**EMPLOYMENT TRIBUNALS**

| ***Claimant*** | | ***Respondent*** |
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| Mrs D Moss | **AND** | The Insolvency Service |

**Heard at**: London Central

**On**: 22- 24 January 2020
Chambers 29 January 2020

**Before:** Employment Judge Nicolle

**Members:**

Mrs J Cameron
Mr DL Eggmore

**Representation**
**For the Claimant:** Mr N Toms, of Counsel
**For the Respondent:** Mr J Duffy, of Counsel

## RESERVED JUDGMENT

The claims for disability discrimination under S.15 of the Equality Act 2010 (the "EqA") fail.

## Reasons

Issues

1. This claim is now limited to S.15 of the EqA for discrimination arising from disability. The Respondent accepts that the claim as now constituted has been brought in time.

2. In an email of 8 September 2019 to the Tribunal Richard Gillingham, (Mr Gillingham) representative of the Public and Commercial Services Union ("PCS") withdrew the following elements of the pleaded claim:

- indirect discrimination and the alternative claim of discrimination arising from a disability in respect to redundancy process;

- discrimination arising from disability in respect to the grievance delays; and

- discrimination arising from disability, and the alternative complaint of failure to make a disability related adjustment, in respect of the delay in grievance consideration.

These claims were dismissed pursuant to a Judgment of the Tribunal dated 1 October 2019.

3. The Claim relates to the Respondent's application to the Claimant of its Attendance Management Policy (the "Attendance Policy").

4. The Respondent admits that the Claimant was at all material times disabled, and that it was aware of her disabilities.

5. The only issues therefore remaining before the Tribunal are set out below as recorded the Preliminary Hearing Case Management Summary:

6. Did the Respondent treat the claimant unfavourably because of something arising from her disability, as follows?

a) The Respondent informing her on around 7 December 2018 that they were invoking the formal Attendance Policy including capability hearing which would include consideration of her dismissal.

b) The Respondent informing the Claimant on or around 12 December 2018 she should return to work immediately or take redundancy in order to avoid dismissal.

c) The Claimant being told [at the] capability hearing on 9 January 2019 that the Respondent was going to have to consider whether they could continue to support her long-term sickness absence or immediately terminate her employment and the ongoing consideration of dismissal up to 14 January 2019.

7. Was any, or all, of this treatment because of something arising from the Claimant's disabilities, namely her sickness absence?

8. Was any unfavourable treatment by the Respondent a proportionate means of achieving a legitimate aim?

9. Remedy, if applicable.

10. It is the Respondent's case that even if the Claimant establishes unfavourable treatment, such treatment was a proportionate means of achieving a legitimate aim, namely managing her long-term sick absence. The Respondent accepts that her absence was "something arising in consequence of" her disabilities.

11. Proportionate means of achieving legitimate aims relied on by the Respondent are:

- managing attendance fairly, effectively and in a clear and transparent fashion;
- enabling employees to remain at work;
- reducing sickness absence and the impact this has on the business and other employees; and
- promoting a culture of attendance where employees feel valued, supported and committed to the business and their colleagues.

The Hearing

12. The Tribunal heard evidence from the Claimant and Mr Gillingham on her behalf, and for the Respondent from Fallon Costello, Provider Liaison and Invoicing Analyst, (Mrs. Costello), Kimberly Morley-Scott, HR Advisor in the HR Local Management Advisory Team, (Ms Morley-Scott) and Gemma Game, HR Business Partner (Ms Game). There was a bundle comprising 1426 pages. Counsel for both parties provided written skeleton arguments and Mr Toms provided the Tribunal with five case law authorities.

13. Given that the bundle comprised 1426 pages we were only referred to a relatively small proportion of the documents and as such our findings of fact are confined to such documents together with the witness statements and matters arising during cross examination.

**Findings of Fact**

The Claimant

14. The Claimant was employed by the Respondent from 23 August 2004 until 24 May 2019. The Claimant's most recent position was as a Higher Executive Officer at Grade B2, in the Respondent's Official Receiver Services; Central Management Group ("CMG"). Her job tile was Junior Service Provider Liaison and Invoicing Analyst.

The Respondent

15. The Respondent is an agency for the Department for Business, Energy and Industrial Strategy ("BEIS").

The Claimant's Health and Disabilities

16. The Claimant relies on the mental impairment of recurrent depressive order together with anxiety disorder, stress disorder and hypervigilance. She also relies on the physical impairment of a degenerative disc disorder in her back and associated chronic pain syndrome.

17. In an email dated 13 November 2018 to the Tribunal the Respondent conceded that the above conditions amounted to disabilities at the time of the alleged acts of discrimination in December 2018 and January 2019. Further, in an email dated 12 December 2019 it was conceded that the Respondent knew, or could reasonably have been expected to know, that the Claimant was disabled by reason of these conditions in December 2018 and January 2019.

Absence Record

18. The Tribunal was referred to a document (page 1426 in the bundle) setting out the Claimant's ill health absences since 23 September 2008. The Claimant had an absence of 173 days between 19 June 2012 and December 2012 as result of back problems. The Claimant had a further absence of 103 days between 19 June 2013 and 29 September 2013 as result of back surgery. The Claimant was absent for a period of 168 days between 5 June 2017 and 19 November 2017 on account of anxiety/stress. The Claimant was absent on account of anxiety/stress for 331 days from 28 June 2018 until leaving the Respondent's employment on the grounds of voluntary redundancy on 24 May 2019.

19. As a result of her health conditions the Claimant had a Reasonable Adjustments Passport. This represents a rolling document which was periodically updated following an initial review undertaken on 4 May 2016. The Passport refers to matters starting from June 2013 when the Claimant had a double spinal fusion operation.

20. The Claimant had been working from home in St Albans from 22 September 2014. This was partly as a result of the closure of the Respondent's St Albans office and the Claimant's back condition making travelling difficult.

21. The Passport records various adjustments made to the Claimant's working arrangements as a result of her medical conditions to include her working days being reduced from five to four with effect from 1 January 2018.

The Claimant's Grievances

22. The Claimant raised a grievance dated 24 June 2016. Whilst the details of the grievance are not directly relevant to the Claim it concerned "overpayments" of sick pay, deductions from the Claimant's salary and the Claimant's contention that her complaints related to her becoming physically disabled in 2013-14.

23. The Claimant raised a further grievance on 26 April 2017. In effect this grievance related to the failure by the Respondent to resolve the matters set out in the grievance of 24 June 2016.

2017 Absence

24. The Tribunal was referred to the procedure adopted by the Respondent following the Claimant's absence between 5 June and 20 November 2017.

25. The Claimant attended an appointment with the Respondent's Occupational Health Service ("OHS") advisor on 22 November 2017. The Occupational Health report included the following summary of the Claimant's condition:

> "Ms Moss has been off work since 5 June 2017 due to mental health related issues which are perceived to be related to her personal home circumstances, her physical impairment and an HR pay issue".

The recommendations to manager/HR section of the report included:

> "I would suggest that the HR pay issue is resolved, or she is given the time frame for this process, this seems to have been a stressor".

26. The Claimant attended a formal attendance review meeting ("FARM") with Mrs. Costello on 16 January 2018 to discuss her attendance in the period from 5 June to 19 November 2017. Mrs Costello advised the Claimant that she had decided not to issue her with a written improvement warning at this stage. She did, however, state that if further attendance issues arose the Respondent would need to have a further meeting.

2018 Absence

27. The Claimant was off on account of stress/anxiety from 28 June 2018.

28. Mrs Costello sent the Claimant an email on 17 July 2018 in which she referred to the 14-day period for an informal review of her absence being triggered. She asked the Claimant whether she wished to have another OHS referral.

Further Grievance

29. The Claimant raised a further grievance in a letter to Nigel Bebbington, Head of Business Development (Mr. Bebbington), dated 26 September 2018. The grievance concerned "multiple issues relating to the long-standing issue of alleged overpayments". In effect this was a repetition of matters originally raised in the Claimant's first and second grievances dated 24 June 2016 and 26 April 2017 respectively. Whilst it is not necessary for us to set out the details of the complaints regarding "overpayments" it is relevant to refer to complaint six on page 4 of the Claimant's grievance letter. The Claimant stated that since at least April 2017 the failure of the Respondent to resolve the pay matter was causing her ill health. She sought a formal apology for the avoidable ill health the Respondent's negligence had caused her.

30. The Claimant attached her grievance letter dated 26 September 2018 to an email to Mr Bebbington on 1 October 2018.

Sickness absence management

31. At 17:48 on 1 October 2016 (therefore prior to the Claimant sending her grievance to Mr Bebbington at 20:00 that day) Ms Morley-Scott sent an email to various individuals, to include Mrs Costello, regarding the management of the Claimant's long-term absence. This recommended that there should be an informal review during which consideration should be given as to whether the sickness absence can continue to be supported. She went on to state that if it was believed the sickness absence cannot be supported that a FARM should be arranged as per the continuous absence procedures.

32. Mrs. Costello, the Claimant's Line Manager, spoke with her on the telephone on 3 October 2018. She then summarised their conversation in an email later that day. This email was cordial. It recorded that they had discussed a possible OHS referral and that the Claimant had advised that she would rather wait until she was ready.

33. On 5 November 2018 Mrs Costello had a further telephone conversation with the Claimant. It was agreed that there should be a face to face meeting between them in the London office on 15 November 2018 so that the Claimant could collect a new laptop.

34. As arranged the Claimant met with Mrs Costello in London on 15 November 2018 for what was described as an informal catch up. Mrs Costello advised that she would be in touch soon to start the next stages of the attendance management process. The Claimant cannot recall there having been any mention of the attendance management process. The Claimant regarded the meeting and lunch with Mrs Costello as being friendly.

35. On 26 November 2018 there was a further telephone call between Mrs Costello and the Claimant. During this call Mrs Costello updated her about the announcement of a proposed restructure of CMG, which could have an impact on staff. She advised the Claimant that there was to be a staff meeting about this proposal on 3 December 2018.

36. The Claimant joined the 3 December 2018 staff consultation meeting via telephone conferencing facilities. Whilst the Claimant was unable to see the visual slides presented during the meeting it became apparent to her that her role was at risk of redundancy.

37. Mrs Costello had a further telephone conversation with the Claimant on 4 December 2018. This related to the proposed restructuring of CMG. The Claimant asked Mr Costello about the impact on recruitment of formal attendance measures, and what might be needed when being asked for references from the Service.

<u>7 December call</u>

38. There was a further telephone call between Mrs Costello and the Claimant on 7 December 2018. The Claimant recollected the call lasting for approximately 90 minutes.

39. The Claimant made a three-page handwritten note of matters arising during this call (pages 66-68 in the bundle). The note records there being three options namely: likely return to work and date, not feasible to support absence, medical retirement. The Claimant's case is that during this call Mrs Costello said, or at least implied, that the intention was to invoke the formal Attendance Policy and consideration of her dismissal. This is denied by Mrs Costello.

40. We find that the call involved a discussion of the Claimant's position in the context of the redundancy process, and in a situation where she was on long term sickness absence, and whilst there is no evidence that Mrs Costello referred to either a capability hearing or dismissal on ill health grounds, we find that the possibility of dismissal, albeit not imminently or inevitably, was something which was referred to, at least by implication, during the call.

41. The Claimant's contemporaneous note of the call does not refer to either the capability procedure or an ill health dismissal. We consider this significant given that she listed three options. However, we consider that the Claimant's recording of one option being "not feasible to support absence" could have been interpreted by her as the possibility that the Respondent would invoke a FARM with a possible consequence that the matter could then be referred to a Decision Maker (DM).

42. Mrs. Costello did not have the authority to dismiss an employee, not being of the requisite grade to do so, and as such she merely had authority to make recommendations which may not necessarily be followed.

<u>Email correspondence</u>

43. Mrs Costello sent the Claimant an email on 12 December 2018 under the heading "case conference details and formal attendance matters". Mrs Costello referred to having tried to call the Claimant a couple of times without answer. The Claimant gave evidence that she had received, but not answered these calls on the Monday, as this was her non-working day. The Claimant perceived Mrs Costello's email to be a "chasing" email.

44. Mrs Costello advised the Claimant that she was going to be granted a discretionary payment for a maximum time period of 60 days due to the failure to progress the grievance in the appropriate timescales. This meant that she would remain on full pay until at least 12 February 2019.

45. Mrs Costello referred to the delay in invoking a formal attendance process notwithstanding the standard 28-day trigger point having long since expired. She referred to her absence and that of Mr Bebbington on account of ill health as being the reasons for this. Mrs Costello confirmed that the Claimant would liaise with Mr Gillingham to set up a mutually convenient meeting date and time.

46. Mrs Costello described the purpose of the proposed meeting as follows:

> "I would like us to discuss possible support to return to work, gain further understanding of steps required to enable that, likely return date, if no clear return date then discussion around possible next steps and potential formal action and referral to a DM. As I have said on the phone, the DM approach would be my very last resort and would rather we fully explored all potential options available to you".

47. The email recorded discussion around the CMG restructure and downsizing and that the Claimant had asked for details about medical retirement options. Mrs Costello explained that if the Claimant wished to proceed with this option then another OHS referral would be needed.

48. The Claimant's contention is that she was advised by Mrs Costello during the call on 7 December, and as then referenced in Mrs Costello's follow up email on 12 December 2018, that she must in effect take redundancy otherwise face dismissal on capability grounds. This is disputed by Mrs Costello.

49. Mr Gillingham sent a letter to Mrs Costello dated 12 December 2018. In this letter Mr Gillingham expressed his concern that a FARM was to be held. He said that such a meeting may amount to discrimination arising from disability and/or a failure to make adjustments to the application of the Attendance Policy contrary to the EqA.

50. At 07:41 on 19 December 2018 Ms Morley-Scott sent an email to Mrs Costello relating to the Claimant and the "FUAM Process". She said that having read through the comments in Mrs Costello's email that it was evident that she wanted to support the Claimant as best she could in the circumstances. Ms. Morley-Scott advised regarding the Claimant's ineligibility for roles in various scenarios. This included that if she was issued with a formal warning relating to her attendance, she would be ineligible to apply for other posts in the Insolvency Service. She explained that a duty existed to indicate to the Government Resourcing Service (GRS) and other government departments (OGD) whether any member of staff is undergoing formal performance/attendance/disciplinary action.

51. Mrs Costello then sent the Claimant an email at 14:33 on 19 December 2018. This largely reflected the comments by Ms Morley-Scott in her email earlier that day to Mrs Costello. It also set out the timeline for the redundancy process, which included a deadline of accepting voluntary redundancy of 25 February 2019, and for any compulsory redundancy notices to be issued on 25 March 2019.

52. Mrs Costello also attached a copy of the Attendance Policy. She stated that she had a duty as the Claimant's Line Manager to follow the continuous absence procedures. She referred to the Claimant having been invited to attend a FARM meeting.

53. In relation to the FARM meeting she stated that it provided an opportunity for them to meet to develop a return to work plan.

54. The email also referred to medical retirement. She indicated that the criterion set by the Cabinet Office for ill-health retirement was that the ill-health is likely to be permanent.

55. Mrs Costello rejected the suggestion, that unless the Claimant provided any imminent return to work date, that she would face a dismissal hearing unless she had applied for medical retirement or voluntary redundancy. She went on to state as follows:

> "The FARM will inform any decision making, along with consideration of the full individual circumstances of the case and the business needs / what the business can reasonably support".

56. Mrs Costello concluded by stating:

> "Ultimately my aim is for us to have a sit down together to discuss all options available to try and support you in the best way possible, where there is flexibility with follow up actions".

57. At 19:04 on 19 December 2018 Ms Morley-Scott sent an email to Mrs Costello, Mr Bebbington and Ms Game entitled "case conference – DM". The email summarised the grievances raised by the Claimant. Ms Morley-Scott stated that the decision about the Claimant's current role within the OR CMG is an operational matter and is not influenced by her health issues.

58. Ms Morley-Scott advised Mrs Costello that she had a duty as the Claimant's Line Manager to follow the Respondent's absence management policy and procedures for continuous absences. She advised that Mrs Costello should invite the Claimant to a FARM. She went on to state that on completion of the FARM that Mrs Costello should decide whether the business can continue to support the Claimant's absence or whether to refer her case to a DM.

59. Mrs Costello sent the Claimant a letter dated 20 December 2018. She confirmed that the FARM had been arranged for 9 January 2019. She said that the Claimant's employment with the Respondent could be affected if her sickness absence could no longer be supported. She advised the Claimant that if she continued to remain unfit for work, she should consider whether ill-health retirement is appropriate.

<u>Ms. Game's Involvement</u>

60. Ms. Game became involved as a result of the Claimant being one of the employees with the 10 worse sickness absence records of the 800 for whom she had responsibility as HR Business Partner, but also as a result of the pending restructuring of CMG. She does not normally become involved in individual employee meetings but has more generic responsibilities.

61. Ms. Game denied that there was a need to consider dismissal. She said that if the Claimant's case had been referred to a DM that it would have been referred back to Mrs. Costello because the grievance had not been resolved.

FARM meeting on 9 January 2019

62. The Claimant attended the FARM on 9 January 2019. The bundle contained both her handwritten notes of the meeting and the Respondent's longer notes. The Claimant was represented by Mr Gillingham. Andrea Grime was in attendance as a note taker together with Mrs Costello. The meeting lasted for just over an hour.

63. In her note of the meeting the Claimant recorded the options as being:

- return to work;
- phased return;
- Occupational Health referral.

64. The Respondent's note of the meeting included large sections cut and pasted from the Respondent's absence management procedure.

65. Mrs Costello asked the Claimant whether she could think of any reasonable adjustments that could be sought in relation to the issues that were preventing her return. The Claimant could not think of anything. Mrs Costello advised that an OH referral would be the next step.

66. After the FARM on 9 January 2019 Mr Gillingham sent an email to Mrs Costello. He complained that Mrs Costello should have obtained OH advice prior to calling the FARM. He also complained that the Claimant's return to active work was being impeded by the Respondent's continuing failure to deal with her grievance. He requested that a reasonable adjustment to the FUAM policy would be to adjourn the process until the grievance had been resolved.

67. Mrs Costello sent an email to the Claimant and Mr Gillingham on 14 January 2019. This attached the FARM outcome of the same date together with notes of the FARM meeting taken by Ms Grimes. Mrs Costello advised that the Claimant had five working days to appeal if she disagreed with the FARM decision of referring to OHS. Mrs. Costello attached 21 documents to her email.

68. The FARM outcome letter of 14 January 2019 confirmed that there had been an agreement by the Claimant for an OH referral. She went on to state:

> "I am pleased to confirm that the Insolvency Service will still support your sickness absence due to the nature and reason of your absence and I will not consider dismissal or demotion at this stage. Your absence will continue to be reviewed regularly and I may reconsider my decision at any time if it becomes unlikely that you will return to work in a reasonable period of time".

69. The Claimant attended an OH review on 30 January 2019. The report from Dr Pardip Phull advised that the Claimant would need to be satisfied with the outcome of the grievance to facilitate a return to work.

Redundancy

70. On 4 February 2019 the Claimant and others were informed that they were at risk of dismissal by reason of redundancy.

71. In relation to the redundancies we were referred to a document at pages 378-384 in the bundle concerning the restructuring and downsizing of the OSCMG. This included a reduction in numbers from 7 to 4 in the Claimant's B2 Grade. The Respondent worked on the basis that if there was a 70 to 80% similarity between the existing and proposed roles that this constituted a job match. The Claimant's existing role was not one of those regarded as a match with the revised positions. As such hers was a position provisionally at risk of redundancy absent her successfully applying for an alternative position within the Civil Service.

72. A requirement for a successful application for redeployment was the completion of a skills set matrix. The Claimant completed and submitted such a document to Mrs Costello. However, Mrs Costello advised that it was deficient in that it did not have adequate examples of relevant experience. Mrs Costello said that she sought to assist the Claimant given her health situation by providing examples from job descriptions of relevant experience. Given her ill health and the distress of her father in law's death, the Claimant did not submit a revised skills set document. It was apparent that she had become disillusioned about her prospects of continuing employment.

73. On 22 February 2019 the Claimant accepted the offer of voluntary redundancy.

74. There were no compulsory redundancies as a result of the reorganisation of CRG. All employees whose positions were deleted from the organisational structure were either found alternative positions with the Respondent or elsewhere within the Civil Service or took voluntary redundancy.

Grievance Outcome

75. The Claimant attended a grievance investigation meeting with Andrea Wilkinson, IES Investigator on 28 February 2019. Ms Wilkinson sent the Claimant a grievance investigation report on 1 April 2019.

76. The Claimant attended a formal grievance meeting with Dan Goad, HR Director on 1 May 2019. Mr Goad partially upheld the Claimant's grievance on 24 June 2019.

**Relevant Policies and Procedures**

Grievance Policy

77. This includes:

- All complaints should be dealt with promptly, transparently, fairly and consistently;

- Ultimately, an aggrieved employee is seeking resolution as quickly as possible and this may be best achieved by an early discussion with the employee; and

- If the grievance case is then not resolved after 40 working days, it is advisable for the case to be reviewed by the Senior Manager.

Absence Management Policy

78. The Respondent has a comprehensive document Attendance Policy. Whilst we were referred to sections of the Attendance Policy on numerous occasions throughout the hearing it is sufficient to set out the following sections:

- Attendance will be managed fairly and effectively in a clear and transparent way. Action will be taken when health and well-being are at risk or when absence levels are unacceptable. A continuous period of sickness absence is one which reaches 14 consecutive calendar days.

Meetings during continuous sickness absence

- An informal review – to keep in touch with the employee and explore the support needed to help the employee return to work.
- A formal attendance review meeting ("FARM") – to explore the support needed, but also to consider whether the employee is likely to return within a reasonable timeframe, and therefore whether the business can continue to support the absence.

79. The Attendance Policy provides that the above meetings should take place at the following points:

- An informal review after 14 consecutive calendar days of sickness absence, and every month thereafter.
- A FARM after 28 consecutive calendar days, another when the sickness absence has lasted three months and every quarter thereafter.

80. The Attendance Policy provides guidance for the conduct of FARMs. The Manager should:

- undertake the same actions as in the informal review;
- discuss with the employee the same actions as in the informal review;
- discuss with the employee whether a return to work is likely within a reasonable timescale;
- consider whether the sickness absence can continue to be supported; and

- explain that dismissal/re-grading may be considered if their level of sickness absence cannot be supported.

81. The Attendance Policy has a section on "considering dismissal" which provides:

> Decisions on dismissal should be taken by local Line Managers who, in normal circumstances, will be at least one grade higher than the employee and at D2 level or above.

82. Dismissal should be considered when the attendance management procedure has been followed and :

- attendance has not improved to a satisfactory level following a final written improvement warning; and
- a return to work is not expected within a reasonable timeframe during a period of continuous absence.

83. The Attendance Policy also provides that during a FARM the Manager should consider whether occupational health advice is needed to enable them to make a decision about next steps and discuss this with the employee.

84. It provides guidance on how a Manager should decide if an absence level can continue to be supported. It states that the following factors should be taken into account:

- the attendance management procedure has been followed correctly;
- everything reasonable has been put into place to help the employee to improve their attendance;
- Occupation Health advice, issued within the last three months, has been obtained; and
- whether the employee is likely to meet the criteria for ill-health retirement has been considered.

**The Law**

85. S.15 EqA provides that 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.

86. In a disability discrimination claim under S.15, a tribunal must make findings on:

- The contravention of section 39 of the EqA relied on – in this case section 39(2)(d).

- Whether the contravention relied on by the employee amounts to unfavourable treatment.

- It must be "something arising in consequence of disability"; for example, disability related sickness absence.

- If unfavourable treatment is shown to arise for that reason, the tribunal must consider whether the employer can show the treatment was "a proportionate means of achieving a legitimate aim".

87. There is no need for a comparator in order to show unfavourable treatment under S.15. It is possible to demonstrate 'unfavourable' treatment without needing to resort to a 'compare and contrast' exercise. A claimant bringing a claim of discrimination arising from disability under S.15 is entitled to point to treatment that he or she alleges is unfavourable in its own terms.

88. In Pnaiser v NHS England and anor 2016 IRLR 170, EAT, Mrs Justice Simler summarised the proper approach to establishing causation under s.15. First, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

89. An employee who is treated unfavourably as a result of having to take a period of disability-related absence would have a claim under S.15 unless the employer can justify the unfavourable treatment on the basis that it is a proportionate means of achieving a legitimate aim.

90. S.136 EqA provides that once a claimant has proved facts from which a tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof shifts to the respondent to prove a non-discriminatory explanation. In the context of a s.15 claim, in order to prove a prima facie case of discrimination and shift the burden to the employer to disprove his or her case, the claimant will need to show:

- that he or she has been subjected to unfavourable treatment;

- that he or she is disabled, and that the employer had actual or constructive knowledge of this;

- a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment; and

- some evidence from which it could be inferred that the 'something' was the reason for the treatment.

91. If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either:

- that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability; or

- that the treatment, although arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

92. Any allegation of discrimination arising from disability will only succeed if the employer is unable to show that the unfavourable treatment to which the claimant has been subjected is a proportionate means of achieving a legitimate aim.

93. Mr Toms referred to various cases in his submissions. This included the decision of the EAT in Buchanan v Commissioner of Police of the Metropolis UK EAT/0112/16/R9 and specifically from the judgment of Judge David Richardson the following:

> Generally speaking the policies and procedures applicable to attendance management do allow for a series of responses to individual circumstances. And this is in keeping with the purpose of disability discrimination law. It is to secure more favourable treatment for disabled people and it requires employers to assess on an individual basis whether allowances or adjustments should be made for them.

94. He referred to the Court of Appeal's decision in City of York Council v Grosset [2018] EWCA Civ 1105 and the judgment of Lord Justice Sales to include at paragraph 57:

> A particularly strong factor under the ET's conclusion that the dismissal was not proportionate was its unchallenged assessment that, if the respondent had put in place reasonable adjustments as required by sections 20 and 21 EQA, by reducing the work pressure on the claimant, he would not have been subjected to the same level of stress".

He went on to state also in paragraph 57:

> The ET was plainly entitled to give the weight it did to the impact of the respondent's failures to make such reasonable adjustments as it should have put in place.

95. Mr Toms referred to the EAT's decision in Hensman v Ministry of Defence UK EAT/0067/14 and the judgment of the Hon. Mr Justice Singh and specifically his reference at paragraph 42 to the judgment given by Pill LJ In Hardy and Hansons Plc v Lax [2005] ICR1565 which stated:

> The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject [the employer's] submission … that when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances".

96. Mr Toms also referred us to the decision of the EAT in Trustees of Swansea University Pension & Assurance Scheme and another v Williams [2015] IRLR 885 and specifically the judgment of Mr Justice Langstaff at paragraph 29 where he stated:

> The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be.

Conclusions

97. We make the following conclusions, applying the law to the facts found in relation to the agreed issues. We will address the individual allegations relied on in turn.

**The Respondent informing the Claimant on around 7 December 2018 that they were invoking the formal Attendance Policy including capability hearing which would include consideration of her dismissal.**

98. The Respondent argues that the alleged treatment did not take place. The first question for us to determine is whether the Claimant was informed that the Respondent would be invoking the Attendance Policy to include considering a capability hearing and her dismissal.

99. It is unequivocal that under the Attendance Policy the holding of a FARM was well overdue. The Claimant had been continuously absent from work for a period of well in excess of the 28-day trigger point.

100. We find that the possibility of a dismissal, albeit not imminently or inevitably, was something which was referred to during the 7 December 2018 call between Mrs Costello and the Claimant. We reach this finding for the following reasons:

- the Claimant's note of the call sets out three options to include "not feasible to support absence";

- her note refers to a possible need to revert to the formal attendance process and that the Respondent would not seek medical retirement, but would go down formal dismissal route, if not prepared to discuss returning to work; and

- in her email to the Claimant of 12 December 2018 Mrs Costello stated that whilst the DM approach would be her very last resort it was nevertheless included.

101. We therefore find that whilst it would not have been possible for dismissal to have taken effect under the terms of the Attendance Policy, without the matter being referred to a DM, it was understandable that the Claimant would have perceived the telephone conversation of 7 December 2018, to involve as a possible outcome, a capability hearing and her dismissal on ill health capability grounds.

102. We do not consider it appropriate to take an overly literal approach as to whether the notes and emails relating to the 7 December 2018 telephone call include express reference to dismissal, but rather we have approached the matter by interpreting the evidence and the contemporaneous documentation, to reflect what would reasonably have been understood by the Claimant.

103. The next question we need to consider is whether this treatment constituted unfavourable treatment on account of the Claimant's disability. We find that the treatment did constitute unfavourable treatment arising from the Claimant's disability. We make this finding for the following reasons:

- the telephone call was a pre-cursor to the arrangement of a FARM on 9 January 2019;

- whilst Mrs. Costello in her email of 12 December 2018 sought to assuage the Claimant's concerns regarding the purpose of the call and the FARM it included considering all options and by implication dismissal; and

- whilst anything discussed, and what the ramifications would be of such discussion and impending process were hypothetical, we find that the Claimant's perception of what was discussed on the call of 7 December 2018, and the impending FARM on 9 January 2019, was unfavourable treatment arising from her absence on account of her disability.

104. We now consider whether the must consider whether the Respondent can show the treatment was a proportionate means of achieving a legitimate aim.

105. The Respondent set out various aims relied on and of those we consider that the following are potentially applicable:

- managing attendance fairly;
- reducing sickness absence and the impact it has on the business and other employees.

106. We find that in notifying the Claimant that a FARM meeting was being invoked to consider options, to include possible referral to a DM and ultimately a dismissal, that the Respondent's actions were justified as being a proportionate means of achieving the legitimate aim of reducing sickness absence and the impact this had on the business. We reach this finding for the following reasons:

- the Claimant had been continuously absent since 28 June 2018;
- the Claimant had a substantial history of ill health absences in the period from 2012;
- the Respondent had already substantially delayed the invocation of a FARM;
- the Respondent was entitled to balance the requirements of the Claimant to remain at work against the adverse business consequences of having employees with substantial and ongoing absences; and
- the Respondent balanced these competing requirements and ultimately decided that the business could continue to carry the cost of the Claimant's continuing employment.

**The Respondent informing the Claimant on or around 12 December 2018 she should return to work immediately or take redundancy in order to avoid dismissal**

107. The Respondent says that no such treatment took place. The relevant email to consider is that from Mrs Costello to the Claimant at 15:12 on 12 December 2018. We find that the treatment in question did not take place. We make this finding for the following reasons:

- whilst the FARM would potentially include consideration of dismissal, we find that this allegation has a more immediate implication in that it refers to the Claimant needing to return to work immediately or take redundancy in order to avoid dismissal. We do not find the evidence to be consistent with such an ultimatum being made; and
- there were various possibilities being considered in the context of both the Claimant's substantial ongoing absence on account of ill health but also with a restructuring and possible redundancy process having been recently invoked.

108. We find that in communications with the Claimant that Mrs. Costello was referring to a number of potential scenarios, some of which could have involved

the Claimant departing the business, but we do not find that this included a threat of the Claimant's immediate dismissal unless she agreed to take voluntary redundancy.

109. Given our finding above it is not strictly necessary for us to consider the question as to whether such treatment would constitute unfavourable treatment. However, if it had been necessary for us to do so we would have found that such treatment i.e. the threat of immediate dismissal absent a return to active employment would have constituted unfavourable treatment arising from the Claimant's disability.

110. It is not therefore necessary for us to consider whether the Respondent can show the treatment was a proportionate means of achieving a legitimate aim. Had we been required to do so we would have found that giving an ultimatum, to immediately return to work or face voluntary redundancy, would not have been proportionate and would have failed to provide an appropriate balance between the Claimant's wish for continuing employment and the Respondent's business objective of managing attendance.

111. Further, we would have found that the Respondent's failure to conclude the long outstanding grievance procedure prior to considering a capability dismissal would have been a failure to make a reasonable adjustment on account of the Claimant's disability. This would have been sufficient to negate the Respondent's ability to argue that any unfavourable treatment was proportionate.

**The Claimant had been told at the capability hearing on 9 January 2019 that the Respondent was going to have to consider whether they could continue to support her long-term sickness absence or immediately terminate her employment and the ongoing consideration of dismissal up to 14 January 2019**

112. First, we find that the meeting on 9 January 2019 was a FARM and not a capability hearing. We do not, however, consider that this distinction is material as a FARM could consider issues of capability and potentially a referral to a DM for a capability related dismissal.

113. The next question we must consider is whether the treatment alleged took place. We find that the meeting did consider whether the Respondent could continue to support the Claimant's long-term sickness absence. The scope of the FARM would include this consideration as it reflects the issues to be considered in the Attendance Policy. We further find that there was ongoing consideration of the Claimant's dismissal up to 14 January 2019.

114. We find that the Respondent did not advice the Claimant that the immediate termination of her employment was being considered at the FARM on 9 January 2019. We reach this finding having reviewed the notes of the meeting both as compiled by Ms Grimes on behalf of the Respondent and the Claimant's contemporaneous note of the meeting. Whilst we find that dismissal following

referral to DM was a possibility it was not something which was being immediately considered. We make this finding for the following reasons:

- during the FARM Mrs. Costello asked the Claimant if she could think of any reasonable adjustments that could be sought in relation to the issues that were preventing her return;

- the Claimant stated that she would need a lot of help to find a new position and we consider that this is consistent with possible redeployment rather than immediate dismissal on capability grounds;

- Mrs. Costello indicated that the next step would be an Occupational Health referral. We find this inconsistent with a threat of the immediate termination of the Claimant's employment; and

- the Claimant's note of the meeting is consistent with several options being considered to include a return to work, and that any possible dismissal was one future scenario, but not an immediate threat to terminate her employment.

115. In any event it is relevant that in her letter of 14 January 2019 Mrs Costello advised the Claimant that the Respondent would continue to support her sickness absence and not consider dismissal or demotion at this stage. We acknowledge the Claimant's contention is that the mere discussion of whether her continuing employment could be supported, and the threat of immediate termination, is itself unfavourable treatment in the period from 9 January until reassurance was provided on 14 January 2019. We nevertheless consider that this letter is relevant as to what the Respondent's intentions were as at 9 January 2019 and what the Claimant's reasonable perceptions of those intentions were.

116. Given our finding that part of the alleged treatment took place, i.e. the Respondent considering whether they could continue to support the Claimant's long-term sickness absence and the ongoing consideration of dismissal up to 14 January 2019, we then need to consider whether this constituted unfavourable treatment arising from her disability. We find that it did. We make this decision for the following reasons:

- the consideration by the Respondent of all potentially available options under the Attendance Policy was unfavourable treatment arising from the Claimant's long-term absence on account of her disability; and

- whilst it would inevitably be the case that during an employee's long term continuous absence on account of sickness, and certainly once the 28-day trigger point had been reached under the Attendance Policy, that the Respondent would consider the business case and such consideration would include the possibility of issuing a warning and ultimately dismissal, this constitutes unfavourable treatment.

117. It is therefore necessary for us to consider whether the Respondent can show the treatment was a proportionate means of achieving a legitimate aim. We

find that it did as it was proportionate and legitimate for the Respondent to undertake ongoing consideration of long-term sickness absence given the business requirement to manage absence and balance employee welfare considerations against business operational efficiency.

Reasonable adjustments and the grievance

118. Finally, whilst not directly relevant given our decisions above, we set out the argument advanced by Mr Toms that for the Respondent to show that the treatment was a proportionate means of achieving a legitimate aim it would have been necessary for it to have first made all reasonable adjustments given the Claimant's disability. Mr Toms argues that the reasonable adjustment required was the resolution of the Claimant's long outstanding grievances. This is on the basis that the Claimant's absence from work was solely attributable to her reaction to the Respondent's delays in dealing with her grievance.

119. Whilst we consider it to have been wholly unacceptable that the Respondent had failed to deal with the Claimant's grievances given its duration, we are not in a position to reach a finding on what was the cause of the Claimant's mental health disability.

120. We consider the Respondent's position that it would take at least a further three months from the time of the FARM to conclude the grievance investigation and outcome represented a false deadline given that it would have been possible for the Respondent to have investigated and concluded this matter much quicker had it approached it with greater expedition.

121. Further, we accept the Respondent's evidence that had the matter been referred to a DM the question of whether there were any steps which could be taken to address the cause of the ill health would have been a factor taken into account in accordance with the Attendance Policy. As such we consider that this issue is hypothetical, given that the Claimant's absence was not referred to a DM but also given that we have found that either the treatment in question did not take place or alternatively that it did not constitute unfavourable treatment arising from the Claimant's disability. If, however, we had been required to reach a finding on this point we would have found that a reasonable adjustment would have been the conclusion of the Claimant's grievance prior to a potential warning being issued or a referral to a DM for possible dismissal on capability grounds.

Employment Judge Nicolle

Dated **13 February 2020**

Sent to the parties on:

17 February 2020
For the Tribunal Office