman stating she understood that Dr Chapman was yet to receive the documentation from the psychiatrist. The claimant had expressed that she felt able to return to work and she asked Dr Chapman to consider any possible options that could facilitate that to a degree that Dr Chapman was happy with temporarily whilst the documentation was awaited from the psychiatrist.

58. A colleague of Dr Chapman's replied that the report from the specialist had not been received and for that reason they could not advise on the fitness for work or change her fitness status without seeing the claimant again.

59. Ody Nwankwo replied on 19 January 2018 that the claimant's fit note was due to expire on 13 February 2018 and the next course of action may be to consider possible ill health retirement. They could not continue to await a report that had been pending for at least 3 months and she was not confident that it would arrive soon. She did however make it clear in that letter that if the report arrived then the 'suspended process' with OH will undoubtedly resume'. She said she would give it until the 13 February 2018 and be in touch again nearer that date.

Dr Bahrololoumi's report – 22 January 2018

60. The claimant forwarded this to Liz Weatherburn, Ody Nwankwo and her trade union representative at 20:00 hours stating it had been collected that afternoon.

61. The report confirmed that they had been able to stabilise the claimant's mental state during her time off work. She was now compliant with her medication and continuing with it had stabilised her mood to a large extent. He believed her now to be of a stable state of mind, but she needed to continue with the medication she was on for the foreseeable future. Having known the claimant for over a year now it was his belief that if she continued with her medication and did not stop taking it she was likely to remain stable in her mood and her anxiety would be controlled. Whilst acknowledging occupational health's view that the claimant could work in a quieter environment and that he agreed to that to a large extent, it was his experience that if patients remained compliant with their medication and did not default in taking it they are likely to remain reasonably well. However, the nature of the illness is such that if the claimant was likely to have episodes of slight discrepancy in her mood but that could be taken care of when it happens. He would discuss the issues with Dr Chapman when he could get hold of her and relay his views to her.

62. Ody Nwankwo forwarded the report to Dr Chapman the following morning @ 09.33.

Invite to ill health meeting

63. On 23 January 2018 Ody Nwankwo sent the claimant a letter inviting her to a meeting on 30 January 2018 to explore the option to propose an ill health settlement to her. The letter included an offer of a goodwill payment of £3572. The claimant's evidence was that this was received on 25 January 2018. The letter set out the contradictions between OH advice of placing the claimant at a quiet station and the claimant's wish to return to a busy station. The outcome of the meeting it was stated 'may' result in her employment being terminated due to her continued ill health and not being able to fulfil her position since June 2017. It set out the detail of the conflicting reports but does not make reference to Dr Bahrololoumi's report. Whilst it is clear from the above email that Ody Nwankwo had the specialists report by 09.30 on the 23 January the letter reads as if it was written following the meeting on the 17 January and as if that report had not been seen. As the tribunal did not hear from Ody Nwankwo it cannot be clear on whether or not she had seen the psychiatrist report when this letter was sent.

Ill health proposal meeting – 30 January 2018

64. This meeting took place with Liz Weatherburn and Ody Nwankwo, John Stanford was there with the claimant. It was clearly to discuss the

option of ill health retirement. John Stanford confirmed that he had advised the claimant against accepting the monetary entitlement disclosed with the invite letter. He followed this up by stating the claimant had secured a one-hour session with her psychiatrist for the next day, 31 January 2018.

65. After the meeting Ody Nwankwo contacted occupational health and booked a slot at 3pm the following day and asked that a call also be placed to the psychiatrist.

66. The claimant had an appointment with psychiatrist on 31 January 2018. A meeting was arranged with Dr Chapman for the 5 February 2018 but the claimant advised by email of the 2 February that she was unable to attend as she was in the process of seeking legal advice. She did attend a further welfare meeting on 9 February 2018.

67. On 7 March 2018 a meeting did take place between the claimant and Dr Chapman as a result of which Dr Chapman confirmed that the claimant was fit to resume work with various recommendations. The claimant commenced a phased return to work on 12 March 2018. She began working four hours a day for several months. She worked at two of her usual stations, Hitchen and Stevenage.

Sick pay

68. Sick pay was covered in the claimant's at clause 11 as set out above.

69. It was clarified at this hearing that the claimant is not challenging the sick pay policy as such. She argues however that the clause placed her at a substantial disadvantage since due to her disability she was likely to have increased sickness absence and therefore more likely to be on reduced or nil pay than a non-disabled person. As such she states that reasonable adjustments should have been made to pay her full pay.

70. The claimant's sick leave commenced on 22 June 2017 and her full sick pay entitlement expired on 11 October 2017. This was confirmed to her in a letter from the payroll manager dated 6 October 2017. The claimant was informed that her 16 weeks at half pay would be due to end on 31 January 2018 and if her sickness continued after that she would go onto nil pay.

71. The claimant raised the issue of sick pay as part of her grievance on 26 April 2018. All that the tribunal has seen in response to that is an email from Emma Devine who dealt with it to the claimant's trade union representative of 17 May 2018 in which she stated that without any admission of liability the situation could have been resolved quicker and that the delay resulted in a detriment to the claimant. They apologised for that and as a gesture of goodwill offered to pay the claimant the full amount of sick pay that the claimant had deducted (with no reduction to

half pay). A payment of £4,188.64 was seen on a payslip dated 16 June 2018.

Relevant Law

72. The claimant brings claims of disability discrimination under the following sections of the Equality Act 2010.

73. Direct discrimination - Section 13(1): -

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

74. Section 15 - discrimination arising from disability: -

> "(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."

75. Section 20(3) - duty to make reasonable adjustments, provides as follows:-

> "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."

76. Section 23 deals with the appropriate comparison and sub sections 1 and 2 provide: -

> "(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
>
> (2) The circumstances relating to a case include a person's abilities if—
>
> (a) on a comparison for the purposes of section 13, the protected characteristic is disability;
>
> (b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability."

77. Section 136 deals with the burden of proof and provides as follows:-

> "(1) This section applies to any proceedings relating to a contravention of this Act.

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

78. The Code of Practice on Employment (2011) makes it clear that to decide whether an employer has treated a worker "less favourably" a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. The less favourable treatment must be "because of" a protected characteristic which has the same meaning as the phrase "on grounds of" in previous equality legislation. In some cases, as the Code makes clear the basis of the treatment will be obvious and in others less so. The tribunal will then need to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic. This was also made clear in Shamoon v Chief Constable of the RUC [2003] IRLR 285 when it was stated that tribunals may be able to "avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was".

79. The Code specifically addresses comparators in disability cases at section 3.29. It is the same as for other types of direct discrimination. However, the Code makes clear that the relevant circumstances of the comparator and the disabled person including their abilities must not be materially different. An appropriate comparator will be a person who does not have the disabled persons impairment but who has the same abilities or skills as the disabled person. It is important the Code emphasises to focus on those circumstances which are in fact relevant to the less favourable treatment.

80. The claimant also brings a complaint under s.15 of discrimination arising from disability, and the Code makes clear at section 5.3 that by contrast to direct discrimination the question in this case is whether the disabled person has been treated unfavourably because of something arising in consequence of their disability. There must be a connection between whatever led to the unfavourable treatment and the disability. The consequences of a disability include anything which is the result, effect or outcome of a disabled persons disability. The consequences will be varied and will depend on the individual effect upon a disabled person of their disability (Section 5.9).

81. Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a "proportionate means of achieving a legitimate aim". It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations.

82. With regard to reasonable adjustments, the Code reminds that the phrase "provision, criterion or practice" is not defined by the Act but should be

construed widely so as to include for example any formal or informal policies, rules, practices, arrangements or qualifications including one of decisions and actions (clause 6.10). The provision must cause substantial disadvantage to the disabled person which as the Act provides is something that is more than minor or trivial. The purpose of the comparison with people who are not disabled is to establish whether it is because of the disability that a particular provision disadvantages the disabled person in question.

83. The Code emphasises at 6.23 that the duty is to take such steps as it is reasonable to have to take in all the circumstances of the case in order to make adjustments. There is no onus on the disabled worker to suggest what adjustments should be made. However, where the disabled person does so the employer should consider whether such adjustments would help overcome the substantial disadvantage and whether they are reasonable.

84. Clause 6.28 sets out some of the factors which might be taken into account when deciding what is a reasonable step for the employer to have to take: -

- "Whether taking any particular steps would be effective in preventing the substantial disadvantage;
- The practicability of the step;
- The financial and other costs of making the adjustment and the extent of any disruption caused;
- The extent of the employers financial or other resources;
- The availability to the employer of financial or other assistance to help make an adjustment (such as advice through access to work); and
- The type and size of the employer.
- Ultimately the test of the reasonableness will be an objective one and will depend on all of the circumstances of the case."

85. In dealing with sick pay the Code of Practice states:

> 17.21 Workers who are absent because of disability-related sickness must be paid no less than the contractual sick pay which is due for the period in question. Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a worker is absent due to disability-related sickness, an employer should consider whether it would be

> reasonable for them to do so.
>
> 17.22 However, if the reason for absence is due to an employer's delay in implementing a reasonable adjustment that would enable the worker to return to the workplace, maintaining full pay would be a further reasonable adjustment for the employer to make.

86. The claim in relation to sick pay is one of discrimination arising from disability contrary to section 15 of the Equality Act 2010. It must therefore be established that the claimant was treated 'unfavourably' by the application of the sick pay policy to her and that such was 'because of something arising in consequence of her disability'. Although decided under the Disability Discrimination Act 1995 the court in Meikle v Northamptonshire County Council 2004 IRLR 703 found that:

> The proper approach was to ask whether NCC had shown that, if all the reasonable adjustments required by s.6 to her working conditions had been made, [the claimant] would have been absent for over 100 days and thereby liable to the reduction in sickness payment.
>
> …
> [the medical] evidence pointed towards her lengthy absence being the consequence of the prolonged failure of NCC to take appropriate steps to cope with her disability. There is, on the evidence, no reason to believe that she would have been absent from work, certainly for more than 100 days, if the requisite adjustments had been made.

Submissions

87. Both representatives relied on written submissions and elaborated on these orally at the hearing.

Conclusions

Direct discrimination

Failing to arrange a timely OH appointment following the meeting on 24 August 2017

88. The tribunal is bound to find that there was a failure to arrange on OH appointment following that meeting. It was clearly discussed, and Liz

Weatherburn did not arrange it. Her evidence in this respect was not convincing.

89. The claim is one of direct disability discrimination, that the respondent did not arrange this 'because of' the disability. As the Code makes clear the comparator will be a person who does not have the disabled person's impairment but who has the same abilities and skills as the disabled person. It was agreed at the Preliminary hearing that the appropriate comparator is on the facts of this case an employee unable to work due to a physical disability or illness.

90. It is submitted on behalf of the claimant that Liz Weatherburn's reference to the need for further medical information suggests that it was the claimant's mental health condition that cause her reluctance to refer her. The tribunal has not heard any evidence from which it could draw that inference or from which it can conclude that this delay was 'because of' the claimant's mental health condition. That claim fails and is dismissed.

Failing to arrange a meeting with the claimant, OH and Liz Mead as recommended in the OH report of 18 October 2017

91. It must be established that this occurred 'because of' the claimant's disability for there to be direct discrimination. It is submitted on behalf of the claimant that Liz Weatherburn appeared to be nervous about arranging the meeting without more medical evidence and that it can be inferred that was due to the claimant's disability being a mental health one.

92. The tribunal does not accept that inference can be drawn from the evidence heard. There were difficulties in obtaining information from the claimant's treating specialist which was needed. There has been no evidence from which the tribunal can draw the inference that the delay was 'because of' the claimant's disability

Adopting a passive and inflexible approach to OH consultation with the claimant's treating psychiatrist. In particular, did the respondent:

1. fail to make reasonable efforts to establish contact between Dr Bahrololoumi and OH.

2. refuse to contemplate the claimant returning to work without a formal report from Dr Bahrololoumi.

93. The tribunal has not found that there was a 'passive and inflexible approach'. The Occupational Health consultant required a report from the claimant's treating consultant. There were difficulties in obtaining this. The OH doctor tried to speak to him, and they kept missing each other. That was not the fault of the respondent.

94. Having sought OH advice and being told that she required the specialists input the respondent would have been remiss in contemplating the claimant's return to work without this. The claimant's GP had not provided details of adjustments that could be made. The respondent owed a duty of care to the claimant and others. It did not treat her less favourably because of her disability. It would have needed to wait in any case where specialist medical advice had been sought.

Failing to allow the claimant to return to work before 12 March 2018.

95. When the issues were clarified at the outset of this hearing this allegation as put as a failure to make reasonable adjustments claim was said to be not allowing the claimant to return after the 17 January and/or 23 January. In submissions counsel for the claimant referred to Ody Nwankwo's email to OH of the 17 January 2018 in which she asked if pending the psychiatrist report the claimant could at least carry out some of her role. The reply of the 19 January 2018 from OH was that they could not agree to that until Dr Chapman had answers to specific questions raised of the psychiatrist. She could only suggest that the claimant be re-referred to Dr Chapman as it had been some time since she'd seen her. Counsel stated that Ody Nwankwo 'inexplicably' decided not to action that. That is not quite the case as she replied on the same day saying they still had a sick note that did not expire until 13 February and she would contact OH again nearer that date.

96. Counsel then acknowledged in submissions that this particularly allegation was more about a failure to make reasonable adjustments. She acknowledged that the tribunal might find that to allow the claimant to return before receipt of the psychiatrist's report was 'more favourable treatment' and in that case she would pursue her argument of a failure to make reasonable adjustments. She conceded that the same allegation could not be both direct discrimination and a failure to make reasonable adjustments.

97. Once the advice was received from the specialist on the 22 January 2018 the claimant attended another session with her psychiatrist on the 31 January. She had a further welfare meeting on the 9 February and an occupational health appointment on the 7 March when Dr Chapman confirmed that the claimant was fit to resume work with various recommendations. There was no less favourable treatment of the claimant because of her disability compared to the claimant's hypothetical comparator of an employee unable to work due to a physical disability or illness. The OH doctor had to meet the claimant and agree with the return to work. When this was done the claimant did return. There was no direct discrimination.

Proposing on 23 January 2018 to dismiss the claimant on grounds of capability.

98. The respondent did not 'propose to dismiss' the claimant. The respondent sent a proposal for an ill health settlement. The earlier email to the claimant of the 19 January 2018 had made it clear that OH were not prepared to authorise the claimant's return to work without the psychiatrist's advice but that if it arrived the ill health retirement process would be 'suspended' whilst they continued to liaise with OH. The claimant had been signed off sick until the 13 February 2018 and having had no clear advice it was not unreasonable for the employer to consider ill health retirement. It was an offer. The trade union representative negotiated with the respondent. The matter was not however taken any further. The claimant was not treated less favourably than her hypothetical comparator where the possibility of ill health retirement could still reasonably have been considered in the same circumstances.

99. It follows from those conclusions that there was no direct disability discrimination.

Discrimination arising from disability: s.15 EqA

100. Did the respondent treat the claimant unfavourably because of something arising in consequence of her disability, namely her absence from work, by:

100.1 Reducing her basic pay to half pay on or around 12 October 2017.
100.2 Stopping her basic pay on or around 1 February 2017.
100.3 Requiring her to take two weeks of her annual leave entitlement in December 2017.
100.4 Proposing on 23 January 2018 to dismiss the claimant on grounds of capability.

101. It was acknowledged by counsel for the claimant in submissions that the sick pay claim and issue about annual leave are dependent on the claim of a failure to make reasonable adjustments. The claimant does not challenge the sick pay policy itself. The only basis for the claim, it was accepted was as set out in Meikle if delay is established in the claimant returning to work due to a failure by the respondent to make reasonable adjustments.

102. Counsel for the respondent submitted that the claim as failed should also fail as the claimant was not in receipt of 'basic pay' during her sick leave. She was in receipt of 'sick pay' pursuant to clause 11 of her contract. The tribunal notes that point but believes that it is only the use of language. It is quite clear that what the claimant was claiming was that her sick pay should not have been reduced to half and then stopped at all.

103. In considering the claim that the claimant's contractual entitlement was not extended the tribunal has to accept the submissions of the respondent that that must fail. The claimant is not entitled to more advantageous treatment.

104. In the event that the tribunal were wrong it would have found the actions of the respondents justified. It accepts the argument that the respondent had a legitimate aim in ensuring its employees are fit and able to undertake their duties. As stated in O'Hanlon paying sick pay for too long may be a positive disincentive to return to work.

105. With regard to annual leave, the claimant requested to take annual leave during her sickness period so that she would receive full pay. This was something the claimant herself suggested. It cannot amount to unfavourable treatment.

106. The tribunal's conclusions with regard to ill health 'dismissal' are repeated. This was a proposal for ill health retirement. No agreement was reached and it went no further. It was not unfavourable treatment. If it had been found to be it was justified in view of the length of absence and lack of clear advice on how and when the claimant could return

Failure to make reasonable adjustments: s.20 & s.21 EqA

107. Did the respondent have a provision, criterion or practice ("PCP") that the claimant undertake her duties according to her contract of employment?

The only reference to this PCP in the claimant's submissions was at paragraph 39 of the written submissions in which it was argued that requiring the claimant to perform her contractual duties put her at a substantial disadvantage since she was unable to perform them and was therefore at risk of dismissal.

108. The respondent argued in submissions that it did not apply such a PCP as the claimant was allowed to be off sick and away from the workplace. This is not a sickness dismissal case in which such a PCP would be relevant.

109. Whilst appreciating the respondent's argument the tribunal does accept that the respondent had a provision, criteria or practice of requiring its employee to undertake their duties in accordance with the contract and such would and did place the claimant as someone with a disability at a substantial disadvantage as she was likely to require more time away from the workplace.

110. However, the respondent took such steps as were reasonable. It could not allow the claimant to return to work without medical evidence in support of a return to work plan. It tried to obtain that. Once it was obtained and OH considered it arrangements were made and the claimant

did return to work. The respondent would have been in breach of its duty of care to the claimant and others to have allowed her to return sooner. On the 3 August 2017 when the claimant returned from an earlier and much shorter period of absence she went missing and ended up in A&E. The respondent acted reasonably in following OH advice that a report was required from the claimant's treating psychiatrist.

111. The respondent, as already concluded, did not propose to dismiss the claimant but considered with her and her trade union representative ill health retirement.

Did clause 11 of the claimant's contract of employment (capping sick pay at 16 weeks' full pay and 16 weeks' half pay) place the claimant at a substantial disadvantage in comparison with persons who are not disabled?

112. The tribunal accepts the respondent's submissions that this was a generous sick pay scheme. It did not place the claimant at a substantial disadvantage. It was advantageous to those with disabilities who are more likely to be off for longer periods.

113. If that conclusion were wrong and the PCP applied and placed the claimant at a substantial disadvantage the respondent did take reasonable steps. There is no criticism of the sick pay scheme in itself. It is being argued that the respondent unreasonably delayed the claimant's return to work. That is not accepted. It would have been unreasonable to allow her to return without the supporting medical evidence. Once that had been obtained a return to work was arranged.

114. It follows from those conclusions that there was no disability discrimination and all claims fail and are dismissed.

_____
Employment Judge Laidler
13 November 2019
Date: …….
19 November 2019
Sent to the parties on: .....

.....
For the Tribunal Office