EMPLOYMENT TRIBUNALS

Claimant: Mrs B E Magson

Respondent: Delphside Limited t/a Avondale Mental Health Care Centre

Heard at: Liverpool **On:** 4 & 5 November 2019 and
(In chambers) 25 November 2019

Before: Employment Judge Wardle
Mr A G Barker
Mr W K Partington

Representation
Claimant: Mr P Quinn - Solicitor
Respondent: Mr P Goodbody - Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's complaints of discrimination arising from disability contrary to sections 15 and 39 of the Equality Act 2010 and of unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996 are well-founded and that remedy in respect of these findings will be assessed at a hearing in due course.

REASONS

1. By her claim form and as amended at a Preliminary Hearing held on 29 May 2019 the claimant brings complaints of discrimination arising from disability contrary to sections 15 and 39 of the Equality Act 2010 ("EqA") and of unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA"). She also brought a complaint of wrongful dismissal based on the fact that she was not paid her full statutory notice period of 12 weeks but was instead paid one month's pay in lieu of notice. Such complaint has however since been withdrawn upon recognition by the respondent of its error in this regard and payment by it to her of her statutory notice entitlement resulting in the complaint having been dismissed on withdrawal.

2. In relation to the discrimination arising from disability claim the claimant contends that the unfavourable treatment was her dismissal which arose in

consequence of the respondent's belief that she could not carry out lone working safely because of the risks to herself and others if she had a seizure associated with her disabling condition of epilepsy whilst at work coupled with its belief that it could not sustain her role without an element of lone working. That reason for dismissal arose in consequence of the claimant's disability. On the respondent's case dismissing the claimant was a means of achieving the aim of ensuring a safe environment for the claimant and others. In circumstances where it is not suggested that this aim was not legitimate the question for determination is whether the claimant's dismissal was a proportionate means of achieving it, which the claimant disputes saying that the respondent should have organised a phased return to work and ensured that she was always working alongside a colleague, which measures were, the respondent says, impracticable particularly in view of the state of its finances.

3. In relation to the unfair dismissal claim having regard to the reason for her dismissal as stated above the claimant was dismissed for capability, which will require consideration of the question whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss her.

4. The Tribunal heard evidence from the claimant and on behalf of the respondent it heard from Mr William Devling, Chairman of the Board of Trustees, Ms Paula Jones, Centre Manager and Mr Kevin Cullen, Mental Health Nurse. Each of the witnesses gave their evidence by way of written statements, which were supplemented orally by responses to questions posed. The documents that were before the Tribunal as a bundle was marked as “R1”.

5. Having finished taking the evidence and submissions late on the second day of hearing, the parties were made aware that the Tribunal would be reserving its judgment. It subsequently sat in chambers on 25 November 2019, when it considered the evidence, the submissions and the applicable law and was able to reach conclusions on the issues requiring determination by it.

6. Having heard and considered the evidence it found the following facts.

Facts

7. The claimant was employed by the respondent from 27 February 1997 until 18 December 2018 when her employment was terminated on the grounds of ill-health capability. At the time of her dismissal she held the post of Laundry Assistant, which role she had undertaken since April 2015.

8. The respondent is a registered charity, which runs Avondale Mental Healthcare Centre, which is a residential home for people with severe mental health problems. It has a capacity of 54 residents, the majority of whom are according to the respondent's ET3 unable to transition to living in the community.

9. The claimant worked 30 hours a week on a shift pattern of four consecutive days work followed by two days off work. On each shift she worked with a colleague. Her role involved her collecting laundry stored in baskets from

residents' rooms, washing, drying and ironing it before returning it to the rooms.

10. According to Ms Jones' evidence there took place a noticeable shift in the claimant's personality in December 2017 in that she varied from becoming emotional to becoming argumentative and that quite suddenly she began to suffer seizures as occurred in Ms Jones' office on 9 January 2018, which she describes as the claimant going vacant and repeating words unrelated to matters under discussion.

11. The claimant was signed off sick from this date. She subsequently attended a clinic at Warrington and Halton Hospitals on 30 January 2018 with Dr Pomeroy, Consultant Neurologist. His report of this attendance verified on 5 February 2018 to her GP, Dr Smith, at page 62 set out a history of her beginning a few weeks earlier with symptoms of nausea and possibly lightheadedness as though she had stood up too quickly and that she was found to have a perforated eardrum. The report continued to state that after a few weeks she began to feel detached and to have unusual episodes, which often happened when she lost her train of thought and sometimes began stuttering and which ended with her turning to the right, jumping up and appearing startled saying something that didn't make sense. His impression was that she was describing dissociation, which can happen in response to seizures or concurrent stress.

12. She continued to be certificated as unfit for work because of the seizures which was ultimately diagnosed as the condition of Temporal Lobe Epilepsy. Pursuant to the respondent's Sickness Absence Policy she was entitled to two weeks' full pay followed by Statutory Sick Pay (SSP) but in response to a request from the claimant for extended company sick pay it exercised a discretion to pay her full pay until 1 May 2018 before SSP began to be paid.

13. Following her clinic attendance Dr Pomeroy wrote further to Dr Smith by a letter typed on 12 March 2018 to advise that he now had the results of the claimant's EEG stating that there were two episodes witnessed during it with the first occurring before the application of the electrodes and the second whilst they were in position, which episode was videoed at the time during which she appeared agitated, went to stand and then said repeatedly 'Oh yeah'. He also described that she was asked her name during the episode and responded by saying ' You want me to tell you my name', which indicated some degree of awareness. He further explained that each episode lasted approximately 30 seconds, during which time there was a focal seizure, which localised to the left side and which he speculated might represent a temporal seizure on clinical grounds. His suggested plan was to arrange for a further MRI and for the claimant to start a dose of Levetiracetam beginning at 250 mg once a day and increasing every three days to an initial target dose of 500 mg twice a day.

14. On 19 March 2018 Ms Jones wrote to the claimant to advise that though she had attended for several informal meetings during February and March she wished to arrange a formal Managing Attendance meeting with her in April and that she had provisionally pencilled in Monday 16 April 2018 at 11.00 a.m. at which she was given the chance to be supported by a work colleague or trade union representative. The notes of this meeting are at pages 132-3. Ms Jones was accompanied by Gaynor Benyon

(Administrator) and the claimant attended unaccompanied. In regard to her condition and its medical investigation the notes record the claimant advising that she had a more in depth MRI scan booked for 17 April 2018 and a follow up appointment with Dr Pomeroy on 1 May 2018. They also record that the claimant suffered a vacant seizure after being asked if her medication was having an effect, which lasted 30 to 40 seconds and during which she grasped at the table, experienced unsettled breathing and presentation before going to stand up. In response to the enquiry about the medication's effect the claimant was undecided. In regard to the frequency of the episodes she advised that she thought them to be less frequent but that she was still having them daily and that her GP thought that they were stress related. Ms Jones wrote to the claimant subsequently on 18 March 2018 at pages 134-5 in confirmation of the matters discussed at the meeting and enclosing a request form for completion by her for permission to access her medical information, which she was asked to return by 30 April 2018.

15. Following the claimant's next clinic with Dr Pomeroy on 1 May 2018 he wrote further to Dr Smith on 9 May 2018 with a diagnosis of localisation related epilepsy secondary complex seizures with left sided focus on EEG. In his report he advised that he had witnessed two slightly different attacks during the clinic with the first happening when he called the claimant which saw her becoming quite anxious before being able to calm herself with her husband's assistance and the second when she began struggling with her speech whilst they were talking about the impact that the seizures have on her, which he suspected were related to anxiety and panic as a secondary effect precipitated by the onset of the seizures. In relation to frequency it was estimated that on a bad day she was suffering a seizure between every 1 and 2 hours and on a good day between 10 and 15. In relation to a treatment plan he advised that he was waiting the formal result of an MRI performed under the epilepsy protocol two weeks previously and he suggested that the claimant's dosage of Levetiracetam be increased initially to 750mg and after a month to 1000mg.

16. In the meantime on 2 May 2018 Ms Jones wrote further to the claimant reminding her that the request form for permission to access her medical information had not been returned by her, which she was asked to do by 11 May 2018. Such form was subsequently returned on or before 14 May 2018 as on this date Ms Jones wrote to Dr Smith enclosing a consent form and asking for the provision of a report in relation to the claimant and a professional opinion in relation to the nature of any reasonable adjustments needed to facilitate her return to work and the likely timescale of a return.

17. On 15 May 2018 Dr Pomeroy wrote again to Dr Smith to say that he now had the results of the more detailed MRI brain scan, which showed a bulky left amygdala but no other definite abnormality, the significance of which was uncertain. In the belief that further imaging at that time was unlikely to be helpful a repeat interval scan had been arranged in six months' time and he advised that diagnosis and treatment remained as stated in his previous clinic letter.

18. On this same day Ms Jones wrote to invite the claimant to a second stage managing attendance meeting on 23 May 2018 and to advise that as she now had a diagnosis she would arrange for an Occupational Health (OH) appointment to take place, which she did that day by sending a referral form

at pages 137-141. By way of relevant background information Ms Jones advised that Avondale was a mental health nursing home caring for vulnerable individuals with mental health care needs and that the claimant's role involved her in loading and unloading the washers and dryers, collecting and delivering laundry to individuals' personal rooms, ironing items of clothing and using an industrial roller iron with such work being a mixture of both team and lone working. In relation to medical history she advised that the claimant had been absent owing to seizures since 9 January 2018, which she had attributed to stress factors but that she had recently been diagnosed with Temporal Lobe Epilepsy, in response to which she had commenced medication with limited impact to date. In relation to the nature of the seizures she described some of these as involving tapping, grasping for objects, turning of her head and anxiousness and others involving her swearing and appearing to present aggressively. Advice was sought on whether suitable reasonable adaptations to duties could be made to allow her to resume her duties and on a realistic timescale for any return.

19. The second stage managing attendance meeting scheduled for 23 May 2018 was subsequently re-arranged for 19 June 2018 due to the claimant having a GP appointment on the original date. In advance of this the claimant attended for an OH assessment conducted by Dr Hadland on 11 June 2018. The report of this assessment dated 12 June 2018 at pages 76-78 advised that she remained unfit for work but suggested that a return to work in 4-6 weeks' on a phased basis time was possible provided that her symptoms continued to improve and recommended a follow-up appointment in three weeks time.

20. On 14 June 2018 the claimant had a further hospital appointment with Dr Winterbottom, Advanced Nurse Specialist in Epilepsy, who provided a letter authorised for sending to Dr Smith, the claimant's GP, on 27 June 2018 at pages 79-80. This reported that the claimant had undergone three of her typical stereotyped focal seizures in clinic but that she had managed to give warning on all three events and that the seizures continued to happen daily despite an increase in her medication up to 1000mg twice daily with the result that the dosage was agreed to be increased to 1250mg in the evenings for the next month and continued with a 250mg monthly increase. In relation to the claimant's fitness to return to work Dr Winterbottom thought it appropriate for her to do so albeit in a phased manner and stated that it was important that her epilepsy was not seen to interfere with her abilities to work in the laundry adding that whilst she would be working with chemicals she was never a lone worker and her seizures did not impair her mobility; she did not fall within seizure and they were brief in nature. It was advised that the claimant would be seen again in two months' time.

21. The second stage managing attendance meeting went ahead as re-arranged on 19 June 2018, at which the claimant was accompanied by her trade union representative David Maskell and Ms Jones by Ms Benyon, the notes of which are at pages 142-146. Following the meeting Ms Jones wrote to the claimant on 28 June 2018 at pages 81-2 to confirm the points discussed, which was condensed into four sub-headings (1) the claimant's progress (2) an update on processes (3) how matters would proceed and (4) occupational health. In relation to (1) it was stated that the claimant's seizures were reducing occurring approximately 4/5 times a day recently but that during the meeting she had experienced two the first of which was

attributed to anxiety due to the meeting and the second when her role and risk factors were being discussed. In relation to (2) it was stated that the actions and support offered so far was shared with her representative and that he had nothing to add. In relation to (3) it was stated that possible actions had been discussed including adaptations to the workplace; phased return to work; change in duties; ill-health retirement etc. as had the possible risks or impacting factors of any return to work such as lone working, impact of altered mood/emotions, use of equipment and addressing issues via mediation. In relation to (4) it was stated that a follow-up appointment with OH had been arranged for 2 July 2018.

22. On 29 June 2018 Dr Smith provided to the respondent a medical report at pages 83-84 in answer to its questions regarding changes that could be made to the claimant's workplace to facilitate her return and the timescale for this. In this he advised that there were no practical workplace adjustments that could be made although it may be with her input information could be dispersed among staff to explain her condition and hopefully mitigate any embarrassing or serious situations when she does feel fit to return to work. In relation to a timescale he advised that this was difficult to predict as it largely depends on response to medication, which is usually introduced at a gradual rate because of its side-effects but that they had agreed a phased return that should be suitable in the near future.

23. Ahead of the claimant's second OH appointment, which was rescheduled from 2 to 9 July 2018 Ms Jones wrote to Dr Hadland on 26 June 2018 with additional information at pages 147-8 in which email she raised the prospect of the claimant's seizures with their associated changes in moods/emotions and behaviours triggering behaviours in the homes' residents that could place them or the claimant in a vulnerable position adding that at a recent meeting with her discussion around her altered emotional state, behaviours, lone working etc. of which she added there was a lot had seemed to trigger a seizure, which saw her repeating words, attempting to stand up, slapping/tapping the table and then turning and grabbing hold of an individual's arm. She also stated that were she to grab or hold on to a resident not only could this place her in a compromised position in regards to her safety but could also leave her open to a safeguarding issue or police involvement and that should she do this whilst using the ironing equipment it could have very serious consequences for her physical health in relation to drawing in and burn injuries before suggesting that the healthcare professionals who have expressed the view that a return to work would be beneficial for the claimant only have to take on board her view of the role and current health status whereas the home is duty bound to base any return on ability to perform duties safely and risk to her and others.

24. On 9 July 2018 the claimant met again with Dr Hadland. His OH report dated 10 July 2018 at pages 85-7 advised that she was fit for work with recommendations. He commented that the frequency of her absence seizures had reduced since her last appointment and that she had told him that she was continuing to have one or two per day typically lasting around 30 seconds and that she always has an aura so that she is aware in advance that a seizure is about to occur. As regards her return he advised that a risk assessment would be required by management due to the possibility of her experiencing absence seizures at work and that he currently considered her unfit for lone working requiring her to be

accompanied by a colleague at work, which will remain the case for the foreseeable future. He further suggested that a phased return should be arranged with the claimant working half her usual hours during the first week and increasing them incrementally back to normal over a period of four weeks. In response to the additional questions asked by Ms Jones in her email dated 26 June 2018 he answered that she was fit for all aspects of her job subject to his recommendations; that it was hoped that the control of the claimant's seizures will improve further with a further increase in her medication dose; that aside from the need to avoid lone working there were no work adaptations likely to be needed and that it was unlikely that her health and any adjustments required might place other staff or service users at risk providing that she was accompanied at work.

25. The claimant continued to remain absent from work and on 30 July 2018 she attended her GP and was signed off as unfit for work until 31 August 2018. Following the provision of this fit note to the respondent Ms Jones wrote to her on 3 August 2018 at page 89 informing her that a risk assessment had been arranged for 10 August 2018 with one of the respondent's health and safety competent persons and inviting her to a third stage managing attendance meeting on 15 August 2018. In relation to the risk assessment this was carried out by Kevin Cullen. The background to it is set out in a document headed 'Individual Lone Working Risk Assessment' at page 91, where it is stated that following on from a risk assessment completed for the claimant in relation to her sickness/ absence and potential return to work a lone working risk assessment has been requested. The assessment which began at 11.00 a.m. lasted 30 minutes at the end of which the claimant had a seizure. The nature of this was described by Mr Cullen in a document at page 90 as involving the claimant being unable to maintain her own safety, moving her chair around the room whilst still seated, pointing, shouting, pulling at her clothes and trying to open windows and being unable to preserve her dignity. The episode had been captured on CCTV and the footage was shown to us during the hearing. In our view Mr Cullen's description of it was a little exaggerated as we did not see, for example, any attempt by the claimant to open windows or any demonstrated inability to maintain her dignity. Notwithstanding the occurrence of this seizure and his observation that following it she had no recollection of events Mr Cullen considered it appropriate to ask the claimant to confirm by signature that the remedial actions contained in the assessment document at pages 91-8 had been discussed.

26. The third stage managing attendance meeting scheduled for 15 August 2018 was subsequently re-arranged for 20 August 2018 because of the unavailability of the claimant's representative on the earlier date. The meeting had the same attendees as the second stage one and the notes of it are at pages 151-4. Ms Jones wrote subsequently to the claimant at pages 100-2 on 23 August 2018 in relation to it. In this she referred to the claimant and her representative being provided with copies of the risk assessment and Mr Cullen's description of the seizure she had experienced during it. She also referred to her having another seizure during the meeting when she shouted, banged the table with clenched fists, struck her representative several times on his arm, slapped him on the back and grabbed at his clothing and his lanyard around his neck. She also stated that they had discussed the information provided by her GP and OH, which she termed as somewhat conflicting commenting that OH had said there should be no lone

working for the foreseeable future and her GP noting that no adjustments should be made other than education of staff regarding her condition.

27. In relation to the issue of lone working the letter records that the claimant had expressed the view that there was not much of it in her role as a Laundry Assistant and that other employees had had adjustments made for them but Ms Jones stated that she had clarified that the role comprises a great deal of lone working and that any potential risk is assessed and determined with regard to the individual requirements of each employee in relation to their working conditions, environment, equipment used and any personal health issues they may have. In relation to the risk assessment the letter records that it revealed a number of potential hazards such as ironing with both hand-held iron and on-roller iron, use of footsteps, the Otex system in the laundry and its potential for breathing impairment, nurse call and emergency alarms provoking seizure and risk of violence from residents due to perceived provocation during a seizure and that the unpredictable nature of the seizures and her inability to control their presentation placed her at a high level of risk with regard to lone working. The letter went on to say that that it was her belief that there exists a substantial risk of potential serious harm to the claimant, other members of staff and residents even if she was accompanied at all times and furthermore that such option was not financially viable in any event with the result that the respondent intended to review the claimant's situation following a period of her being clear of seizures for a period of three months commencing on 1 September 2018 following the expiry of her current sick note during which she would be suspended from work on full pay.

28. On 17 September 2018 the claimant in response to a request from the respondent provided consent forms for it to apply to her GP/specialist nurse for a written report as to her current state of health, indicating that she wished to see a copy of the report before its supply to her employer and recognising that she had to contact the clinician within 21 days of her employer's application to make arrangements to see it which forms it enclosed when writing to Dr Smith and Dr Pomeroy on 30 October 2018 for this purpose. The letters in question asked if they could confirm, following the prescription of new medication, whether or not the claimant had remained seizure free from 1 September 2018 to date and if they could differentiate between the two different types of seizure that the claimant was experiencing.

29. In the meantime the claimant attended a further clinic with Dr Pomeroy on 16 October 2018, following which he wrote the next day to Dr Smith at pages 106-107. By the letter he confirmed the diagnosis of localisation related epilepsy with secondary generalised clonic seizures and that her current medication involved both Levetiracetam and now Lamotrigine. He also commented about the claimant having begun to experience a new attack type associated with shaking and falling backwards which started after an appointment with OH during which a phased return to work was discussed, which had to have been on 9 July 2018 as this was the only occasion prior when a phased return was suggested and about his having noticed a pattern of further differing attack types that happened when she was talking to him about her diagnosis and when she was on the phone to the epilepsy nurses and to his secretary, which he thought were situational in nature and associated with agitation and therefore coming from the mind

rather than the brain. He advised that he would keep the claimant under a more frequent review and that he would ask the epilepsy nurses to do likewise. In the meantime he recommended an increase in the dosage of Lamotrigine to 50mg twice daily over the next 8 days and following this an increase in the dosage of Levetiracetam in weekly steps of 250mg to the maximum dosage of 1500mg twice daily and after a gap of at least a month if the typical attacks were continuing he suggested further increases in the Lamotrigine in steps of 25mg every 2 weeks up to a maximum of 100mg twice daily if required and tolerated.

30. Separately Dr Pomeroy wrote to Ms Jones by a letter typed on 7 November 2018 in response to her request for information on the claimant's diagnosis of temporal lobe epilepsy stating that he thought that this could be answered via copies of clinical correspondence relating to the three appointments that the claimant had had with him on 30 January, 1 May and 16 October 2018. He also stated that it was difficult to quantify the precise frequency of seizures but that he was confident that she continues to have a high frequency of partial seizures, which have been ongoing since the recent changes on 1 September 2018 adding that the letters did not address prognosis but that he remained hopeful that with a systematic approach to anti-convulsants and increasing understanding of the symptoms it will be possible to gain understanding and decrease in seizure frequency in the medium to long-term, although he suspected that this process was likely to take place over the course of many months.

31. In the meantime the respondent made a third referral of the claimant to OH on 31 October 2018 essentially asking the question whether she had maintained a sustained period of time from 1 September to date seizure free, which saw her attend for a third OH assessment on 27 November 2018 when she was seen by Dr Babu. The clinician's report of this visit dated 28 November 2018 advised that she had told him that she feels more like herself since starting new medication, which we understood to be the Lamotrigine. He also advised that she had told him that she was continuing to have absence (or partial) seizures up to 5 or 6 times a day and that she had had falls with the seizures, although it was her evidence that these type of seizures had stopped at this time. He also commented that the claimant in referring to several stressors both personal and work-based that she has endured over the past few years that she perceives that she is unsupported at work and that there has been a breakdown in interpersonal relationships at work. Due to these absence seizures and perceived work-related stressors he considered her unfit for work but advised that with ongoing appropriate treatment it was likely that she would be able to return to work in around 8 weeks' time. He also recommended that she had regular meetings with management to provide ongoing support and to facilitate discussion about her perceived stressors at work.

32. These stressors at work related to her relationship with her two colleagues in the laundry in the names of Paula Cowley, her Supervisor and Jeanette Fitzpatrick, another Laundry Assistant. There had been an incident outside of work at another employee's 40th birthday party at the end of January 2018, when the claimant had been given to understand that nobody she worked with was planning to attend only to discover when she dropped in to leave a gift that they were in fact there, which led her to be quite abrupt with them so she was told later by Ms Jones when she attended work at the

beginning of February 2018 to hand in her sick note. Having been given to understand this and that her two colleagues had been offended by her behaviour it was her unchallenged evidence that she was taken by Ms Jones to see them but that her attempts to apologise were rejected with Ms Cowley blaming her for spoiling her night and later telling her that she did not want to speak to her. This breakdown in relationships between the claimant and the other two laundry employees appeared to be an issue simmering in the background in so far as the respondent was concerned as demonstrated by the discussions with the claimant at the managing attendance meeting on 19 June 2018 when Ms Jones spoke about issues that could possibly impact on team relations having not been fully resolved meaning that it would be part of any phased return to work that they would expect people to sit down and iron out any differences.

33. Following the provision of the OH report Ms Jones wrote to the claimant on 29 November 2018 to invite her attendance at a managing attendance meeting on 10 December 2018 to discuss progress in relation to seizures during the three month period ending 30 November 2018 and to determine if her employment could be continued. As regards pay the claimant was advised that her full pay would cease on this date and that as she had utilised all allocated SSP she would be sent documentation in order to allow her to claim sickness benefit from the Department of Work and Pensions. In the event the date of the meeting was put back to 18 December 2018 in order to allow the claimant to secure consistent trade union representation.

34. The meeting proceeded on this re-scheduled date with the same attendees as on the occasion of the third stage meeting on 20 August 2018, the notes of which are at pages 167-169. The claimant was informed at this meeting that her contract was to be terminated on grounds of capability due to ill-health. Such decision was confirmed in writing the same day by Ms Jones' letter at pages 120-22. The reason for this as given was essentially that the claimant was still experiencing frequent absent seizures and had done so during the period 1 September to 30 November meaning that a 'seizure free' period of three months had not been achieved, which was the only reasonable adjustment that the organisation could make.

35. The claimant subsequently exercised her right of appeal by a letter dated 21 December 2018, in which she pointed out that at the time of the lone working risk assessment she was not receiving the correct medicine for the root cause of her disability and that since she has been on new more specific medication there has been real time improvement in the day to day management of her disability before suggesting that a work specified risk assessment may have been more appropriate at the present time as she now seemed to be improving with her day to day routine and was making vast improvements in controlling her disability. Her letter was acknowledged the same day and she was informed that an appeal hearing had been arranged with Paul Harrison, a Trustee, for Monday 7 January 2019 at 3.00 p.m. The respondent's letter asked her to advise them in advance of her intention to attend, which the claimant did not do.

36. On her evidence the claimant made an error with the time of the appeal hearing thinking that it was 3.30 p.m. and arrived in the home's car park at 3.10 p.m. with her union representative before entering the reception between 3.20 and 3.25 p.m. to be told that by the receptionist that the

meeting had already taken place in their absence and that it could not be reconvened as Mr Harrison had left for another appointment even though she had not seen anyone entering or leaving the premises and/or the car park following her arrival at 3.10 p.m. She subsequently received an outcome appeal letter dated 7 January 2019 at pages 126-127 dismissing her appeal and upholding her dismissal.

37. On 21 February 2019 the claimant presented her ET1 making the above-mentioned complaints following compliance with the early conciliation regime. The respondent subsequently submitted its ET3 in resistance of the complaints within the prescribed period.

Law

38. The relevant law for the purpose of the discrimination claims is to be found in the Equality Act 2010 (EqA). Section 4 brings together the protected characteristics, i.e. the grounds on which discrimination will be deemed unlawful, included among which is the ground of disability. Section 15 (1) provides that '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) B cannot show that the treatment is a proportionate means of achieving a legitimate aim. Section 15(2) provides that 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.

39. In relation to the unfair dismissal claim the relevant law is to be found in the Employment Rights Act 1996 (ERA). Section 94(1) provides that an employee has the right not to be unfairly dismissed by his/her employer. Section 98(1) provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for the dismissal and, if more than one, the principal one and that it is a reason falling within section 98(2) or some other reason of a kind to justify the dismissal of an employee holding the position which the employee held. The reasons contained in section 98(2) include capability. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 this shall be determined in accordance with equity and the substantial merits of the case.

Conclusions

40. Applying the law to the facts as found the Tribunal reached the following conclusions. We considered first of all the claimant's complaint relating to her having suffered discrimination arising from her disability contrary to section 15 (EqA).

41. In order to succeed with such a complaint the claimant must establish that he or she has suffered unfavourable treatment and that the treatment is because of something arising in consequence of his or her disability and in the event that such matters are established the employer will be liable

unless it can show that the unfavourable treatment is a proportionate means of achieving a legitimate aim and/or that it had no knowledge of the claimant's disability, which latter ground of defence is inapplicable in this case as disability is conceded. In so far as the burden on the claimant is concerned to establish the unfavourable treatment she relies upon the fact of her dismissal and the respondent acknowledges that the second stage of the test requiring it to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim is engaged in circumstances where her dismissal by reason of her being continuously absent from work for a lengthy period arose in consequence of her disability. The legitimate aim advanced by it is ensuring a safe environment for the claimant and others.

42. In addressing this objective justification defence we considered the events concerning the claimant's absence, which began on 9 January 2018 by reason of a condition ultimately diagnosed as temporal lobe epilepsy with which she continued to be certified as unfit as at the date of her dismissal on 18 December 2018. It seemed to the Tribunal that whilst the respondent may have been initially open to the prospect of the claimant returning to her duties as a Laundry Assistant it became less wedded to the idea as time wore on. We considered that this change of stance was illustrated by the email that Ms Jones sent to Dr Hadland on 26 June 2018 following the claimant's first Occupational Health (OH) appointment on 11 June 2018 when whilst advising that she remained unfit for work he suggested that a return to work in 4-6 weeks' on a phased basis was possible provided that her symptoms continued to improve. We found the tone of this communication at 147-8 as unjustifiably alarmist in terms of the possible ramifications of the claimant's seizures vis-a- vis residents and the potential for safeguarding concerns and police involvement to arise. We also could not fail to pick up on the fact that the goalposts began to be changed by Ms Jones on the degree of lone working undertaken by the claimant in that the original referral made on 15 May 2018 at page 140 merely referred to the job being a mixture of both team and lone working in the laundry and resident areas whereas she now sought to emphasise that the role involved a lot of lone working. This change of emphasis continued to gather pace in the shape of the risk assessment carried out by Mr Cullen in that this took the form of an Individual Lone Working one in which again the work activity was described as involving large periods of lone working.

43. In regard to the degree of lone working involved in the claimant's role of laundry assistant it was her consistent position that there was little or none, which she relayed to Dr Winterbottom, Advanced Nurse Specialist in Epilepsy when she attended her clinic on 14 June 2018 and to Ms Jones at the third stage managing attendance meeting on 20 August 2018. In terms of this conflict we found the claimant's evidence to be more credible having regard to the respondent's change of tack seemingly in response to the OH suggestion of a return to work within a 4-6 weeks' period and its reluctance to contemplate any sort of analysis of the claimant carrying out a laundry shift in order to establish how the activities broke down in relation to them being either singly or jointly undertaken and what adjustments, if any, might be required to accommodate her disability we considered that the respondent may well have exaggerated matters in this regard, as Mr Cullen had in his description of the seizure suffered by the claimant during the course of the risk assessment, possibly influenced by the fact that the

relationship difficulties between the claimant and her two colleagues in the laundry flowing from events earlier in the year would not have made for a co-operative environment.

44. It was of course the case that the respondent's risk assessment's conclusion that the claimant was in a high risk category with regard to lone working led to the requirement for a seizure free period over three months between 1 September and 30 November 2018 to be achieved by her in order to retain her employment, which was always going to be nigh on impossible having regard to the fact that her medication was still being gradually increased and added to in order to arrive at optimum dosages to limit the frequency of her seizures. In this connection it was suggested in the letter of dismissal that this medical suspension on pay was the only reasonable adjustment that the respondent could make but given the almost inevitable outcome of the claimant being unable to demonstrate a three month clean bill of health we considered that the unfavourable treatment flowing from it in the form of the claimant's dismissal was incapable of justification as there was a less discriminatory means of achieving a safe working environment for the claimant and others by following the OH advice given by Dr Babu, who thought that with ongoing appropriate treatment it was likely that she would be able to return to work in around 8 weeks' time and trialling a return at that point with adjusted duties if necessary to minimise risk. At the point of the dismissal hearing on 18 December 2018 the claimant was off pay; there had been significant improvement in her condition since she began taking the Lamotrigine in October 2018 in that her seizures were now confined to the partial ones and 3 weeks had already elapsed of the timescale indicated for her return in circumstances where a review of progress had been suggested 3 weeks down the line. On the claimant's evidence she was seizure free beyond her dismissal date, in consequence of which had the OH advice been followed and she had been reviewed at this time she would not have posed a risk to herself or others. We therefore concluded that the respondent had not shown that the claimant's dismissal was a proportionate means of achieving a legitimate aim and that by her dismissal she had been discriminated against in consequence of her disability.

45. Finally we addressed the unfair dismissal claim. We considered first of all if the respondent had demonstrated a potentially fair reason for the claimant’s dismissal. We found that such reason had been shown namely capability, which means in accordance with section 93(3)(a) ERA the employee’s capability assessed by reference to skill, aptitude, health or any other physical or mental quality. In the instant case the claimant’s ill-health in the form of temporal lobe epilepsy, which was long-term in nature, clearly related to her capability to perform the work which she was employed to do.

46. The next question for us was whether the dismissal was procedurally fair. A fair dismissal for a long-term absence from employment requires a fair procedure to have been followed, which in particular requires (i) the employer to have consulted with the employee for the purposes of establishing the actual medical position, monitoring the employee’s progress and keeping the employee up to date with the employer’s position, which is especially important if the employer is considering dismissal (ii) a thorough medical investigation to establish the nature of the illness or injury and its prognosis and (iii) consideration of other options in particular alternative

employment within the employer's business. In terms of the second requirement in relation to medical investigation we considered that the respondent had failed to remain neutral in seeking advice from Dr Hadland following his suggestion of a possible return to work for the claimant within 4-6 weeks having regard to the alarmist tone of Ms Jones' communication to him in response as described above and that there was an element of it picking and choosing which parts of advice given to it that it chose to adopt in that it effectively ignored two separate advices from Dr Winterbottom and Dr Hadland given respectively in June and July 2018 that the claimant was fit to return to work and also the most recent advice given by Dr Babu that with ongoing appropriate treatment, which had begun to have beneficial effects, the claimant was likely to be able to return to work in around 8 weeks' time i.e. before the end of January 2019. Having regard to the fact that the claimant was an employee with 21 years' service and a hitherto good attendance record we considered that an employer acting reasonably would not have conducted its medical investigation in this partial way which suggested to us a reluctance on the respondent's part to allow her to return to her duties and as such we found that it had acted unreasonably in treating the reason of the claimant's capability as sufficient to dismiss her.

47. In such circumstances we concluded that the claimant was unfairly dismissed and that her claim of unfair dismissal is well-founded.

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Employment Judge Wardle
Date: 2 December 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

13 December 2019

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS