EMPLOYMENT TRIBUNALS

Claimant: Ms J Kelly

Respondent: Durham County Council

HELD AT: North Shields **ON:** 23-26 September 2019

BEFORE: Employment Judge Aspden
Mr J Adams
Mr R Dobson

REPRESENTATION:

Claimant: In person
Respondent: Mr A Tinnion, counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. the claimant was employed by the respondent from June 1986 until she was dismissed by notice given on 18 April 2018.

2. The claimant brings the following claims:

   2.1. a complaint of unfair dismissal; and

   2.2. a complaint that her dismissal constituted disability discrimination contrary to section 39 of the Equality Act 2010.

3. In relation to the complaint of disability discrimination, the claimant contends that her dismissal was an act of discrimination within section 15 of the Equality Act 2010. She claims she was dismissed because of her absence from work, which absence, she says, arose in consequence of her disability.

4. A preliminary hearing took place on 21 February 2019 to determine whether the claimant met the definition of a disabled person in section 6 of the Equality Act 2010 at the material times. In a reserved judgement, Employment Judge Shore decided as follows: 'the claimant meets the definition of disability contained in section 6 of the Equality Act 2010 in that she had a mental impairment which has a substantial long-term adverse effect on her ability to carry out normal day-to-day activities at the relevant time, which is 14 April 2018.'

5. At the outset of this case, Mr Tinnion confirmed that:

   5.1. the respondent concedes that the claimant was a disabled person not only on 14 April 2018 but also throughout the period of her absence from work which began in November 2016, except perhaps for a short period before the first occupational health report was obtained;

   5.2. the respondent concedes that, at the time it dismissed the claimant, it knew, or could reasonably have been expected to know, that the claimant had the disability;

   5.3. the respondent accepts that the claimant was dismissed because of her absence but does not accept that the claimant's absence arose in consequence of her disability and contends that her absence arose due to dissatisfaction with workplace arrangements; and

   5.4. even if the claimant's absence arose in consequence of her disability, her dismissal was justified as a proportionate means of achieving the following legitimate aims:

      5.4.1. ensuring the respondent had a workforce fit to attend work and perform the duties of their post;

      5.4.2. relieving the pressure on work colleagues caused by the claimant's absence; and

      5.4.3. ensuring the respondent's financial and managerial resources were used efficiently and allocated appropriately.

6. The issues for this Tribunal to determine were as follows:

   6.1. In relation to the complaint of disability discrimination:

      6.1.1. Did the claimant's absence from work arise in consequence of her disability?

      6.1.2. If so, has the respondent shown that dismissing the claimant was a means of achieving one or more of the aims identified above?

6.1.3. If so, has the respondent shown that dismissing the claimant was a proportionate means of achieving that aim?

6.2. In relation to the unfair dismissal complaint:

6.2.1. What was the reason for dismissal?

6.2.2. Was that a reason relating to the capability of the claimant for performing work of a kind which she was employed by the respondent to do or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held?

6.2.3. If so, in all the circumstances, did the respondent act reasonably or unreasonably in treating that is a sufficient reason for dismissing the employee?

Evidence and facts

7. We heard evidence from the claimant and, for the respondent, from Mrs Davison, the claimant's line manager, Mr Emberson, who took the decision to dismiss the claimant, and Mr Wood, who was the chair of the panel that dealt with the claimant's appeal against dismissal.

8. We were also referred to a number of documents in a bundle prepared for this hearing by the respondent.

9. We make the following primary findings of fact.

10. The claimant started work for the respondent in June 1986. In March 2010 she started a role as a Social Worker qualified for Approved Mental Health Professional status in the Affective Disorder Team South.

11. In November 2014 the claimant was told that certain allegations had been made against her. Several months later, in June 2015, the claimant was sent a letter clarifying that there were six allegations against her and then in August that year an investigation report was completed. That report concluded that three of the allegations against the claimant should be dismissed and that there was sufficient evidence to consider the other allegations in an informal disciplinary process. Subsequently, in January 2016, 14 months on from when the allegations were originally made, the claimant was issued with what was described as a 'letter of management advice' in relation to those three remaining allegations. In that letter the claimant was told that this did not constitute formal disciplinary action but that the letter of management advice would be placed on her record and she was warned that further incidents might result in formal disciplinary action being taken.

12. On 14 September 2016 one of the respondent's senior managers, Ms Joisce, emailed the claimant, saying 'Julie can you advise as to what work is in your diary over the next week. I may need to check out a couple of complaints we have received regarding your involvement with service users and some providers and will need to get your perspective on some of these.' The claimant replied the following day with details of what she had in her diary and said 'it appears to me

that you are questioning my practice yet again, can you please inform me if I can carry on with the appointments I have next week.'

13. Two days after receiving that email from Ms Joisce the claimant began a period of absence from work giving the reason as work-related stress. Thereafter the claimant was absent from work until her dismissal in 2018, except for one day early on in this period when the claimant returned to work.

14. The fact that Ms Joisce had contacted the claimant saying complaints had been made against her was the trigger for the claimant's absence. By way of background, at this time the claimant was already feeling anxious at work. Her concerns dated back to the complaints that had ultimately led to the claimant being given management advice. The claimant was unhappy about having been given the letter of advice - she did not feel she had done anything to warrant it. She also felt she was being excluded from certain things at work. Ms Joisce raising further concerns made the claimant even more anxious. Her anxiety was compounded by the fact that this was being raised by a strategic manager rather than her own manager. In her evidence the claimant explained to us that she had a history of mental health problems which, in her words, could lead to her becoming, in her words, 'a little paranoid.'

15. Based on the evidence we heard, we infer that the claimant was given a fit note by her GP giving the reason for her absence as work-related stress. We infer that the claimant's GP accepted that the claimant was not well enough to work based on what the GP was told by the claimant herself.

16. On 1 November 2016 the claimant attended what was described as an attendance management meeting with Mrs Davison. This meeting was a 'first stage interview' under the respondent's attendance management policy. The claimant told Mrs Davison that she felt down and was experiencing work-related stress and that her GP had offered counselling which the claimant, at that point, had declined. the claimant's line manager offered the claimant counselling through occupational health but the claimant said she did not want it at the moment. During the meeting the claimant explained that she had been feeling isolated in her role and that she was concerned that her practice was being questioned. There was a discussion about whether the claimant was well enough to discuss the concerns that Ms Joisce had about her practice. The claimant said she was keen to get things over and done with. However, Mrs Davison said they would need to get occupational health advice first. The claimant and her line manager agreed that the claimant would be referred for an occupational health report on how to support the claimant back to work and also advice on her emotional well-being and fitness to address competency issues.

17. Two days later the claimant sent an email to Ms Joisce in which she described the absence review meeting as 'upsetting and very unhelpful.' She also said 'the organisation keeps telling me (explicitly and implicitly) it has 'concerns' or 'complaints' about my work-but it has yet to follow any of these allegations up with information. I expected this information at yesterday's meeting, but none was given. Yet again, I am left hanging and it is torturous.' She asked for the occupational health appointment to be arranged as soon as possible and she

also asked for the details of the concerns or complaints about her work to be shared with her in advance of any further meetings.

18. Ms Joisce replied by email, saying 'we have not been able to discuss 'concerns' or 'complaints' about your practice, despite managers wanting to do so, due to you going off sick and your fit note stated that you were not available for meetings. We need occupational health to report on your emotional well-being before we can address this with you. We will not address any issues within the absence management process. This therefore currently means that managers will investigate informally or formally any concerns or issues without your input. Obviously for a more rounded approach your input, when appropriate, would be much appreciated. A referral has been made to occupational health following your absence management interview and a subsequent meeting will be arranged on receipt of the report'. We infer from that email that the claimant's GP had in fact said in a fit note that the claimant was not available for meetings.

19. Later that month, the claimant met with a medical practitioner, Ms Davies, for an occupational health assessment. Ms Davies prepared a report dated 24 November 2016. Addressing the likely duration of absence, Ms Davies said 'until a resolution to the work-related circumstances which has resulted in this episode of ill health has been attained and agreed by all parties, I am not in a position to accurately predict when Ms Kelly will be fit to return to the workplace. In general it is helpful if such circumstances are resolved within a reasonable timescale, therefore I would encourage the matter to be concluded as soon as possible.' Addressing workplace adjustments and restrictions to aid return to work Ms Davies said 'this may not be a clinical problem in origin and therefore more could be achieved by management (rather than clinical) intervention in this case. I would suggest that what may facilitate a return to work would be some formal management discussion of the incidents that Ms Kelly cites is causing her current ill-health and subsequent absence from work.' Addressing the claimant's functional capacity, Ms Davies said 'Ms Kelly is experiencing symptoms of stress which she perceives are work-related; these symptoms are manifesting as disturbed unrefreshing sleep, which results in fatigue; her levels of concentration are likely to be affected and fluctuate throughout the course of the day; she is also lacking in confidence and has low self-esteem. All of which are likely to have an effect upon her ability to perform to her usual standard.' Ms Davies also expressed the opinion that the claimant was fit to attend meetings with management to address the underlying concerns.

20. We infer from this report of 24 November 2016 that Ms Davies considered that the claimant was absent from work due to ill-health given that she specifically refers to ill-health in her report and referred to the symptoms that the claimant was experiencing. We do not accept Mr Tinnion's submission that the reference to the possibility that 'this may not be a clinical problem in origin' meant that Ms Davies did not believe that the claimant was ill. Ms Davies was clearly commenting on the causes or triggers for the claimant's period of ill-health and the potential solutions.

21. On 5 December 2016 the claimant emailed Mrs Davison and Ms Joisce saying 'I have now been to occupational health who have said I am okay to proceed with the issues you want to raise with me.'

22. On 23 or 24 February 2017 the claimant submitted a formal grievance naming six individuals against whom she was making complaints. The claimant's grievance concerned a number of issues including: the complaints or allegations that had been made against her in 2014; the way those complaints had been investigated including the duration of the investigation and her belief that the investigation had been influenced by lies and inaccuracies; the fact that she had been given the letter of management advice in January 2016, the contents of which she disagreed with; an allegation that information she had requested about the investigation had not been provided to her; allegations that the claimant's line manager had undermined her and failed to support her after she had been given the management advice; the fact that she had not been given information about the complaints mentioned in September 2016; an allegation that, since her absence, she had been to HR sickness absence meetings that were unhelpful and intimidating. The claimant later provided a more detailed document elaborating on her grievances.

23. In March 2017 the claimant's sick pay went down from full pay to half pay.

24. At some point a meeting was arranged to take place on 29 March 2017 to discuss the complaints that had been mentioned by Ms Joisce in September 2016. Two days before that meeting was due to take place the claimant emailed to say she would not be attending the meeting, saying she had been advised not to attend and wanted to postpone the meeting until her grievance had been investigated.

25. A Mr Hassall was appointed to investigate the claimant's grievance. He spoke to the claimant for an hour on 6 April, at a meeting at which the claimant had her partner and union rep present, and for 2 ½ hours on 19 April, at a meeting at which the claimant had her niece present. This was a detailed meeting: Mr Hassall asked a lot of questions and the claimant gave full answers. As part of his investigation Mr Hassall spoke to a number of other people between June and September 2017.

26. In the meantime, a meeting was arranged between the claimant and a manager, Ms Rich, on 12 July 2017 to discuss the issues relating to the claimant's performance that Ms Joisce had alluded to in September 2016. We infer that the claimant must, at some point, have changed her mind about not wanting to discuss this issue until her grievance had been dealt with. The meeting was described as and 'informal discussion'. The claimant was accompanied by her union rep. Ms Rich explained the concerns that had been raised and gave the claimant a chance to respond. Ms Rich said she would send the claimant a copy of the minutes so that she could check their accuracy and they would then be sent onto Ms Joisce who would decide whether a formal investigation was required.

27. A few days later, on 20 July 2017, the claimant met with Mrs Davison again to discuss her absence. The claimant said she was struggling with her mental

health and well-being, described feeling down and tearful and described the impact that was having on her family. The claimant also said that she did not feel she could return to work until she had outcomes from the investigation into the allegations made against her and the grievance she submitted. She also said she did not feel that she could return to her substantive post at the Goodall centre as she could not work again with the previous manager who had made allegations against her. The claimant discussed with Mrs Davison the possibility of her being redeployed into another role within the organisation, but the claimant said she would find it difficult to return to work in another role for fear of bumping into that other manager. The claimant and Mrs Davison agreed that redeployment was not something that could be considered at that time, but that it may be worth exploring what other issues were resolved. During that meeting, the Mrs Davison also explained to the claimant that as she had been absent for 10 months the process would move on to final stage in accordance with the attendance management policy. She said there could be more than one final stage meeting. In line with the earlier occupational health report, Mrs Davison explained that she would issue the claimant with the 'mental well-being toolkit' for her to consider. The claimant said she was unsure whether it would be helpful at that time but she agreed to take a look at it. The claimant agreed for Mrs Davison to make a further referral to occupational health.

28. The claimant's entitlement to sick pay ended in July 2017.

29. On 14 August 2017 an occupational health report was prepared by a Dr Wynn. Addressing the likely duration of absence, Dr Wynn said 'whilst Ms Kelly has received appropriate support through her treating doctors, any future return to work may prove dependent on the extent to which her outstanding work related concerns could be addressed to the mutual satisfaction of herself and her managers. However, at present, I am unable to provide reassurance of Ms Kelly's return to work within a foreseeable timescale on health-related grounds alone.' Addressing the claimant's functional capacity Dr Wynn said 'Ms Kelly describes a profound loss of self-confidence and sense of trust and mutual respect in the workplace as ongoing obstacles to return to work.' Addressing workplace adjustments, Dr Wynn said he had explored with the claimant, in principle, potential adjustments to her substantive post, that may help reinforce her self-confidence and return to work but the claimant told him that she did not feel they were likely to prove effective. He recommended that the performance management procedures and grievance procedures be resolved soon as practicable and went on to say 'if it were operationally feasible to resolve these outstanding issues in the near term, and these addressed Mrs Kelly's concerns, she may subsequently benefit from a return to rehabilitative duties, including a phased return to work.' Dr Wynn also addressed the redeployment procedure saying he had explored with the claimant 'the extent to which alternative work, out with the current management structure possibly not involving the same level of responsibilities inherent in her current role, may overcome obstacles to work'. He said 'however, Ms Kelly explained that the pervasiveness of her current symptoms was such that she did not feel able to consider such options at present.' We infer that the claimant did tell Dr Wynn that she did not feel able to consider redeployment at that time, for health reasons.

30. A further meeting was due to take place on 5 September 2017 to discuss the claimant's absence. This was described as a 'Final stage interview'. The claimant could not attend, however, because she had forgotten the meeting was due to take place. Later that month, on 22 September, the claimant completed a questionnaire which formed part of the respondent's mental health toolkit. The questionnaire was designed to identify workplace stressors. The claimant identified a large number of stressors at work as being 'major concerns.' Then, on 12 October, the rearranged "final stage interview" took place. At this meeting the claimant told Mrs Davison that she was feeling worse than she had been. She said this was partly due to the fact that the grievance she had submitted had not yet been determined and also because she still did not know what was happening with the complaints or concerns alluded to by Ms Joisce in September 2016, which the claimant had discussed with Ms Rich in July. It appears from the notes of that meeting, and we find, that the claimant had been told by this stage that the grievance investigation should be concluded around the second week in November but that the claimant had been told nothing about timescales or the outcome in relation to the concerns about her practice. The claimant expressed concern about how long these matters had been ongoing without conclusion. The claimant also told Mrs Davison she could not even think about returning to work at present due to her mental state. She said that once she had outcomes in relation to the allegations against her and the grievance she had submitted she might be able to consider redeployment options. The claimant and Mrs Davison agreed that a timescale for a return to work could not be agreed at that time while the grievance and informal investigation into other allegations was ongoing. They also agreed that the further completion of the mental health toolkit would be 'parked' until the claimant has those outcomes whereupon the matter would be revisited.

31. A few days after this meeting, Ms Rich sent an email to the claimant's union rep in which she said she had met with Ms Joisce earlier that day and that Ms Joisce had decided that it was not appropriate to request any formal investigation into the practice issues that were discussed with the claimant on 12 July although they would need to be addressed with the claimant by her manager in supervision following her return to work.

32. Mr Hassall prepared a report on the claimant's grievance, which report was dated December 2017. In that report he said he had not found any evidence to uphold the claimant's grievance. That report was passed to the respondent's Head of Adult Care, who had been appointed to determine the claimant's grievance. He accepted the findings of the report and emailed the claimant notifying her that her grievance was not upheld on 20 December 2017. The claimant accepted in cross examination that the complaints she made in her grievance were taken seriously and investigated thoroughly by Mr Hassall. However, she criticised the length of time it took to complete. In his report Mr Hassall addressed the length of time the investigation took. We infer that he recognised the investigation had taken longer than one would ordinarily expect and certainly far longer than was envisaged by the respondent's own grievance policy and was anticipating criticism. Mr Hassall referred to the number of issues raised by the claimant which meant he had to speak to a number of different people. One of those people had left the organisation, which was a further complicating factor. He also referred to the fact

that the interviews took place over the summer period and therefore took longer due to the need to accommodate holidays, including his own. What he did not explain was why there was nearly a three-month gap between the second interview with the claimant and his first interview with anybody else and why it took more than two months to compile his report after the last of the interviews had been completed in September 2017.

33. The claimant appealed against the grievance decision as she was unhappy with the outcome.

34. In the meantime the claimant attended another final stage interview with Mrs Davison to discuss her absence on 16 January 2018. The claimant said at that meeting she was feeling scared stiff at the prospect of returning to work at the Goodall centre. She also said she did not feel she could return to work until she had the outcome of the appeal hearing. The claimant also said she would not be able to return to her substantive post as her team manager was named in the grievance and that she would not be able to return to the Goodall centre at all. The claimant discussed with Mrs Davison the possibility of redeployment. The claimant agreed to consider redeployment and mentioned that working with older people may be something that she would be interested in. It was agreed that enquiries would be made about possible redeployment opportunities within the wider service. The claimant also agreed to an occupational health referral to consider redeployment.

35. Mrs Davison explained to the claimant the next steps in the procedure if it was not possible to support her back to work, which would include consideration of whether she could remain in employment but that the aim of the process at that point was still to support the claimant back into work either in her substantive role or in redeployment opportunity.

36. On 9 February 2018 and 5 March 2018 the claimant's appeal against the rejection of her grievance was considered by an Appeal Sub-committee. The claimant was present at the first meeting. It is not clear to us whether she was also present at the second meeting. The outcome of the appeal was that some of the allegations the claimant had made were upheld in part and the remainder were dismissed. It is clear from a note of a meeting that took place on 14 March that the claimant knew the outcome of her appeal against the grievance by that date although she did not receive written confirmation of that outcome until on or around 16 March.

37. On 5 March 2018 Dr Wynn prepared another occupational health report. Dr Wynn said 'following the last OHS report I understand it has not been possible, to date, to establish circumstances within the workplace and which Ms Kelly would feel subjectively secure with a return to work. I understand Ms Kelly has had access to the internal vacancies bulletin of the Council, but to date no suitable alternative roles have arisen. I understand Ms Kelly is awaiting the outcome of an appeal in relation to the grievance procedure, and I recommend this is concluded as soon as practicable. However, the advice provided within the OHS report of 14 August 2017 otherwise remains unchanged.' It is clear from the reference to the previous

report that Dr Wynn was saying that he was still 'unable to provide reassurance of Ms Kelly's return to work within a foreseeable timescale.'

38. On 14 March 2018 the claimant attended another attendance management meeting to discuss her absence. The claimant described her confidence as 'shot'. She said she was seeing the counsellor in her GP surgery to help with that. She explained that she was unhappy about the outcome of her grievance appeal and that she was going to seek legal advice. The report of that meeting recorded that the claimant told Mrs Davison that she did not feel she could return to her substantive post at the Goodall centre as she could not work again with the previous manager. She also said she could not work for managers in the mental health directorate. The claimant did say, however, that she may consider an alternative post or area of work and she agreed to be added to the redeployment register. The claimant was not entirely happy with this record of the meeting and sent an email later saying she felt she had been misrepresented. She said she did not say she did not feel she could return to her substantive post but rather that as long as her substantive post remained in the mental health directorate, she did not feel she could return to it.

39. We find that the claimant was added to the redeployment register after this meeting as was agreed. This enabled the claimant to explore potential opportunities for redeployment.

40. The day after that meeting, Mrs Davison compiled what was described as a 'long term attendance management report'. It set out the history of the claimant's sickness absence, what had been discussed in attendance management interviews and what the occupational health service had advised. The report identified certain operational difficulties that were occasioned by the claimant's absence. Mrs Davison said that the claimant's absence meant that somebody else had to undertake her role, which impacted upon allocation of work and efficiency of service provision. In addition the report noted that an agency worker had been used to help manage the impact of the claimant's absence. Mrs Davison's conclusion was that there was no likelihood of a return to work. She said she felt there was no alternative but to refer the matter to a 'long term attendance management hearing' for consideration. This is the stage of the respondent's policy at which an employee's future employment is formally considered.

41. The long term attendance management hearing to place on 18 April 2018. It was chaired by Mr Emberson. The claimant was present, accompanied by her trade union rep. Ahead of that meeting the claimant was provided with a copy of Mrs Davison's report and the report was discussed in the meeting. At the end of the meeting Mr Emberson decided to dismiss the claimant. Mr Emberson sent the claimant a letter confirming the termination of her employment on 18 April, with the termination date of 10 July 2018. That letter records Mr Emberson's reasons for deciding to dismiss the claimant. He noted that the claimant's current fit note stated that she was unfit to return to work until 31 May 2018. He suggested that the claimant had said that she would be unfit to return to work even then. We accept the claimant's evidence that this does not quite accurately represent what she said. What she said was that if she was unable to return to work she would

get another fit note. We accept that the claimant had said however that she could not return to her substantive role within its existing directorate because, even if she had been well enough to return to work, she did not want to work with those managers. The claimant had raised the possibility of carrying out her substantive post in a different directorate. Mr Emberson explained in the meeting and repeated in his letter that this was not operationally feasible. In evidence he explained to us that the skills and knowledge required to do the claimant's role in order to meet regulatory requirements were different from those that were held by those in other directorates which would mean the respondent could not provide adequate supervision from within other directorates without a significant restructure which would be onerous particularly given that a restructure had only recently taken place. Redeployment had also been discussed at the meeting but the claimant confirmed at the meeting that there were only temporary vacancies available and the claimant did not wish to consider those. In her evidence the claimant confirmed this was the case she also confirmed that Mrs Davison had asked other managers if any vacancies were likely to arise but no future vacancies had been identified.

42. The claimant questioned Mr Emberson about why she was not offered a supernumerary position as an alternative to dismissal. Mr Emberson's evidence was that he did not consider such a position because this sort of arrangement was something that could only sensibly be offered over a short-term period, perhaps a couple of months and that it is the sort of arrangement that may be appropriate in cases where there is some sort of conflict between two individuals in the workplace and steps need to be taken to separate those individuals pending a longer time resolution.

43. Based on the evidence of Mr Emberson, supported by the letter setting out his reason for dismissing the claimant, we find the reason Mr Emberson dismissed the claimant was that she had been absent for a long duration and remained absent from work, and he believed she was unlikely to return to work in a reasonable period because the claimant had said she felt unable to return to work in her substantive post in the foreseeable future, and there were no suitable vacancies into which the claimant was willing to be redeployed.

44. The claimant appealed against her dismissal in May 2018. Later that month, an appeal meeting took place before an appeals subcommittee chaired by Mr Wood, who was a councillor. The claimant attended that meeting with her union rep and her partner. Mr Emberson was also present. The appeal was rejected in a decision that was confirmed by letter of 5 June 2018. The claimant's employment ended the following month.

Legal framework

Unfair dismissal

45. An employee has the right, under section 94 of the Employment Rights Act (ERA) 1996, not to be unfairly dismissed (subject to certain qualifications and conditions set out in the Act).

Reason for dismissal

46. When a complaint of unfair dismissal is made, it is for the employer to prove that it dismissed the claimant for a potentially fair reason ie a reason falling within section 98(2) of the 1996 Act, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held.

47. Under ERA 1996 section 98(2)(a) the employer will have a potentially fair reason for dismissal where it can show that it dismissed the employee for a reason which relates to the capability of the employee for performing work of the kind which he was employed by the employer to do.

Reasonableness

48. If the respondent shows that it dismissed the claimant for a potentially fair reason the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) of the Employment Rights Act 1996.

49. Section 98(4) of ERA 1996 provides that: '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

    a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

    b. shall be determined in accordance with equity and the substantial merits of the case.'

50. In assessing reasonableness, it is not for the Tribunal to substitute its view for that of the employer: the test is an objective one and the Tribunal must not fall into the substitution mindset warned against by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, [2009] IRLR 563. The objective approach requires the Tribunal to decide whether the employer's actions fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439).

51. The EAT has held that, in deciding whether or not an ill health capability dismissal is fair 'The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?'': Spencer v Paragon Wallpapers Ltd [1976] IRLR 373, [1977] ICR 301. The relevant factors to be scrutinised include: the nature of the illness and the job; the likely length of the continuing absence; the need of the employers to have done the work which the employee was engaged to do; the effect on other employees; how the illness was caused; the effect of sick-pay and (if relevant) permanent health insurance schemes; length of service and whether there is alternative work that the employee could do.

52. If an employee's ill health was caused by the employer's treatment, that does not preclude the employer forever from effecting a fair dismissal, however culpable its treatment: McAdie v Royal Bank of Scotland [2007] EWCA Civ 806, [2007] IRLR 895. As the Employment Appeal Tribunal said, in a judgment approved by the Court of Appeal, '[i]f it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work. Employees who have been injured as a result of a breach of duty by their employers are entitled to compensation in the ordinary courts, which in an appropriate case will include compensation for lost earnings and lost earning capacity: tribunals must resist the temptation of being led by sympathy for the employee into granting by way of compensation for unfair dismissal what is in truth an award of compensation for injury.' The EAT acknowledged that 'there must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to 'go the extra mile' in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable.' However, the EAT sounded a note of caution about how often it will be necessary or appropriate for a tribunal to undertake an enquiry into the employer's responsibility for the original illness or accident, saying the Tribunal's 'concern will be with the reasonableness of the employer's conduct on the basis of what he reasonably knew or believed at the time of dismissal, and for that purpose a definitive decision on culpability or causation may be unnecessary.' As the EAT said 'it is important to focus not, as such, on the question of that responsibility but on the statutory question of whether it was reasonable for the [employer], 'in the circumstances' (which of course include the [employer's] responsibility for [the employee's] illness), to dismiss [the employee] for that reason. On ordinary principles, that question falls to be answered by reference to the situation as it was at the date that the decision was taken.' These principles apply not just to cases where the employer's conduct has caused the illness, but also where that conduct has exacerbated it: L v M UKEAT/0382/13 (16 May 2015, unreported).

53. Before deciding to dismiss an employee because they are incapable of performing the job they were employed to do, an employer might reasonably be expected to try to fit the employee into some other suitable available job. However, it was said in the judgment of O'Connor J in the High Court decision in Merseyside and North Wales Electricity Board v Taylor [1975] IRLR 60, [1975] ICR 185: "… when one comes to consider the circumstances of the case, as to whether they make it reasonable or unreasonable to act upon his incapacity and to dismiss him, it cannot be right that, in such circumstances, an employer can be called upon by the law to create a special job for an employee however long-serving he may have been.' We note, however, that that case predates the introduction of legislation on disability discrimination, including the duty on employers to make reasonable adjustments.

54. In East Lindsey District Council v Daubney [1977] IRLR 181, [1977] ICR 566 the EAT stressed the importance of consulting with the employee and discovering the true medical position before an employee is dismissed on the ground of ill health.

As the EAT said in Spencer v Paragon Wallpapers, what is required is 'a discussion so that the situation can be weighed up, bearing in mind the employer's need for the work to be done and the employee's need for time in which to recover his health'.

55. Defects in the initial decision to dismiss may be remedied on appeal if, in all the circumstances, the appeal is sufficient to cure any earlier unfairness (Taylor v OCS Group Ltd [2006] IRLR 613). The Court of Appeal noted that the Tribunal must 'determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.'

Discrimination

56. It is unlawful for an employer to discriminate against an employee by dismissing him or her or by subjecting him or her to any other detriment: section 39(2) of the Equality Act 2010.

57. An employer discriminates against a disabled employee if it treats that person unfavourably because of something arising in consequence of his or her disability and the employer cannot show either (a) that it did not know, and could not reasonably have been expected to know, that the employee had the disability; or (b) that the treatment was a proportionate means of achieving a legitimate aim: EqA 2010 s15.

58. Simler P in Pnaiser v NHS England [2016] IRLR 170, EAT, gave the following guidance as to the correct approach to a claim under EqA 2010 s 15:

    58.1. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B.

    58.2. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

59. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a

question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

60. For an employer to show that the treatment in question is justified as a proportionate means of achieving a legitimate aim, the legitimate aim being relied upon must in fact be pursued by the treatment.

61. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. The Tribunal must weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure or treatment and make its own assessment of whether the former outweigh the latter: Hardys & Hansons plc v Lax [2005] IRLR 726, CA. In doing so the Tribunal must keep the respondent's workplace practices and business considerations firmly at the centre of its reasoning (City of York Council v Grosset UKEAT/0015/16, upheld by the Court of Appeal [2018] EWCA Civ 1105, [2018] IRLR 746) and in appropriate contexts should accommodate a substantial degree of respect for the judgment of the decision-taker as to the respondent's reasonable needs (provided he or she has acted rationally and responsibly): O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145, [2017] IRLR 547.

Conclusions

Disability discrimination

62. The first issue we need to determine is whether the claimant was dismissed because of something that arose in consequence of her disability.

63. The reason for the claimant's dismissal was that she had been absent for a long duration and remained absent from work, and the respondent believed she was unlikely to return to work in a reasonable period because the claimant felt unable to return to work into her substantive post in the foreseeable future, and there were no suitable vacancies into which the claimant was willing to be redeployed.

64. The respondent did not accept that the claimant's absence from work was something arising in consequence of claimant's absence.

65. In determining this issue we turn first of all to the findings of the Shore Tribunal from earlier this year, which findings of fact we are bound by. EJ Shore found that the claimant had a long history of mental impairment and that the effects of that impairment on the claimant's ability to carry out day-to-day activities were more than minor or trivial between 2016 and the claimant's dismissal. EJ Shore also found that the claimant's symptoms included lethargy, withdrawal from social and family situations and an inability to look after her own well-being and personal hygiene.

66. We now turn to our own findings of fact. Relevant findings include the following:

    66.1. Throughout her absence the claimant's GP signed fit notes declaring her unfit to work. At the time of dismissal she had a fit note saying she was

unfit for work until 31st May, which Mr Emberson relied on in dismissing the claimant for capability reasons. Although inevitably those fit notes were based on what the claimant had told her GP, there was no suggestion by the respondent that the claimant's GP had been hoodwinked into believing she was unfit for work in circumstances in which she could have worked.

66.2. Throughout the claimant's absence, in meetings to discuss her absence the claimant referred to her mental health. For example in November 2016 she referred to feeling down; in July 2017 she said she was struggling with the mental health and well-being and was getting counselling and that her GP had increased antidepressant medication; by October 2017 the claimant referred to feeling 'even worse.' We have no reason to disbelieve that contemporaneous account the claimant gave about her mental health and the treatment she was receiving. We find those accounts accurately conveyed the state of her health at that time.

66.3. Occupational health reports also consistently confirmed that the claimant was unfit for work, the implication being that the claimant was not well enough to work rather than that she was not willing to work. We infer from the report of 24 November 2016 that Ms Davies considered that the claimant was absent from work due to ill-health given that she specifically refers to ill-health in her report and referred to the symptoms that the claimant was experiencing. As recorded above, we do not accept Mr Tinnion's submission that the reference to the possibility that 'this may not be a clinical problem in origin' meant that Ms Davies was saying the claimant was not ill. Ms Davies was clearly commenting on the causes or triggers for the claimant's period of ill-health and the potential solutions rather than suggesting that her absence was not because of ill health.

67. Looking at the evidence in the round, we are satisfied that the claimant's disability was an operative cause of her absence. That being the case we find that the claimant's absence arose in consequence of her disability, notwithstanding that there were other factors that contributed to her absence, including an unwillingness to return to work before her grievance was resolved and, subsequently, an unwillingness to work with certain individuals.

68. As the respondent accepts that it knew or ought to have known that the claimant had the disability at the time of her dismissal, the issue on which the claimant's disability discrimination claim now turns is whether the respondent has proved that dismissal of the claimant was a proportionate means of achieving a legitimate aim.

69. Mr Tinnion submitted that the claimant's dismissal served three aims:

69.1. Firstly, protecting scarce public funds and resources.

69.2. Secondly, reducing the strain on the respondents and other employees caused by the claimant's absence.

69.3. Thirdly, ensuring the respondent had a workforce fit to actually attend work and perform the substantive duties of the post.

70. The evidence before us showed the very considerable amount of time and resources the respondent's managers expended seeking to manage the claimant during her period of absence and we accept that, while the claimant was absent, other employees had to cover for the claimant while still providing an adequate service to service users. We readily accept that these were all legitimate aims and it was not suggested otherwise by the claimant. We also accept that dismissing the claimant was a means of pursuing those aims.

71. The real issue in this case is whether the claimant's dismissal was a proportionate means of achieving those aims. This requires us to weigh the reasonable needs of the respondent against the effect of dismissal on the claimant and decide whether the former outweigh the latter.

72. The effect of dismissal on the claimant was, of course, severe: she was out of a job following more than three decades of service.

73. As for the needs of the respondent, it is clear that the claimant's absence was having an adverse impact on the respondent – her absence needed management attention and cover had to be provided while the claimant's job was kept open.

74. In weighing those adverse effects, one relevant consideration is the duration of the claimant's absence, including whether, and how soon, the claimant was likely to return to work.

75. So far as future absence is concerned, the claimant had been signed off as unfit for her substantive role until the end of May. However, the claimant had made it clear she would not feel able to come back to that role within that directorate, nor any other role in that directorate, because she felt the relationship between her and the managers and that directorate had completely broken down. So even if there was some prospect of the claimant being well enough to work after May 2018, it was not something she was prepared to consider within that directorate.

76. The claimant suggested she should have been given more time to recover following the conclusion of the grievance procedures. However, even setting aside the fact that the claimant had clearly said she was not prepared to return to work in the directorate, the evidence available at the time of the decision to dismiss shows that it is unlikely she would have been able to put the matters that led to her raising a grievance behind her. Despite the fact that the claimant was given the opportunity to raise a grievance which she acknowledges was taken seriously and investigated thoroughly, she was unhappy with the outcome of that grievance process. Despite having been given the opportunity to appeal against that she made it clear that remained unhappy a month later. It was reasonable for Mr Emberson to conclude that there was nothing to be gained by waiting to see if the claimant's perspective on matters changed. On the evidence available, we there was no reasonable prospect of the claimant returning to her substantive post in the directorate in which she worked.

77. The claimant did raise the possibility of remaining in her role but being managed from outside the directorate. This was considered by Mr Emberson who felt -we find genuinely - that it was not operationally feasible. Bearing in mind that case law reminds us to accord a substantial degree of respect for the judgement of the

decision-taker, we accept that was a reasonable conclusion: the skills and knowledge required to do that role in order to meet regulatory requirements were different from those that were held by those in other directorates which would mean the respondent could not provide adequate supervision from within other directorates without a significant restructure which would be onerous particularly given that a restructure had only recently taken place. That being the case, there was no prospect of the claimant returning to her substantive role or any other role in the directorate in the foreseeable future.

78. The respondent considered whether the claimant could be redeployed into another role in a different directorate. The claimant had been on the redeployment register for a month at the time her employment and before that Mrs Davison had made enquiries with other managers about possible vacancies yet nothing had emerged. We accept that there were no suitable permanent vacancies for the claimant over that time period. There were some temporary vacancies but the claimant did not want to be considered for them. We are satisfied that the respondent made reasonable efforts to find alternative employment for the claimant before deciding to dismiss her.

79. The claimant also submitted that the respondent should have found her a supernumerary position to enable her to return to work on a phased basis. The claimant suggested this should have been done in the relatively early stages of her absence as a reasonable adjustment to keep her in work or, in the alternative, should have been offered at the time of dismissal as an alternative to dismissal.

80. So far as offering this as an alternative to dismissal is concerned, we accept Mr Emberson's evidence that this sort of arrangement was something that could only sensibly be offered over a short-term period, perhaps a couple of months and that it is the sort of arrangement that may be appropriate in cases where there is some sort of conflict between two individuals in the workplace and steps need to be taken to separate those individuals pending a longer time resolution. In other words, this sort of arrangement may be suitable as a holding exercise in circumstances where the employer has control over the period for which the arrangement needs to continue, but would not be a long-term solution in itself. In this case, the evidence does not support the conclusion that a short-term arrangement of this type was likely to succeed in returning the claimant to work on a permanent basis. At the time of her dismissal the claimant was not clearly saying that she could return to work at that point even on a phased basis. Her evidence when we questioned her about this was equivocal. At best she appeared to be saying that this sort of arrangement might have helped to get back to work depending on the nature of the work offered. In all the circumstances we consider it was reasonable for the respondent to focus on a longer-term solution to the claimant's return to work.

81. In deciding whether it would have been proportionate to allow the claimant a longer period of employment to see whether she might return to work in some capacity in the future, the claimant's long service is something that weighs in her favour. However, the respondent's own procedure talks about considering dismissal after six months of absence. That policy applied to all employees,

regardless of length of service. It follows that, considering dismissal after an absence of considerably more than six months was within the scope of the respondent's policy.

82. The claimant says that in determining this case we should take into account the respondent's own responsibility for her absence. The claimant says the respondent was at fault in a number of ways. In particular:

    82.1. the claimant criticises the way she was managed in relation to the complaints raised in 2014 and the other matters referred to in the grievance she submitted in 2017;

    82.2. she criticises the respondent for not holding attendance management meetings in accordance with the attendance management policy between the first meeting in November 2016 and the next one which took place in the summer of 2017;

    82.3. she criticises the length of time it took the respondent to give her details of the matters of concern that were first mentioned to her in September 2016, and to investigate those issues;

    82.4. she suggests the respondent should have offered her a supernumerary position at an early stage of her time off work and if they had done that she might have been to return to work sooner; and

    82.5. she criticises the length of time it took the respondent to deal with her grievance.

83. As noted above, in McAdie v Royal Bank of Scotland the EAT sounded a note of caution about how often it will be necessary or appropriate for a tribunal to undertake an enquiry into the employer's responsibility for the original illness. McAdie was an unfair dismissal claim but the principle is equally relevant to this claim of disability discrimination. With that in mind, we are firmly of the view that it is not appropriate for us to re-investigate the claimant's grievance and consider to what extent, if any, the respondent might have caused or contributed to the claimant's ill-health. The same goes for the gap between attendance management meetings and the length of time it took the respondent to give the claimant details of the matters of concern raised in 2016 and investigate those issues. Those are issues which occurred many months before the claimant's dismissal and it is neither necessary nor appropriate for us to undertake an enquiry into whether those matters had any ongoing impact upon the claimant at the time of her dismissal and, if so, the extent of the respondent's culpability (and we note in passing that those issues are not a straightforward matter given that, in relation to the attendance meetings, the claimant had herself criticised the respondent for holding the first attendance meeting at in any event was clearly in contact with the respondent either in person or through her union representative; and, in relation to the concerns about the claimant's conduct or performance, the respondent was initially concerned about whether it was appropriate to have discussions about such issues with the claimant when she was absent from work was work related stress and the claimant herself decided not to attend the meeting in March that had been arranged specifically to discuss those issues).

84. Regarding the suggestion that a supernumerary position should have been offered to the claimant at an early stage, we note that the claim we are dealing with is not a claim that the respondent failed to make reasonable adjustments at some earlier point during the claimant's absence. In any event, the claimant's suggestion that she might have been able to engage with such an offer is contradicted by the contemporaneous documents dating from absence when she told managers that she could not contemplate a return to work.

85. As for the time it took the respondent to deal with the claimant's grievance, the claimant makes a valid point about the time taken to deal with her grievance. It took an inordinate amount of time for which we have not heard any reasonable explanation from the respondent. However, this is not a case in which the respondent is claiming that the claimant's absence reached certain trigger points that enabled it to take action under its policies and that would not have been reached if it had dealt with the grievance more efficiently. Furthermore, before dismissing the claimant, the respondent waited until after the claimant had exhausted the entire grievance process, and allowed her a further period in which to consider her position and alternative employment.

86. Looking at all the circumstances, we are satisfied that this is not a case in which it was reasonable to expect the employer to wait any longer before taking the decision to dismiss based on the information available at that time about the likelihood that the claimant would be unable to return to work in the foreseeable future and the lack of alternative vacancies. We are satisfied that the reasonable needs of the respondent outweighed the effect of dismissal on the claimant.

87. We conclude that dismissing the claimant was a proportionate means of achieving the legitimate aims identified above. It follows that the respondent did not discriminate against the claimant by dismissing her.

Unfair dismissal

88. As recorded above, the reason for the claimant's dismissal was clearly that she had been absent for a long duration and remained absent from work, and the respondent believed she was unlikely to return to work in a reasonable period because the claimant felt unable to return to work into her substantive post in the foreseeable future, and there were no suitable vacancies into which the claimant was willing to be redeployed. This was a reason relating to the capability of the claimant for performing work of the kind which she was employed by the respondent to do, which was a potentially fair reason for dismissal within section 98(2) of the Employment Rights Act 1996.

89. The issue then is whether the respondent acted reasonably or unreasonably in dismissing the claimant for that reason.

90. We are satisfied that the procedure followed in reaching the decision to dismiss the claimant was reasonable. The claimant was given adequate warning that this was under consideration; she was given a full report setting out the considerations that might lead to her dismissal; she was given a full opportunity to respond to that report, with her union rep being present; she was given an

opportunity to appeal, which she took advantage of; and her appeal was considered independently.

91. Furthermore, for the same reasons that we concluded that the claimant's dismissal was a proportionate means of achieving legitimate aims, we conclude that the decision to dismiss the claimant was, in all the circumstances, within the range of reasonable responses open to a reasonable employer.

92. In all the circumstances we conclude that the respondent acted reasonably in dismissing the claimant for the reason it did. The claimant's dismissal was fair.

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Employment Judge Aspden

Date 1 November 2019