EMPLOYMENT TRIBUNALS

Claimant: **Miss L Prins**

Respondent: **Secretary of State for Justice**

Heard at: **Swansea** **On: 28, 29, 30 and 31 October & 1 November 2019**

Before: **Employment Judge: W Beard** **Members: Ms G Fleming, Mr P Bradney**

Representation:
Claimant: In Person
Respondent: Mr O James (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is:

(1) That the claimant's claim of unfair dismissal is well founded. Had a fair process been followed the claimant's prospect of dismissal at a date prior to the actual date of dismissal was 100%.
(2) That the claimant's claim of disability discrimination pursuant to sections 20 and 21 Equality Act 2019 is well founded.
(3) That the claimant's claim of disability discrimination pursuant to section 15 Equality Act 2019 is not well founded and is dismissed.
(4) That the claimant's claim of disability discrimination pursuant to section 19 Equality Act 2019 is not well founded and is dismissed.
(5) The respondent is ordered to pay to the claimant the sum of £12,500.00 in compensation of disability discrimination
(6) There is no award of compensation in respect of unfair dismissal.

REASONS

Preliminaries

1. The respondent is responsible for the prison service across the UK. The claimant was employed by the respondent as a "Business Hub Manager" at Swansea Prison and had worked there from November 2011. The claimant represented herself the respondent was represented by Mr James of Counsel. The claimant gave oral evidence and the respondent called Ms J Minty, the claimant's direct line manager;

Mr G Barrett, who was at the time Governor of Swansea Prison and Mr K Brown who was Mr Barrett's superior. The claimant claims unfair dismissal and disability discrimination. The latter claim is in three parts, a failure to make reasonable adjustments, discrimination arising from disability and indirect discrimination. The respondent denies all of the claimant's complaints. The respondent denies the factual foundation of the complaints but also argues that a number of the claimant's complaints are out of time. The tribunal has considered at a preliminary hearing whether there has been an act of discrimination extended over time or whether time should be extended on a just and equitable basis and has limited the claimant's claims to those that occurred in 2017 or after. The details of the claimant's complaints and the respondent's responses are set out in a Scott schedule prepared by the parties (pp. 64-81)

The Facts

2. The claimant initially joined Swansea Prison in November 2011 on a temporary contract as an Administrative Officer. In September 2012 the claimant applied for and was appointed to the role of Business Hub Manager.

3. The respondent has an absence management policy. This policy has trigger points for formal meetings. However the policy provides a discretion for the manager dealing with absence, albeit that, without mitigation, warnings would be given to employees who breached trigger points.

4. The claimant has been diagnosed with depression and anxiety, the respondent concedes that she is disabled within the meaning of the Equality Act because of this impairment. This disability has led to a number of absences from work over time. In 2014 there was one short and one lengthy period of absence. From that time onwards, the claimant was asking the respondent to provide the claimant with access to Cognitive Behavioural Therapy "CBT". An occupational health report at that time suggested that CBT would be beneficial. The respondent's occupational health provider could authorise such treatment itself if an employee had suffered trauma. However, in the claimant's case, in the absence of trauma, it was not available without a special application for funding being made by the claimant's managers. There was no such application at this early stage. The claimant's longer period of absence in 2014 led to some counselling being provided. The counsellor dealing with the claimant had recommended that counselling be extended but it was not. The claimant was ill once more in 2015. The claimant was again referred to an occupational health practitioner whose advice was that the claimant needed more psychological support. The claimant told us that she discovered that a member of staff had been referred to CBT after their first absence. This was disputed in the sense that this CBT was arranged for that member of staff because of a trauma event. There was no detail provided by either party about this and the tribunal are unable to draw any reasonable conclusion as to the facts surrounding this allegation and therefore take no account of it in our deliberations.

5. The claimant became ill with depression once more. Ms Minty took up her role as the claimant's line manager in February 2017. The Claimant was off sick from work with anxiety and depression from 9 February 2017. Ms Minty had regular contact with the Claimant; the first contact with her on 10 February 2017, then again on 17 & 23 February 2017 and 6 & 23 March 2017. Ms Minty submitted a bespoke

request for CBT on 3 March 2017. Ms Minty also commissioned an occupational health report which was prepared and dated 15 March 2017. The report indicated that the Claimant would remain unfit for work until the CBT had commenced. The occupational health practitioner recommended that there should then be a phased return to work, that the respondent should carry out a stress risk assessment and provide increased support for the claimant. In respect of this absence although absence management meetings were held, there was no warning given to the claimant and the absence meetings were treated as informal in outcome.

6. The claimant began CBT on 27 March 2017. The respondent had budgeted for six sessions. However, after three sessions, in agreement with her counsellor, the claimant stopped the therapy. However, this cessation was on the proviso there that the remaining three sessions would be available should the claimant need them in the future.

7. The length the claimant's absence meant that she reached a trigger point under the Respondent's Attendance Management Policy. The policy requires a manager to hold a formal attendance meeting when such a trigger occurs. The claimant was invited to a meeting and it was agreed that there would be a return to work on 18 April 2017, following the expiry of the claimant's GP certificate. The respondent agreed to the claimant undergoing a phased return to work. This involved reduced hours for the first three weeks. It was also agreed that there would be weekly catch up meetings with Ms Minty. Ms Minty gave evidence that she considered that this approach met the recommendations made in the occupational health report. She told us that she did not consider a specific stress risk assessment document needed to be prepared. This was because the issues she would consider and record in such a document were, in fact, covered by the discussions at this meeting and by the agreement with the claimant as to approach. Ms Minty wrote to the Claimant on 29 March 2017 informing her that she would not be taking any further action but warning that a failure to improve attendance in the future would result in a further attendance meeting.

8. The Claimant returned to work on a phased return on 18 April 2017. The claimant asserts that she did not have regular one to one meetings on her return to work. Ms Minty accepts that to be the case in respect of formally arranged meetings but indicates that she was available and spoke to the claimant on, virtually, a day to day basis. In the Return to Work Form Ms Minty emphasised the importance of the claimant coming to her with any concerns. However, what is clear is that the claimant suffered no particular difficulties at this time. The claimant was discussing things regularly with her manager. Ms Minty reviewed the claimant's job description with her as this had been a point of difficulty for the claimant. The claimant told us that she felt that this did amount to support.

9. The claimant was asked by Ms Minty to make some changes within the team she managed. This involved change to the roles of some long-standing staff in order to increase the flexibility of the team. The staff did not respond well to the plan for change and the claimant perceived their approach to be challenging and dismissive. This caused the claimant to become distressed and, on 4 July 2017 the claimant broke down in Ms Minty's office. Ms Minty agreed to arrange leave for the claimant because of this reaction. The Claimant was on emergency leave between 4 and 15 July 2017.

10. Ms Minty was aware that the Claimant was having problems in that the claimant felt that the behaviour of the team she managed was not helping her illness and that the staff did not understand her condition. The claimant asked Ms Minty to discuss her health with her staff. The claimant and Ms Minty had a different impression of what this meant. The claimant held the belief that this would mean Ms Minty holding a meeting with the staff about the claimant's mental health condition and the effects on the claimant of staff behaviour; the meeting to take place whilst the claimant was absent from work. Ms Minty was of the view that she would engage with this on the claimant's return and inn conjunction with the claimant. We take the view that what the claimant expected would be an inappropriate managerial approach as it would have exposed the claimant's private medical information in a situation outside of her control. We consider that Ms Minty genuinely considered that the claimant only meant such a discussion to take place with the claimant present. This to ensure that only that information which the claimant wanted disclosed would be. When the claimant returned to work, she discovered that no meeting discussing her condition had taken place. The claimant was upset by this.

11. On 19 July 2017 the claimant attended work for a few hours but again became distressed. On the 20 July 2017 the claimant emailed Julie Minty (p. 144), the claimant complained that there had been no discussion with staff, she also set out that she had been having difficulties for five years and that those difficulties were the reason for her absences and that she did not want to take sick leave for things that were not her fault

12. Ms Minty contacted the claimant by telephone that day. There is a dispute about what was said. The claimant contends that the gist of the words used by Ms Minty were 'you can't go off sick every time you don't get your own way'. Ms Minty said that she did not say anything like this at all. The tribunal consider it extremely unlikely that Ms Minty would have said anything of this nature. To do so would not have been in line with the approach that she had taken up to that point. In our judgment it is likely that the claimant has misinterpreted something that was said in line with her sense of disappointment at that time.

13. The claimant and Miss Minty also discussed the claimant resuming the remaining CBT. Ms Minty told the claimant to contact the counsellor directly to reinstate the sessions. The claimant told Ms Minty that she had been in contact with the counsellor and that the referral would need to be centrally cleared by the relevant administration.

14. Ms Minty held an Informal Attendance Review by telephone with the claimant on 28 July 2017. There was some discussion on a return to work and for the claimant possibly undertaking a temporary project. However, the claimant stated that she did not feel that she was able to return to work. In consequence Ms Minty felt it necessary to refer the Claimant for a further Occupational Health consultation on 2 August 2017. Unfortunately, despite significant efforts by Ms Minty in chasing matters up, there were delays before the appointment was arranged. Ms Minty attempted to maintain contact with the Claimant on 11, 17 and 18 August 2017 without success. Contact was made on 20 August 2017. The claimant told Ms Minty that she did not intend to return to work and that she was looking to negotiate an exit package. The claimant had instructed solicitors. The claimant was seeking

to agree an exit package. The claimant clearly had some level of advice about employment matters in relation to her concerns.

15. Ms Minty met with the claimant on the 31 August 2017, this was at the claimant's home. The claimant indicates that she considered this an informal meeting. The respondent sent a letter on 18 August referring to the formal process, the claimant does not recall receiving this, however we consider that she must have in order for the meeting to have been arranged. In the meeting, the claimant's absence was discussed, with Ms Minty indicating that during the previous 12 months the claimant had 119 days of absence. The Claimant made it clear that it was not her then intention to return to work. However, despite that assertion, Ms Minty and the claimant discussed both the Occupational Health referral and the remaining three sessions of CBT, which the Claimant had thought would be useful. It is clear to the tribunal that despite her protestations the claimant's wish to leave work was somewhat equivocal and given Ms Minty's approach that she understood this. The claimant was later told that the respondent would be using its internal processes and did not intend to negotiate an exit arrangement with the claimant

16. Ms Minty contacted the HR central service by phone to find out more, she encountered significant difficulties. There was confusion as to how the remaining three sessions of CBT were to be arranged. Ms Minty also contacted the Claimant's Counsellor, concerned at the length of time the administration was taking to arrange these sessions. Ms Minty made a verbal agreement with the counsellor that the Claimant could go ahead and just book in her final sessions direct with the Counsellor. However, a significant period had passed before this happened. On the 26th September the claimant emailed Ms Minty (page 170) enquiring about the occupational health appointment and the remaining counselling sessions. Ms Minty confirmed on the 28 September that the claimant was to attend an occupational health appointment on the 2nd October. Ms Minty also indicated that she was endeavouring to arrange counselling without providing further details.

17. Something arose, we suspect an administrative failing, which meant that on the 2 October 2017 the claimant, attending an occupational health appointment in Cardiff, was told that an appointment had not been arranged for that day. The claimant contacted Ms Minty expressing her concern, disappointment and upset. The Occupational Health appointment was rescheduled to be by telephone on 23 October 2017. A meeting had been arranged for 3 October 2017 between the claimant and Ms Minty; the claimant felt too upset to meet in the circumstances and the meeting was rearranged.

18. The respondent received an occupational health report, marked as "interim" and dated 23 October 2017, on 6 November 2017. The report indicated that the claimant would be likely to make a recovery once her in work concerns had been addressed. It set out that counselling could assist, but also that, long-term, the outcome was also dependent on employment factors not only medical support. The report recommended a work-related stress assessment. The respondent did not take up the recommendation of a risk assessment; it was considered to be inappropriate given that the Claimant had said she did not want to return to work. This issue of counselling was of course something that Ms Minty was exploring as set out above. Even as late as 3 November 2017 Ms Minty asked the claimant for a contact number of the counsellor because she was still trying to arrange

counselling sessions. This indicates to the tribunal that she still did not consider the claimant's position that she would not return as fixed.

19. The claimant met with Ms Minty on the 6 November 2017 for a formal attendance meeting; the claimant had requested that this be held in a coffee shop. The claimant explained that she felt unsupported and reiterated that she did not wish to return to work. It was explained that the next stage would be a meeting with the Governor but that an updated Occupational Health report would have to be obtained first, as the existing report was only interim. The claimant followed the meeting up with an email on the 27 November 2017 and was told, once more, that the respondent was awaiting the updated report. As can be seen up until this point the respondent's approach did not follow the formal trigger points in dealing with the claimant.

20. On 12 December 2017 the claimant lodged a grievance. In our judgment at this point the respondent would have been clear that the claimant had no intention of returning to work at all. She sent this grievance to the Director for Wales in the first instance; the claimant considered her complaint involved the Governor of Swansea Prison (Graham Barrett) and understood the Director to be his line manager. However, the grievance was referred back to the Governor, Mr Barrett, for him to investigate.

21. Kenneth Brown was Graham Barrett's direct superior. He had seen the grievance and contacted Mr Barrett about it. Part of that discussion became about the claimant directly with reference to her being a person causing difficulties in the administration in Swansea. In the tribunal's judgment it is surprising that this conversation took place, for two reasons: first, Mr Brown would be the person to whom any appeal would be directed; secondly the content of the conversation, which, on any view, raises the issue of potential bias in respect of both Mr Brown and Mr Barrett.

22. A further element of concern relates specifically to Mr Barrett. He would have been aware, by no later than 13 November 2017, that he would be conducting a meeting with the claimant relating to her attendance and her potential dismissal. The claimant's grievance was about the impact of working arrangements and the respondent's approach on her health. He was, overall, responsible for working arrangements at the prison. There was an obvious danger that if both issues were not dealt with together that the outcome of one would impact on the other. Further given that the claimant, in the grievance, held the Governor specifically responsible for, at least some of those arrangements, there was a danger of Mr Barrett being judge in his own cause.

23. A grievance meeting took place on 5 January 2018 the claimant was supported by a trade union representative. The claimant contends that the meeting should have been held elsewhere, that she should have been provided with support from a care team and should have had a separate room which she could go to. The tribunal are satisfied on the evidence of Mr Barrett that, because of his working time arrangements and the layout of the prison premises, it was not feasible to hold the meeting elsewhere. The governor made suitable arrangements for the claimant to enter from a different area than her workspace, this did not happen because of the claimant's early arrival, that was happenstance. During the meeting neither the

claimant, or her union representative, requested access to a separate room or ask for breaks. The Claimant complains that she was not offered support from the care team. The care team was a voluntary staff led arrangement; it required an employee to request support. The claimant was aware of her right to be accompanied, but never requested the support of the care team.

24. The claimant was asked to provide evidence at the meeting. The claimant explained she was not in work and had not collected evidence and would need to access a computer to access any evidence. The claimant was offered the opportunity to do this at the end of the meeting but did not take up the offer. Following the meeting, the claimant was sent an outcome letter on 12 January 2018 advising the Claimant that her grievance was not being upheld. The claimant also received a copy of the meeting notes but disagreed with them. The claimant then subsequently lodged a grievance appeal.

25. Mr Barrett wrote to the claimant on 29 January 2018 inviting her to attendance meeting on 8 February 2018. Mr Barrett had copies of the interim occupational health report and a final occupational health report dated 25 January 2018. Whilst the interim report concluded that the claimant was likely to make satisfactory recovery in appropriate circumstances, the final report set out that the claimant was unlikely to return to work and that no adjustments could be put in place which would make that likely. The claimant attended the meeting on 8 February 2018 supported by her union representative. The claimant complains that she wasn't told that a trainee from HR would be present, along with Mr Barrett and his HR support. The claimant told Mr Barret that her position had not changed since she had the final occupational health report. The claimant's position was that she did not foresee a situation where she could return to work. Mr Barrett raised the possibility of alternative roles and/or redeployment; the claimant rejected those possibilities. The claimant contended before the tribunal that there was no concrete proposal for her to consider, however the claimant did not explore that at the meeting. In our judgment the claimant simply was not interested in alternatives by that stage.

26. There is a level of dispute about what was said at the meeting the claimant alleges that at the close of the meeting Mr Barrett told her "I have done my bit, I'm done". Mr Barrett denies that this was said. However, Mr Barrett told us that the claimant wanted to raise grievance issues which he considered not relevant to the meeting. He told us that the claimant refused to leave as she wanted to talk about her grievance. Mr Barrett's position was that he explained that the grievance was separate and that there was an appeal for both. In our judgment, whilst Mr Barrett may not have used the precise words alleged, he was clear to the claimant that he would have no further involvement in the case. In the circumstances where he had already made a decision on the grievance issues and this was being appealed this was an appropriate response. The claimant complained that she was not afforded the opportunity to put her case in particular referring to a civil service website regarding 'medical efficiency compensation'. Mr Barrett asked the claimant to provide it prior to his decision; the claimant did not provide this. Again, the claimant made no request to access a separate room or ask for any breaks. She also made no mention of wanting someone from the Care Team there at any point.

27. Mr Barrett took account of the final occupational health report in coming to the decision to dismiss the claimant on capability grounds. He concluded that there

was no adjustment that would allow her to return. Finally, he considered that the claimant's stance that there had been a break down in trust and confidence which could not be rebuilt meant that the claimant could not return to work. The decision was sent in a letter dated 12 February 2018. The letter set out that there would be pay in lieu of 7 weeks' notice and compensation of £7,788 under pension provisions. The Claimant was told she could appeal but did not do so.

28. The claimant's grievance appeal was heard by the Director of Public Sector Prisons Wales Mr Brown. He sat with panel members and a note-taker. Mr Brown had no contact with the claimant before the appeal but had had the conversation with Mr Barrett referred to above. The meeting was held at the Regional Wales Office at an office and there was a particular member of staff with whom the claimant was not comfortable because of past dealings. However, she did not draw that to anyone's attention at the time. The claimant was provided with access to a separate room and she used those facilities, she did not request the presence of a member of the care team. The claimant raised issues going back as far as 2014 and was asked if she had covered everything; she agreed she had. The panel considered that the claimant had not raised any new evidence. On that basis they upheld the original decision. That decision was conveyed in writing on 21 February 2018.

The Law

29. With regard to unfair dismissal, the relevant legislation begins with section 98 of the Employment Rights Act 1996, which provides:

> *1) in determining for the purposes of this part, whether the dismissal of an employee is fair or unfair, it is for the employer to show*
> *a) the reason (or, if more than one, the principal reason for the dismissal, and*
> *b) that is ----- a reason falling within subsection 2 ----.*
> *2); a reason falls within this subsection if it ---*
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, ----------*
> *(3) In subsection (2) (a) "capability", in relation to an employee, means his capability assessed by reference to ---- health or any other physical or mental quality, ----------*
> *4) in any other case where the employer has fulfilled the requirements of subsection 1, the determination of the question of 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 employers 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.*

The respondent is required under Section 98 of the Employment Rights Act 1996 to prove the reason for dismissal. Thereafter, the burden of proof is equal between the respondent and the claimant in respect of the fairness of dismissal.

30. The respondent in this case relies on capability which is a potentially fair reason. The tribunal therefore is required to examine the process by which the decision to dismiss was taken. The tribunal recognise that the decision of the Employment Appeals Tribunal in the case of ***East Lindsey District Council -v- Daubney*** sets out with some clarity a summing up of the law in respect of dismissals arising out of capability:

> *'We turn to the second reason relied on by the tribunal. There have been several decisions of EAT in which consideration has been given to what are the appropriate steps to be taken by an employer who is considering the dismissal of an employee on the ground of ill health.* ***Spencer v Paragon Wallpapers Ltd*** *and* ***David Sherratt Ltd v Williams*** *are examples. It comes to this. Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done.'*

31. The Equality Act 2010 deals with disability discrimination, the claimant relies upon sections 15, 19 and 20/21.

31.1. Section 15 provides:

> *A person (A) discriminates against a disabled person (B) if—*
> *A treats B unfavourably because of something arising in consequence of B's disability, and*
> *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

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.

31.2. Section 19 deals with indirect discrimination and provides:
(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—(a)A applies, or would apply, it to persons with whom B does not share the characteristic,
(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c)it puts, or would put, B at that disadvantage, and
(d)A cannot show it to be a proportionate means of achieving a legitimate aim.

31.3. Section 20 deals with the Duty to make adjustments and provides:
(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
Section 21 deals with the Failure to comply with the duty and provides
(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

32. In addition, regarding the Burden of Proof, the provision in section 136 is the UK implementation of the EU Directive 2000/78/EC general framework for equal treatment in employment and occupation at Article 10 which provides

> *Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.*

The statute requires the respondent to provide an explanation where the claimant has demonstrated a *prima facie* case of discrimination. So that where facts have been established from which a tribunal could consider that there was discrimination a non-discriminatory explanation from the respondent is necessary. We considered the reasoning in the cases of ***Igen Ltd v Wong [2005] IRLR 258; Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332*** and ***Madarassy v Nomura International PLC [2007] IRLR 246***. Where it was demonstrated that the employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. The Madarassy case also makes it clear that in coming to the conclusion as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

33. The tribunal is required to examine evidence in a broad way in dealing with issues of discrimination. We are not concerned with an overt motive (whilst such a finding would obviously be relevant) so much as examining the mental processes (conscious or subconscious) of those alleged to have unlawfully discriminated. We must consider the approach in ***Anya –v- University of Oxford & Anr. [2001] IRLR 377*** which demonstrates that it is necessary for the employment tribunal to look beyond any particular act or omission in question and to consider background to judge whether the protected characteristic has played a part in the conduct complained of. This is particularly important in establishing unconscious factors in discrimination. ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** indicates that the tribunal in examining whether there has been less favourable treatment compared to a real or hypothetical comparator should note that a bare difference in treatment along with a difference in the protected characteristic is insufficient. It is always necessary to find that the protected characteristic is an operative cause of the treatment. In ***Zafar v Glasgow City Council [1998] IRLR 36*** it is made clear that unreasonable treatment should not necessarily lead the employment tribunal to a conclusion that the treatment was due to discrimination. Unfairness does not, even in an employment situation, establish discrimination of itself. Further a tribunal is not entitled to draw an inference from the mere fact that the employer has treated the employee unreasonably see ***Bahl v The Law Society and others [2004] IRLR 799.***

34. Section 15 requires no comparator; we are concerned with unfavourable treatment, not less favourable treatment. Unfavourable treatment is treatment that is disadvantageous to the claimant see ***Swansea University v Williams [2018]***

UKSC 65 anything done which is advantageous, even if less advantageous than it might be if not for the consequence of the disability, is not unfavourable. The tribunal must consider two distinct elements of causation. Firstly, what is the something caused by the disability, what arises as a consequence of the disability? This must not be considered narrowly, there can be a number of links in this chain of causation. Secondly, we must consider whether that "something" has caused the respondent to treat the claimant unfavourably; the something must be a significant or effective cause of treatment it need not be the sole or even principal cause. anything done which is advantageous, even if less advantageous than it might be if not for the consequence of the disability, is not unfavourable.

35. In dealing with section 19 we are first to ask ourselves whether a provision, criterion or practice that was or would have been applied generally was applied to the claimant. Thereafter asking ourselves not whether treatment is unfavourable, but whether the application of that provision, criterion or practice creates a disadvantage for the claimant because of her disability and would do so for others who share the claimant's disability.
36. The defence of justification applies to both sections 15 and 19. The test for justification is whether the unfavourable treatment is "a proportionate means of achieving a legitimate aim" this test is squarely one of objective justification. It is for the Tribunal to conduct a balancing exercise based on all the facts and circumstances of the case as to whether the legitimate aim relied upon justified the unfavourable treatment. The employer needs show that unfavourable treatment was reasonably necessary in order to achieve the legitimate aim. If it is shown that the respondent could have taken other measures with a less discriminatory impact, but which would have achieved the same legitimate aim, the treatment would not be considered to be reasonably necessary. Less favourable (here unfavourable) treatment will be incapable of objective justification where there was an obviously less discriminatory means of achieving the same legitimate aim

37. In terms of disability discrimination relating to a failure to make reasonable adjustments, the Tribunal has in mind the decision of the Employment Appeal Tribunal in the ***Environment Agency v Rowan UK EAT/0060/07/DM***, it is indicated that a Tribunal must identify the provision criterion or practice applied by or on behalf of an employer, the identity of non-disabled comparators where appropriate, and the nature and extent of the substantial disadvantage suffered by the Claimant, indicating that it is clear that the entire circumstances must be looked at, including the cumulative effect of the provision criterion or practice, before going on to judge whether an adjustment was reasonable. The Tribunal are aware that it is its duty in the light of the decision in Rowan, to identify the actual provision criterion or practice on the facts of the case.

Analysis

38. The claimant's first set of complaints were of a failure to make reasonable adjustments.
    38.1. Was the claimant required to attend work normally despite recommended levels of support to alleviate the claimant's symptoms, which were ignored? Was the claimant expected to attend meetings normally and without additional emotional support or notification of additional parties attending the meeting:

38.1.1. The claimant began by arguing that the respondent did not recognise her disability, although not structured well it would appear that the PCP relates to the respondent's approach to absence management. Given the disadvantages set out by the claimant it would appear that the claimant complains that the formal dismissal was part of that process, therefore that the claimant was required to attend work.

38.1.2. On that basis we can see that the respondent's approach to absence management and trigger points in respect of both absences was, until the latter stages of the second absence, not to strictly apply the formal process. On that basis the claimant's complaints about an adjustment to the triggers fails on the basis that the respondent did make adjustments to that process. The respondent only moved on from that position when the claimant made it clear that she did not intend to return to work which developed with clarity in or around December 2017. It would not have been reasonable for the respondent to have to make an adjustment to the process once the claimant made it clear she would not come back and the respondent did not consider that equivocal.

38.1.3. The claimant contends that it would have been an adjustment for the respondent to provide mental health training to staff and for Ms Minty to have spoken to the claimant's staff. Even if the claimant is correct that there is PCP requiring her to attend work and she was disadvantaged in that she could not, there was no evidence, other than speculation, that this would have assisted her to return to work and alleviated the disadvantage.

38.1.4. The claimant's complaint about failing to follow occupational health recommendations relates to the first period of absence. In terms we do not consider the respondent failed to follow recommendations in terms of the substance of those recommendations albeit that the form adopted was different. Ms Minty provided support to the claimant and she assessed the claimant's needs and made adjustments to assist with those needs.

38.1.5. The claimant was required to return to work to avoid the absence process, the claimant could not return to work because of her disability, the requirement was a disadvantage and one which any person with the claimant's disability would have suffered. The claimant had previously undergone CBT and this had assisted her in returning to work. In our judgment it appears probable that the further CBT would have alleviated the disadvantage. The respondent had budgeted for the CBT and thought it a reasonable step in the first period of absence. In our judgment it would have been reasonable for the respondent to have to take the step of re-instating the CBT. The respondent would be aware of the disadvantage caused to the claimant of not being able to access the CBT. The reason the CBT was not re-instated was a failure of bureaucratic organisation within the respondent. The claimant requested the CBT at the end of August 2017, it was not put in place even many months later. On that basis we consider that the claimant's claim that the respondent failed to make an adjustment.

38.1.6. This latter claim relies on time limits to an extent. The claimant requested the adjustment at the end of August 2017. The respondent must have a reasonable time in which to implement the adjustment. In this case we can understand that as an unusual situation that it would take some time to implement. However, we consider that the fact that November 2017 had been reached without the adjustment being made is too long, the

respondent should have had the adjustment in place by that time. This would make the claimant's claim out of time. However, the claimant was still being assured in November that the respondent was trying to put the CBT into operation. In addition to this the claimant was involved in internal processes at a time when her mental health was not at its best. In our judgment the prejudice to the claimant of being unable to bring this successful claim outweighs prejudice to the respondent. The respondent had a full record of the problems which the claimant complains of and was in a position to fully defend its position. In our judgment, in the circumstances, it is just and equitable to extend time for the presentation of the claimant's claim on this matter.

38.1.7. The claimant's complaint about a failure to adjust by providing a member of the Care Team for emotional support at grievance and dismissal meetings is undermined on the basis that use of the care team members was within the respondent's gift. It would not have been an adjustment that it was reasonable for the respondent to have to make.

38.1.8. On the facts as we have found them the respondent was not always requested to adjourn the meetings and when it did the claimant was either left in a room with her representative or had access to a nearby room. Therefore, making a room available for the claimant to receive emotional support at grievance and dismissal meeting fails on the facts, when the claimant required a room she had one.

38.1.9. The grievance meeting was held at a time of the claimant's choosing, there were limited venues available. It was not reasonable for the respondent to have to make an adjustment of this of holding the meeting elsewhere.

38.1.10. The claimant complains that the respondent allowed a person named in her grievance to conduct the grievance meeting. This was true; however, we do not see how it arises from the PCP. Even were it to arise out of a PCP of attending meetings "normally", the claimant has produced no specific evidence that any disadvantage arose because of the claimant's disability.

38.1.11. The claimant complains that the respondent failed to provide her with notification that a trainee from HR would attend the dismissal meeting; again, this is true. However, we cannot see a disadvantage arising from the claimant's disability because of this has been identified. Even if there were such a disadvantage, the attendance of trainees at meetings and being introduced at that stage is commonplace, without further reasons it would not have been reasonable for the respondent to have to inform the claimant in advance of the meeting.

39. The claimant's next set of complaints relate to indirect discrimination.

39.1. The claimant relies on the following PCP: "Not making staff aware of how to support the Claimant in the workplace and expecting them to attend and continue work as normal disadvantages the Claimant. Claimant was expected to attend and continue working normally."

39.2. In our judgment this does not amount to a PCP, apart from the phrase at the end, of attending work normally, this is about a specific matter relating to the claimant not a general approach to the workforce.

39.3. Even if we were to consider that the PCP is attending work normally without staff having a general awareness of means of support for those with

mental health issues the following problems arise. Firstly, it is difficult to understand how such a general proposition would permit the tribunal to say that it would cause disadvantage to a group. Identifying the relevant group would either mean that there was difficulty in establishing disadvantage if it were drawn widely (the range of mental health issues being so broad) or so narrowly that it would mean there the group meant those with precisely the claimant's issues.

39.4. Were the tribunal to go that far there is little evidence, beyond the claimant's assertion, that this was a disadvantage to her arising from her disability. The reaction of the staff described could have been just as distressing to someone without her disability.

39.5. Finally, we consider that the respondent could establish a justification defence. It has a legitimate aim of maintaining the training of staff to reasonable levels to suit their specific role and to allow them time to work in that role. Thus, not training all staff in all aspects of mental health but limiting training to those who could apply that training is proportionate.

39.6. In our judgment this claim is not well founded and is dismissed.

40. The claimant's next complaints are based on discrimination arising from disability.

40.1. Did the respondent treat the claimant unfavourably because of depression?

40.1.1. A failure to make allowances in the attendance management policy would be unfavourable treatment.

40.1.2. The respondent did make allowances in the earlier stages and did not treat the claimant unfavourably.

40.1.3. Implementing the formal process in November 2017 was unfavourable treatment.

40.1.4. The claimant's absence was caused by her disability and the implementing of the absence process was caused by her absence.

40.1.5. The claimant had been absent for a considerable time, the respondent had to consider a means of returning the claimant to work. It was a legitimate aim to have staff available for work. The respondent had failed to make an adjustment that could have returned the claimant to work and a move to the formal process would not be proportionate without more. It was, however, proportionate to move to the formal process by November 2017, to explore the options of returning the claimant to work and of obtaining occupational health advice, in circumstances where the claimant was insisting that she would not return to work, but the respondent, in the guise of Ms Minty, was attempting to avoid that outcome.

40.2. In respect of the claimant's complaints relating to February and July 2017, the claimant did not present her claim in time. The claimant presented no evidence as to the reasons for not complaining to a tribunal at that stage and a just and equitable extension of time would disadvantage the respondent as it would be required to given specific reasons for specific occasions of communication; in any event

40.2.1. With regard to a failure to communicate in a timely and appropriate manner from February 2017 we do not consider that the claimant was treated unfavourably. There was regular communication between the claimant and Ms Minty, nothing has been shown to be inappropriate. The communication was entered into because of the

claimant's absence, in so far as there was no communication on any specific occasion there is no evidence that this was caused by the claimant's absence or any other consequence arising from the claimant's disability.

40.2.2. With regard to a failure to comply with OH report dated 17 February 2017. We found as a fact that Ms Minty complied with the substance if not the form of these recommendations and there was no unfavourable treatment of the claimant

40.2.3. Dealing with the conversation alleged in July 2017 where Ms Minty, allegedly states 'you can't go off every time you don't get your own way' our factual findings do not support this.

40.2.4. In terms of the complaint about the provision of CBT. This can be considered unfavourable treatment. However, its cause was not a consequence of the claimant's disability but the bureaucratic systems which placed obstacles in the path of Ms Minty in setting up this treatment.

40.2.5. The complaint in February 2018 that Graham Barrett ended a meeting prematurely was not found to be the case on the facts. In our judgment he ended a meeting because he had dealt with the matters that were pertinent to that meeting, it was not unfavourable treatment at that stage. Even if the treatment were unfavourable in the sense that the grievance and attendance meetings should have been dealt with together the method of holding the meetings separately did not arise as a consequence of something arising from the claimant's disability; it was simply an administrative approach.

41. The claimant complains of unfair dismissal. The reason for the claimant's dismissal was her absence due to ill health. That reason is one related to the claimant's capability to carry out her role. The respondent had medical evidence in the form of an occupational health report which indicated that the claimant would not return to work. The claimant re-enforced this at the attendance meeting.

42. However, the respondent failed to follow a fair procedure in our judgment. There were clear links between the claimant's grievance complaints and her contention as to the reasons for her absence. The separation of her grievance issues from the attendance meeting was one no reasonable employer would have used when it would prevent the claimant from advancing those issues as a reason for continued absence. More damaging, in our judgment is that the person dealing with the grievance and the attendance issues was a person with an interest in the outcome as, he Mr Barrett, was criticised in the complaints; no reasonable employer with the resources of the respondent would have allowed Mr Barrett to be the decision maker. We add to this that the involvement of a senior manager making derogatory comments about the claimant causing problems when discussing the presentation of the grievance is to be deplored: firstly, in its own right, secondly in that it could have had potential to influence the outcome of the grievance. This is all the more important when the individual in question would have a decision-making role in the grievance appeal.

43. However, we have come to the conclusion that had a fair procedure been followed then the dismissal would have come earlier as the attendance meeting would have been held along with the grievance issues. We also conclude that the claimant had by that stage determined not to return to work with the respondent and would have

made that clear; she would have been dismissed in such a meeting. On that basis we consider that the claimant has not lost anything by the dismissal as it would have occurred in any event and at an earlier stage.

44. We consider that the respondent's failure to make reasonable adjustments means that we should compensate the claimant. In our judgment there is no basis on which we can speculate as to the effect of the treatment on the second occasion on returning the claimant to work. Whilst we are of the view that the claimant would have been in a position to return to work, we consider that given all of the other matters which the claimant has complained about the claimant would not have wanted to work for the respondent. We do consider that an injury to feelings award is appropriate. The period in which the claimant was promised and not offered the CBT was substantial, it was at a time where the claimant was already distressed by her mental health disability. We consider that in those circumstances the length of time involved, particularly when the adjustment related to treatment, was subjectively protracted for the claimant. On that basis we consider that the award should fall towards the centre of the Vento Middle band of awards and order the respondent to pay to the claimant the sum of £12,500 (twelve thousand, five hundred pounds).

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Employment Judge Beard
Dated: 28 January 2020

ORDER SENT TO THE PARTIES ON 28 January 2020

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS